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Office of Health Plan Standards and Compliance Assistance  
Employee Benefits Security Administration  
Room N-5653  
United States Department of Labor  
200 Constitution Avenue, NW  
Washington, D.C. 20210

*Sent electronically to e-ohpsca-er.ebsa@dol.gov*

Re: Frequently Asked Questions in Notice 2012-17

Alston & Bird, LLP (“A&B”) appreciates the opportunity to respond, on behalf of many of its employer/plan sponsor clients, to the request for comments set forth in the above mentioned notice (“Notice”). In particular, A&B wishes to comment on the application of new Section 2708 of the Public Health Service Act (“Section 2708”), as added by Section 1201 of the Patient Protection and Affordable Care Act (“ACA”) and incorporated by reference into the Internal Revenue Code (the “Code”) and ERISA.

Section 2708 prohibits group health plans from imposing a waiting period in excess of 90 days. Section 2708 does not define the term “waiting period” but refers to the definition in Section 2704(a) of the Public Health Service Act (“Section 2704”), which pre-dates ACA. Regulations defining a waiting period under Section 2704(a) have been previously issued by the agencies.

## ***Overview of Comments***

The Notice contemplates that future guidance regarding Section 2708 will permit a group health plan to establish a cumulative hours requirement as a condition of eligibility (i.e., a requirement that an employee work a certain number of hours before becoming eligible for the plan). A group health plan could then impose a waiting period (not to exceed 90 days) after an employee completes the cumulative hours requirement, so long as the cumulative hours requirement does not exceed the maximum established by the agencies (“Maximum Hours Requirement”). Although the Notice does not identify the specific Maximum Hours Requirement, the Notice seems to suggest that a

plan could not impose a cumulative hours requirement in excess of 750 hours (i.e., a Maximum Hours Requirement based on 20 hours per week).

Employer/plan sponsors establish terms of eligibility commensurate with their particular facts and circumstances, such as collective bargaining, industry or location. Our clients support allowing employers/plan sponsors to include a Maximum Hours Requirement as a term of eligibility, but are concerned that a Maximum Hours Requirement of 750 hours will significantly minimize (if not eliminate) flexibility needed by employer/plan sponsors by unnecessarily limiting application of a cumulative hours requirement, as an eligibility condition, to employees effectively defined by the agencies as “part-time employees” working 20 hours week. We do not believe that the Maximum Hours Requirement should be so limiting for the following reasons:

- Section 2708 does not make distinctions between full-time and part-time employee status (and the equivalent thereof); therefore, we believe that any application of Section 2708 should apply equally to all classifications and types of employees so long as the integrity of Section 2708 is not compromised. While employer/plan sponsors who are subject to the employer responsibility provisions of Code Section 4980H (Section 4980H) may choose to base eligibility on full-time/part-time status, as defined by the agencies, they are not required to do so. Also, all employer/plan sponsors with a plan subject to Section 2708 will not be subject to Section 4980H.
- Many employers do not define part-time employee status as working as few as 20 hours per week. A Maximum Hours Requirement that is limited to 750 hours will effectively operate as a mandated eligibility requirement for employer/plan sponsors who currently do or wish to extend eligibility to part-time employees (or the equivalent thereof), but only after they have satisfied a cumulative hours requirement that is commensurate with the employer’s own unique circumstances. An unnecessarily low Maximum Hours Requirement could also have the unintended effect of causing employers who currently do or wish to extend eligibility for group health plan coverage to such employees to think otherwise and forgo coverage altogether.

Consequently, we urge the agencies to consider, in lieu of 750 hours, a Maximum Hours Requirement of 1200 hours. A Maximum Hours Requirement of 1200 hours provides employers with the necessary flexibility without also compromising the integrity of Section 2708.

