OABA
Outdoor Amusement Business Association

Our Mission...
To encourage the growth and preservation of the outdoor amusement industry through leadership, legislation, education and membership services.

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*John Portemont 1971
*William T. Collins 1966-1970
*W. G. Wade 1965

* Deceased

April 9, 2012

via electronic mail:
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Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration, Room N-5653
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Technical Release 2012-01 Request for Comments

Dear Sir or Madam:

These comments are submitted in response to the Department's request for comments (Technical Release 2012-01) on the automatic enrollment, employer shared responsibility, and waiting period provisions of the Patient Protection and Affordable Care Act of 2010 as amended by the Health Care and Education Reconciliation Act of 2010 (together, "Health Care Reform").

The Outdoor Amusement Business Association (OABA), for over 45 years has been the national trade association that represents mobile amusement operators in the seasonal, outdoor amusement industry. Our 5,000-plus members are mostly small, family-owned and operated businesses, many of which are in their third generation of existence. Our members provide rides, food, games and other forms of attraction and family entertainment to over 350 million parents and children attending county and state fairs, festivals, circuses as well as other community and fund-raising events (e.g., for churches, fire departments, police associations, Lions Clubs, Shriners hospitals, etc.).

The overwhelming majority of our members have fewer than 25 year-round, full-time employees. However, during the operating season, the number of seasonal, temporary employees working over 30 hours per week can be more than 20 times the number working during the off-season months. For these seasonal employees, the number of hours worked during a given week can fluctuate unexpectedly due to weather conditions, cancellations, the seasonal employee's own availability, and other variables. The mobile, outdoor amusement industry employs some 15,000 seasonal employees during the operating season, most of whom work at least 30 hours per week for at least one month during the season but may not work the entire season, or may work fewer than 30 hours per week for part of the season. The operating season generally runs from Memorial Day to Labor Day and is typically a four to seven-month period.

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The itinerant nature of the industry's seasonal work makes it very difficult to recruit and retain workers who meet our employment criteria (e.g., possessing the interpersonal skills necessary, remaining drug-free, and having no criminal background). Therefore, large carnivals and circuses OABA members rely heavily on foreign workers (nonresident aliens on H and J visas) and local, temporary labor that travel from location to location (often across state lines) and work evenings, weekends and holidays during the operating season. Most businesses in this industry generally do not offer group health or other benefits to these seasonal workers because it would be very costly to do so, especially given insurers' expectations of adverse selection and greater utilization of non-network providers by an itinerant workforce. Most businesses do offer group health and other benefits to their year-round employees. Many seasonal employees are covered under their parents' employers' group health plans, international or foreign-based health insurance policies (for nonresident aliens), or other arrangements. All employees are covered under state mandated workers compensation programs.

Members of the mobile outdoor amusement industry already struggle to remain profitable amid the myriad of federal, state, and local regulation that have expanded over the years. These include rules promulgated by the Consumer Product Safety Commission, Department of Transportation, Department of Labor, US Department of Agriculture, Animal and Plant Health Inspection Service, Department of Justice, state amusement ride regulatory agencies, local fire departments and health departments, Occupational Health and Safety Administration, and other licensing and regulatory authorities. Most mobile amusement businesses do not expect to be able to afford either Health Care Reform's employer responsibility tax penalty or the cost to provide affordable minimum essential coverage to seasonal workers.

In addition to the Health Care Reform penalty and coverage being unaffordable, administering group health plan eligibility and enrollment for the seasonal workforce will be extremely burdensome and impractical. Many seasonal workers do not work for the entire operating season and instead will work one or two events, then do something else for some period, then return to work one or more additional events. This pattern continues throughout the operating season. Thus, the seasonal worker may be a full-time employee for one month or more during the season but not for the other months.

To require the members of this industry to pay the Health Care Reform tax penalty or pay for minimum essential coverage for seasonal workers will dramatically impact the industry as the smaller, family-owned businesses (the majority of our members) will face a severe financial burden and may force some out of business. In addition, many contracts with event sponsors (e.g., for fairs, festivals, circuses, etc.) already have been negotiated and are for a three to five year period so the unanticipated significant increased costs (i.e., for additional health care or the tax penalty) could not be recouped during this contract period.

Automatic Enrollment

Section 18A of the Fair Labor Standards Act requires an employer that has more than 200 full-time employees to automatically enroll new full-time employees in one of the employer's group health plans and to provide certain notice and opt-out opportunities for automatically enrolled employees. Since seasonal employees in the mobile outdoor amusement industry often work sporadic schedules, determining whether and when the 200-full-time-employee threshold is met would be extremely challenging and administratively burdensome under any conceivable regulatory scheme. Moreover, the automatic enrollment requirement itself is impractical for both the seasonal employees and the employers. Generally only the foreign national employees, as part of their visa program, are hired to work a fixed, full-time schedule for a specific period and those employees generally already have coverage and are not subject to Health Care Reform's

individual mandate anyway. The majority of seasonal employees hired in the industry would be considered full-time under the 30-hour-per-week rule for part, but not all, of the operating season.

