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Re: Department of Labor Technical Release No. 2012-01 and Internal Revenue Service Notice 2012-17: Frequently Asked Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods

Dear Sir or Madam:

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies. Together, our members' companies employ more than 12 million individuals and provide health care coverage to over 35 million American workers, retirees, and their families. BRT is invested in addressing health care costs that hamper essential economic growth. For that reason, BRT has been critically engaged on the issue of health care reform and has an interest in seeing an implementation of the Affordable Care Act (ACA) that provides employers with the flexibility they need to continue providing critical benefits to employees and their families.

BRT appreciates the opportunity to submit comments in response to the Department of Labor's Technical Release 2012-01 and Internal Revenue Service's Notice 2012-17, *Frequently Asked Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods*, published on February 9, 2012 (the Guidance). The Department of the Treasury (Treasury), the Department of Labor (DOL), and the Department of Health and Human Services (HHS) (collectively, the Departments) have requested comment on methods and timeframes for determining whether a new employee qualifies as a part- or full-time employee, a determination that may subject an employer to an assessable penalty payment under § 4980H of the Internal Revenue Code (IRC or the

Code) and determine the applicability of a waiting period as defined under § 2708 of the Public Health Services Act (PHSA).

BRT strongly supports the direction of the proposals contained within the Guidance and applauds the Departments for their coordinated efforts and recognition of the crucial need for employer flexibility. We encourage the Departments to incorporate into any proposed rule or future guidance the recommendations presented below.

Guidance Issues Overview

This Guidance, concerning provisions of the Affordable Care Act governing automatic enrollment, employer shared responsibility, and the 90-day limitation on waiting periods, is an important next step in clarifying the employer responsibility provisions well before 2014. We recognize that there will be future rulemaking where comments will be accepted; however, we appreciate the opportunity to provide input on this guidance at this time.

We encourage the Departments to adopt regulations consistent with current classifications and methods that employers use today to determine the status of eligible employees who may be offered coverage. We also encourage the Departments to recognize the value in keeping rules consistent for both employees who are currently employed and those who are newly hired. We are very concerned about the creation of overly burdensome rules that may increase not only the cost of coverage but the cost of compliance. Our goal is to retain employer-sponsored coverage and continue coverage that is currently offered to more than 170 million Americans.

We are encouraged by the Departments' efforts to identify ways to provide ongoing support for three key functions of providing employer-sponsored coverage: first, determination of eligibility for coverage under a plan; second, a waiting period that is recognized as an element of the process following an eligibility determination; and third, an administrative time period to permit individuals to become enrolled in an appropriate plan. We believe that the statute provides some latitude in evaluating these three timeframes to ensure that employees can be eligible for employer sponsored coverage.

While we understand the approach the Departments may be considering, we would also like the Departments to consider a "look back/stability" period for new hires that is consistent with the proposals for existing workers. This will reduce the administrative complexity. Each employer has a different set of facts and circumstances that guide their administrative processes, and, as such, we encourage the maximum amount of flexibility be afforded to employers when offering of health benefits.

However, we will specifically provide comments on the following items specifically addressed in this guidance: the initial time frame for determining a new employee's status when it is unknown at the time of hire, an administrative period to permit employers time to enroll employees into coverage, applicability of the waiting period limitation, and, additionally, a lead time necessary to comply with the regulations.

Initial "Year 1" Eligibility for Health Care Where Full-Time and Part-Time Status is Unknown at Hire

Under Q5, the Departments suggest that employers may have six months to determine whether a newly-hired employee¹ is a full-time employee for purposes of IRC § 4980H and will not be subject to an IRC § 4980H payment during that six-month period with respect to that employee. Further, we understand that the Internal Revenue Service (IRS) and Treasury may propose an approach under which the period of time that an employer will have to determine whether a newly-hired employee is a full-time employee will depend upon whether, based on the facts and circumstances, (a) the employee is reasonably expected as of the time of hire to work an average of 30 or more hours per week on an annual basis and (b) the employee's first three months of employment are reasonably viewed, as of the end of that period, as representative of the average hours the employee is expected to work on an annual basis.

We are very concerned that the three month plus three month approach with "reasonably expected" hours worked and a reevaluation of the time the employee works will create enormous complexity and risk of administrative error. It is very difficult for large employers, particularly employers with tens of thousands of employees that work variable schedules, to make prospective and subjective judgments on an employee's schedule in order to determine whether an employee is full-time or part-time. Under this proposal, large employers, who will adopt a "look-back/stability" approach in determining full-time status and eligibility for coverage for existing workers (as contemplated in previous guidance), would simultaneously be required to develop a secondary system for determining the status of newly hired workers that would be inconsistent with this more reasonable "look-back/stability" approach and would create complexity and the potential for error.

There are many other employer/employee requirements that could be affected by this complexity in defining eligibility for coverage, such as eligibility for coverage through the Exchanges and under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). These complex systems and processes will lead to higher administrative costs. Additionally, if this system is too complex and varied depending on whether an employee is a newly hired or existing employee, employers will face challenges in communicating eligibility.