In addition, we urge the agencies to adopt a coordination rule for Section 2708 and Section 4980H that does not unduly tether the two provisions together. Certainly, employer/plan sponsors who are subject to Sections 2708 and 4980H and who do not want to pay a penalty will not apply a cumulative hours requirement as an eligibility condition to an employee who is determined to be full-time (i.e., working 30 hours or more per week) in accordance with the agencies’ guidance. Nevertheless, that does not necessarily warrant basing the Maximum Hours Requirement on a 29-hour work week (i.e., a Maximum Hours Requirement of 1,087.5 hours). While a Maximum Hours

Requirement based on Section 4980H as a benchmark provides more flexibility than a Maximum Hours Requirement of 750 hours, we believe such a rule would still not provide many employers with the much needed flexibility to draft terms of eligibility commensurate with their particular facts and circumstances.

### ***Overview of Notice-Cumulative Hours Requirement***

The Notice contemplates the following with regard to a plan's waiting period beginning in 2014:

- In accordance with Section 2708, a plan's waiting period may not exceed 90 days.
- A waiting period imposed by a plan begins once an individual satisfies the plan's eligibility conditions. This is consistent with the pre-ACA guidance on the definition of waiting period under Section 2704, which is referenced by Section 2708.
- An eligibility condition will generally be permissible under Section 2708 unless the eligibility condition is designed to avoid compliance with Section 2708. For example, eligibility conditions based on an employment classification (full-time or part-time) or the receipt of a license will be permissible.
- Eligibility conditions based *solely* on the lapse of time, such as a continuous employment requirement, constitute a waiting period subject to Section 2708 and would be permissible for no more than 90 days.
- The agencies anticipate that future guidance will provide that a cumulative hours requirement is an eligibility condition that is not designed to avoid compliance with Section 2708 *so long as* the cumulative hours required by the plan do not exceed a yet to be determined number of hours to be specified in that guidance ("Maximum Hours Requirement").

We fully agree that a cumulative hours requirement should, under certain circumstances, be considered an eligibility condition that is *not* designed to avoid compliance with Section 2708 and that a plan should be able to impose a waiting period *after* that cumulative hours requirement has been satisfied. A cumulative hours requirement is distinguishable from an eligibility condition based *solely* on the lapse of time, such as a continuous employment requirement, because an employee subject to a cumulative hours requirement becomes eligible for the group health plan once he/she has accumulated the requisite hours, *regardless of the duration to accumulate those hours*. Some employees may satisfy the requirement very soon after being hired while it may take others longer, depending on the number of hours they work. Consider the following examples to illustrate the distinction.

*Example #1:* Bob and Joe are both hired by ABC on January 1, 2014. ABC sponsors a group health plan for which employees who have worked 1000 hours are considered eligible for the group health plan. Bob works 1000 hours in 6 months. Joe works 1000 hours in 3 months. Bob becomes an eligible employee after 6 months whereas Joe becomes an eligible employee after 3 months. In this example, ABC's eligibility conditions are not based *solely* on the lapse of time.

*Example #2:* Same facts as Example #1, except that employees of ABC are eligible once they have worked for ABC 90 days. In this example, Bob and Joe are both eligible after 90 days, regardless of how much they have worked during that 90 day period. Thus, the 90 day continuous employment requirement under the ABC plan is an eligibility condition based *solely* on the lapse of time.

Nevertheless, we acknowledge that a cumulative hours requirement could be an eligibility condition designed to avoid compliance with Section 2708 if the requisite hours needed to obtain eligibility are exorbitant. Thus, we believe that a Maximum Hours Requirement is necessary; however, we believe it must effectively balance the needs of employer/plan sponsors with the integrity of Section 2708.

#### ***Maximum Hours Requirement-The Notice***

The Notice does not specifically identify the Maximum Hours Requirement expected to be issued by the agencies in future guidance but it strongly implies through an example in the Notice that the agencies are contemplating a Maximum Hours Requirement of 750 hours.