In recognition of the unique employment circumstances of seasonal employees in the industry, Congress exempted amusement and recreational establishments from the minimum wage and overtime requirements of the FLSA (FLSA § 13(a)(3)) if the employer does not operate for more than seven months of the year or average receipts for any six month period in a year are not more than a third of the average receipts in the other six months of the year. Exemption from the new automatic enrollment requirements of the FLSA for these seasonal employers also is appropriate.

If seasonal employees in the mobile outdoor amusement industry are not exempted from the automatic enrollment requirements, a typical employer in the industry sponsoring a group health plan with a 90-day waiting period would have to determine, on a rolling basis, for each seasonal employee when he or she has worked full-time for 90 days and would be required to automatically enroll employees who shortly thereafter become ineligible for coverage due to reduced hours or employment termination and are not likely to want the coverage in the first instance. Having enrolled seasonal employees in group health, the employers would be required to administer COBRA for those employees who fail to opt out of coverage before becoming ineligible due to reduced hours or employment termination. This would result in a continual and costly administrative burden for the employers without furthering the objectives of Health Care Reform whatsoever.

Employer Shared Responsibility

OABA previously commented on the employer shared responsibility provision of Health Care Reform in response to Internal Revenue Service Notice 2011-36 and those comments are amplified here.

The expected proposed guidance providing that employers will not be subject to penalties under Code § 4980H for failing to offer group health coverage to an employee during the employee's first three months of employment would be helpful to those mobile outdoor amusement industry employers with seasons of no more than three months. However, the majority of employers in the industry have longer seasons.

The intended proposed regulation providing that employers may have six months to determine whether a newly-hired employee is full-time and will not be subject to the Code § 4980H penalties during that period is potentially meaningful to seasonal employers. It is especially relevant if "newly-hired employee" is defined to include any rehired employee since the majority of seasonal employees (at least in the mobile outdoor amusement industry) are rehired season after season. If employees expected to work less than a year at the time of hire can be excluded from the definition of full-time employee, since the intended proposed guidance would consider whether the newly-hired employee is expected to work at least 30 hours per week *on an annual basis*, this also would be meaningful to seasonal employers. Any guidance would need to explain what is meant by "reasonably expected" as of the time of hire to work an average of 30 or more hours per week "on an annual basis".

The proposed exemption (described in Notice 2011-36) for seasonal employees for purposes of determining whether an employer is an applicable large employer is unhelpful to members of the mobile outdoor amusement industry because the operating season normally runs well over 120 days. Thus, absent a broader exemption (e.g., exempting employers in the mobile outdoor amusement industry from the definition of applicable large employer as suggested in our comments to Notice 2011-36), virtually all members of the industry will be treated as applicable

large employers for purposes of the employer shared responsibility provision. This will be the case even though, generally, it will not be the same seasonal employees counted as full-time employees during each month of the employer's operating season.

If there is to be no exemption for employers in the mobile outdoor amusement industry from the definition of applicable large employer, a broader exemption from the definition of full-time employee for the industry's seasonal employees would be helpful. Seasonal employees in this industry are generally local temporary labor and nonresident aliens who, if inclined to participate in their seasonal employer's group health plan for the month or two potentially eligible as an active employee after completing a 90-day waiting period (and perhaps thereafter under COBRA) would be expected to do so for a specific anticipated medical need. This on-off selective participation in a group health plan would have serious adverse impact on the underwriting of the group health plan for everyone.

As OABA previously queried in its comments to Notice 2011-36, if not altogether exempt from the employer shared responsibility penalty provisions, which tax penalty would attach to OABA members that offer group health coverage to year-round full-time staff but not to seasonal full-time staff? Would the employer be treated as not offering coverage (triggering the $2,000-per-full-time-employee tax penalty under Code § 4980H(a)) or as an employer offering coverage with employees who qualify for premium tax credits or cost-sharing reductions (triggering the lesser of the two penalties under Code § 4980H(b))? The 4980H(a) penalty seems to be intended for an employer that fails to off *any* of its full-time employees minimum essential coverage.

Waiting Periods

The expected proposed rules on waiting periods are not particularly relevant for the mobile outdoor amusement industry. If an employer in the industry is permitted to use a 90-day equivalence in cumulative hours worked for the waiting period, the employer would be tracking hours worked for this purpose instead of tracking months worked. More relevant would be guidance explaining how to determine when the 90-day period begins in cases where the employee is hired with the reasonable expectation that he or she work fewer than 30 hours per week and, subsequently, the employee begins to work more than 30 hours per week (perhaps only to return to a schedule of less than 30 hours per week shortly thereafter).

Many OABA multi-generation family-owned members, if faced with the Code § 4980H tax penalty or the cost to provide affordable minimum essential coverage for seasonal workers, will not survive 2014.

Thank you for your consideration of these comments and we look forward to the opportunity to review and comment on future proposed regulations that take into account OABA members' concerns. Please feel free to contact me at 407 681-9444 if you would like to discuss these comments.

Sincerely,

Robert W. Johnson
President