¹ We support the new and previous guidances that have suggested that certain categories of workers, such as seasonal or temporary, would not fall under these requirements.

It would likely also create problems for those employees who need to maintain coverage under the individual mandate requirement of the ACA.

It is very common for employers to administer all of their benefits at the same time. We encourage the Departments to allow for flexibility which will help employers retain their “bundled” approach that best supports employee recruitment and retention. It would be confusing to have separate enrollments for health care and other benefits programs. Such an approach would also complicate the administration of the program and create confusion for employees. We encourage the Departments to identify a simpler approach that can be easily understood, reduce administrative burdens, align with the timeframes of eligibility for the Exchanges, and be easily articulated to new hires.

Alternative Suggestion

As part of our comments, we believe that there is a viable alternative to the new hire approach proposed in Technical Release 2012-01 and Notice 2012-17, which we outline below.

We suggest a “Cumulative Hours Maximum Standard” (CHMS) or a safe harbor that outlines minimum standards to be met while allowing employers flexibility to use “equivalent” approaches to achieve compliance within these standards for newly hired workers. A CHMS should cover full-time and part-time health care plan offerings, under both the definition under IRC § 4980H and the 90-day waiting period requirement under the ACA. We suggest using 1,200 hours as the cumulative hour test.

Example of a CHMS for Employees Where Full-Time/Part-Time Status is Unknown at Time of Hire²:

An example of the approach described above includes an employee who becomes eligible for health care after working 1,200 cumulative hours as dictated by the plan terms. Once eligible, the employee would then be subject to a 90-day waiting period before they could enroll in coverage. There would also be permitted an additional administrative period of up to 45 days to process the enrollment. [In total: 1,200 hours + 90 days + 45 days]. This example represents the outer limit of a safe harbor.

Employers could use different eligibility approaches as long as they were deemed to be equivalent or better than the one described above. An approach would meet this standard if the effective date of coverage under the employer policy for the employee’s health care enrollment is no later than the time it would take under the 1,200 hour CHMS.

² In this example, we believe employers should be permitted to calculate the hours during the entire time to ensure that the employee continues to be a full-time employee.

Under this alternative, we suggest that a sample definition of CHMS be:

“As long as health care coverage (which meets affordability and minimum value standards) is offered at or within the combination of the period of time necessary to meet 1,200 hours, plus 90 days for a waiting period, plus 31 days for administration of the plan, then the employer is deemed to have met the requirements of IRC § 4980H and the 90-day waiting period requirements.”

This alternative standard is consistent with section 2704(b)(4) of the PHS, which states that the term “waiting period” means, with respect to a group health plan and an individual who is a **potential participant or beneficiary in the plan, the period that must pass** with respect to the individual **before the individual is eligible** to be covered for benefits **under the terms of the plan**.

The proposed alternative we have provided both meets the requirements of the 90-day waiting period and ensures employers will be subject to minimal administrative burden. First, a **potential participant or beneficiary in the plan** could be defined to permit employers to only include those individuals who work a certain number of cumulative hours. The plan terms could define that time frame consistent with the alternative proposed. Second, **the period that must pass** could be read as an add-on to the cumulative hour test that is included in step one, in order to determine eligibility.

Further, the statute references another timeframe prior to eligibility and enrollment by stating **“before the individual is eligible.”** The key is “before,” which should permit a timeframe to determine eligibility prior to the imposition of the 90-day waiting period. Finally, the statute does reference **under the terms of the plan**. This reference continues current employer-sponsored coverage practices, where employers may define eligibility, and permits flexibility. For example, a term of the plan that states “eligibility is reviewed using cumulative hours at 4 months from the date of hire,” would be allowable.

In conclusion, while the recent Guidance indicates that a cumulative hours approach is being considered, we agree that such an approach is warranted. We believe that the statute does allow this approach and that it should be executed in a way that permits the greatest amount of flexibility for employers to determine eligibility for employer-sponsored health insurance coverage. A Cumulative Hours Maximum Standard, as previously defined, plus time for a waiting period and administrative period, could provide sufficient flexibility for employers and ensure sufficient lead time for proper administration of employer-sponsored health coverage.

Content and Timing of Administrative Period for Enrollment Process

As discussed above, we believe that there needs to be an administrative period to afford employers sufficient time to enroll employees into coverage. This time period also allows employees adequate time to receive their enrollment materials for the plan they have chosen, review and understand the materials provided, and enroll in their health insurance. Employers also need this time to effectively communicate and accurately process enrollments.

Proposed Solution

We support flexibility for up to a 45-day administration period for the **initial** (new hire) enrollment process. We also believe that there needs to be flexibility provided through a maximum three-month administrative period for the **annual** open enrollment process.