In the example, Employer E hires Employee Z to work 20 hours a week. Employer E's plan requires employees to complete 750 hours to become eligible for coverage. The example indicates that it is assumed, solely for purposes of the example, that the guidance will permit plans to require part-time employees to complete up to, but not more than, 750 hours to be eligible for coverage. The example concludes that Employee Z, who is expected to work 20 hours per week, will complete 750 hours in about 37 ½ weeks and that a waiting period up to 90 days may be imposed once Employee E completes 750 hours of service. Under this rule, coverage will be effective no later than 1 year after Employee E's date of hire.

There appear to be two key elements of this rule as set forth in the example:

- The cumulative hours requirement cannot exceed the Maximum Hours Requirement.
- The requisite hours imposed by the Plan is designed so that the expected coverage effective date, taking into account the waiting period, is not more than 1 year after the date of hire.

We agree generally with these key elements identified in the example but believe a Maximum Hours Requirement of 750 hours is too narrow and will unnecessarily limit application of the general rule.

***Maximum Hours Requirement of 750 Hours is Unnecessarily Limiting***

A Maximum Hours Requirement of 750 hours will significantly minimize (if not eliminate) flexibility needed by employer/plan sponsors by unnecessarily limiting application of a cumulative hours requirement, as an eligibility condition, to employees defined by the agencies as the equivalent of “part-time” employees working 20 hours per week. We do not believe that the Maximum Hours Requirement should be so limiting for the following reasons.

- Section 2708 Doesn’t Warrant a Distinction Between “Full-Time” and “Part Time” Status

Section 2708 does not make distinctions between full-time and part-time employee status (and the equivalent thereof); therefore, we believe that Section 2708, and any corresponding application of the rule, should apply equally to all employee classifications. Employer/plan sponsors should be permitted under Section 2708 to apply a cumulative hours requirement to “full-time” employees as well as “part-time” employees. Certainly, “full-time” employees subject to a cumulative hours requirement of 1200 (as we propose) followed by a 90 day waiting period would be eligible for coverage no later than 1 year after the date of hire- the same as Employee Z in the example. Thus the effects are the same regardless of the class or type of employee.

Employer/plan sponsors that are subject to Section 4980H should also be afforded the same flexibility even though such employers would not be able to escape the penalties under Section 4980H if a cumulative hours requirement is imposed “full-time” employees, as defined by IRS. Such employers may be influenced by Section 4980H’s definition of “full-time” when they establish terms of eligibility under the plan but Section 4980H does not require an employer to offer coverage to any class or type of employee. It simply imposes a penalty that on employer in certain situations that the employer/plan sponsor may be willing to pay. If such an employer is not willing to pay the penalty, the employer/plan sponsor should still be afforded the flexibility to impose a cumulative hours requirement on employees who are considered “part-time” for purposes of Section 4980H (i.e. working 29 hours a week).

- Employers Do Not Always Define Part-time Status as Working 20 Hours Per Week

Many employers do not define part-time employee status as working as few as 20 hours per week. As noted above, employer/plan sponsors who are subject to Section 4980H may define “part-time” status as working as high as 29 hours a week. Employer/plan sponsors who are not subject to 4980H may define “part-time” status as

working even more hours per week.<sup>1</sup> Thus, we assert that a Maximum Hours Requirement of 750 hours is too low to reasonably accommodate many employer/plan sponsors. The unintended consequences of establishing a Maximum Hours Requirement that is too low to reasonably accommodate many employer/plan sponsors are twofold: (i) the agencies establish a defacto term of eligibility for employers who currently do or wish to extend eligibility to part-time employees (i.e., employer/plan sponsors who wish to extend eligibility to “part-time employees” who have satisfied a cumulative hours requirement will essentially be forced to adopt a 20 hours maximum rule) and (ii) employers will forgo extending eligibility to part-time employees.

We believe that our proposed rule that imposes a Maximum Hours Requirement of 1200 hours eliminates these issues without compromising Section 2708.