Example of an Initial Eligibility Process for a New Hire:

Generally, a large employer assesses the initial eligibility for a qualified employee via a batch process. In this example, a large employer requires approximately 30-45 days to administer this monthly-initiated process through the following steps:

- Calculate full-time/part-time status after the time frame to determine eligibility (in this example, 5 months);
- Feed resulting information into in-house and vendor systems;
- Provide employees with individualized enrollment materials based on eligibility;
- Provide health plans with enrollment elections from the benefits enrollment system, which then process enrollment, including sending member cards/materials to employees and their dependents; and
- On the date that represents the beginning of the first pay period of the month following a person's 6th month of employment, benefits enrollment takes effect.

Example of an Annual Eligibility Process:

Generally, a large employer will assess ongoing eligibility once each year in advance of the benefits plan year. In this example, the large employer is approaching the annual open enrollment for the upcoming plan year. The large employer requires three months to assess ongoing eligibility and administer annual open enrollment, as the following steps occur:

Month 1:

- Calculate full-time/part-time status for qualified employees using a 12-month look-back, then determine eligibility for the following plan year (such calculation covers over 200,000 employees each year).

- Feed resulting information to in-house and vendor systems.
- Provide employees with individualized enrollment materials based on eligibility.
- Train human resources team and call centers.

Month 2:

- Employees go through an annual open enrollment process (enrollment elections, utilization of on-line tools and call centers, collection of dependent data, etc.). There may be multiple separate enrollment periods to handle the volume of enrollments.
- Enrollment confirmation is mailed to the employees' homes.

Month 3:

- Enrollment elections sent to multiple health plans who update their systems and send member cards/materials to employees and their dependents in advance of the start of the plan year.
- Employees make any necessary corrections to their enrollments via call centers in advance of the new plan year start.

Waiting Period

The Guidance contemplates that future guidance regarding section 2708 of the PHSA 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 (i.e., CHMS). Although the Guidance does not identify the specific requirement, the Guidance seems to suggest that a plan could not impose a cumulative hours requirement in excess of 750 hours (e.g., a maximum hours requirement based on 20 hours per week). Besides a cumulative hours approach, we also support the flexibility for plan eligibility factors other than the passage of time.

Employers/plan sponsors establish terms of eligibility commensurate with their particular facts and circumstances, such as collective bargaining, industry, or location. We support allowing employers/plan sponsors to include a requirement as a term of eligibility, but are concerned that a Maximum Hours Requirement of 750 hours will significantly minimize (if not eliminate) the flexibility needed by employers/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 per week. For the following reasons, we do not believe that the Maximum Hours Requirement should be so limiting:

- 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 employers/plan sponsors who are subject to the employer responsibility provisions of IRC § 4980H may choose to base eligibility on full-time/part-time status, as defined by the agencies, they are not required to do so. Additionally, all employers/plan sponsors with a plan subject to section 2708 will not be subject to IRC § 4980H.
- Many employers do not define part-time employee status as working as few as 20 hours per week. An unnecessarily low hours requirement could have the unintended effect of causing employers who currently extend eligibility, or wish to do so for group health plan coverage to such employees, to think otherwise and forgo coverage altogether.
- Consequently, we urge the Departments to consider, in lieu of 750 hours, a CHMS of 1,200 hours, as discussed above. Again, a CHMS of 1,200 hours provides employers with the necessary flexibility without also compromising the integrity of section 2708. In addition, we urge the Departments to adopt a coordination rule for section 2708 and IRC § 4980H that does not unduly tether the two provisions together. Certainly, employers/plan sponsors who are subject to section 2708 and IRC § 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 Departments' Guidance. While a CHMS based on IRC § 4980H as a benchmark provides more flexibility than a 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.

Once an employee meets a company's initial eligibility criteria and waiting period, they should be included in the ongoing "stability/look-back" period process to determine eligibility for the upcoming health coverage period or the following plan year. At a minimum, all employees who have been employed during the full "look-back" period should be included in the ongoing "stability/look-back" process.

Lead Time needed to Comply with Regulations

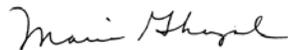
While this issue was not addressed in the Guidance, we believe that large employers need a minimum of 18 months to ensure compliance with new requirements, in advance of their enforcement. This would afford employers a minimum amount of time to evaluate the new requirements, assess the changes that are necessary to the current processes, review the plan

documents and make any necessary adjustments, review and revise vendor and third-party agreements to reflect the new requirements, revise internal communications and materials, and integrate activities into the current processes and compliance efforts.

Conclusion

We appreciate the opportunity to respond to Technical Release 2012-01 and IRS Notice 2012-17. Again, BRT believes that both as a matter of law and policy our employers and employees will be best served by a rule that permits the most flexibility and stability in both the means and timeframe allowed for determining whether an employee qualifies for enrollment in an employer's health insurance plan, and therefore, whether an employer is subject to an assessable penalty under IRC § 4980H or to the waiting period defined under section 2708 of the PHSA. We are available to respond to any questions regarding these comments.

Sincerely,



Maria Ghazal
Vice President and Counsel
Business Roundtable