### ***Maximum Hours Requirement-Our Proposal***

The rule we propose would be similar in nature to the rule in the example but will provide additional flexibility without compromising the integrity of Section 2708. Similar to the example in the Notice, our proposed rule contains the following key elements:

- The cumulative hours requirement is designed so that the effective date of coverage, taking into account the 90 day waiting period, will not be later than 1 year after the date of hire.
- The Maximum Hours Requirement cannot exceed 1200 hours (in lieu of 750 hours as suggested in the Notice). This gives the employer flexibility to apply a cumulative hours requirement as a condition of eligibility with respect any variety of classes of employees, including what we consider to be the low end of “full-time” employment (32 hours per week).

If the plan satisfies these requirements, the cumulative hours requirement would not be an eligibility condition that is designed to avoid compliance with Section 2708, which would permit plans to impose up to a 90-day waiting period once the cumulative hours requirement is satisfied. The following examples illustrate the application of this proposed rule:

*Example #3:* ABC hires employees to work the production line at the XYZ Plant. All such employees are generally expected to work 29 hours per week and all such employees become eligible for coverage under ABC’s health plan after they have accumulated 348 hours of service (an employee who works no more than 30 hours a week will become eligible in about 12 weeks). ABC imposes a 90 day waiting period once an employee satisfies the cumulative hours requirement. ABC’s cumulative hours requirement is not an eligibility condition that is designed to avoid compliance with Section 2708 because (i) the cumulative hours requirement does not

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<sup>1</sup> In fact, the currently dividing line between “part-time” and “full-time” status for purposes of identifying exclusions under the Code Section 105(h) nondiscrimination rules is 35 hours.

exceed the Maximum Hours Requirement and (ii) the coverage is expected to begin under the plan well before the 1 year anniversary following the date of hire.

*Example #4:* Acme hires employees to sale widgets. All such employees are expected to work 32 hours per week and all such employees become eligible for coverage under Acme’s health plan after they have accumulated 1200 hours of service in a 12-month period (an employee who works 32 hours a week will become eligible in about 37 ½ weeks). Acme is not subject to Section 4980H. Acme imposes a 90 day waiting period after the employees satisfy the cumulative hours requirement. Acme’s cumulative hours requirement is an eligibility condition that is not designed to avoid compliance with Section 2708 because (i) the total cumulative hours requirement does not exceed the Maximum Hours Requirement and (ii) the requirement is designed to that coverage under the plan will begin, taking into account the 90 day waiting period, no later than 1 year following the date of hire.

*Example #5.* Employer Z hires Bob as an administrative assistant. Bob is expected to work 27 hours a week and Bob is eligible for coverage under Employer Z’s plan after he has accumulated 1500 hours. Employer Z imposes a 90 day waiting period after Bob satisfies the cumulative hours requirement. Employer Z’s cumulative hours requirement is an eligibility condition designed to avoid compliance with Section 2708 because the cumulative hours requirement under the plan exceeds the Maximum Hours Requirement established under the proposed rule.

### ***Impact of Code Section 4980H on the Maximum Hours Requirement***

As noted above, we do not believe it necessary to tether Sections 2708 and 4980H completely together such that Section 4980H provides the benchmark for the Maximum Hours Requirement in Section 2708. Although using Section 4980H as a benchmark for the Maximum Hours Requirement would be preferred to using 750 hours, we believe that using Section 4980H as a benchmark for the Maximum Hours Requirement is still unnecessarily limiting.

Nevertheless, we agree that some coordination between the two provisions is necessary for those employer/plan sponsors that are subject to Section 4980H. In that case, we urge the agencies to adopt a rule that employer plan/sponsors are not subject to a penalty under Section 2708 with regard to employees who are not immediately identifiable as “full-time” under IRS guidance so long as coverage begins under the plan on the later of the date they are determined to be a full-time or part-time employee (whichever the case may be) in accordance with the guidance and the permissible waiting period. We would also urge the agencies to consider allowing plans a reasonable period of time (e.g. 30 days) to enroll employees in the applicable plan once the employee’s

status is ultimately determined under Section 4980H and any applicable waiting period under Section 2708 has been satisfied.

We again thank you for the opportunity to submit comments. If you have any questions or wish to discuss this issue further, please feel free to contact me.

Sincerely

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