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Submitted electronically via Notice.comments@irsounsel.treas.gov and e-ohpsca-er.ebsa@dol.gov

Attn: CC:PA:LPD:PR
(Notices 2012-58, 2012-59)
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Comments Re: Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage (IRS Notice 2012-58)

These comments are submitted by the American Staffing Association on behalf of the U.S. staffing industry. ASA member companies provide a wide range of employment and work force services and solutions, including temporary and contract staffing, recruiting and permanent placement, outplacement, training, and human resource consulting. Staffing firms employ about 2.8 million temporary and contract workers every day—almost 13 million annually.

Temporary and contract staffing firms play a vital role in the U.S. economy.¹ Staffing firms recruit, screen, select, and employ their own employees and assign them to support or supplement their clients' work forces in a wide range of work situations including employee absences, skill shortages, seasonal workloads, and special assignments or projects. Employees work in virtually all job categories, including industrial labor, office support, health care, engineering, information technology, and professional and managerial positions. Temporary work offers job flexibility, skills training, supplemental income, and a bridge to permanent employment for people just starting out, changing jobs, or out of work. Businesses use temporary help to meet business and economic exigencies and seasonal fluctuations quickly and at a predictable cost.²

We greatly appreciate the administration's efforts to accommodate the unique operational and compliance challenges faced by staffing firms and other employers of variable hour employees under

¹ "Contract staffing" often is used to describe work performed by higher-skilled employees, especially in the engineering and information technology areas, and often involves longer-term, project-based assignments. "Temporary" is used herein to include contract staffing, except where necessary to differentiate them.

² The Conference Board, HR Executive Review: Contingent Employment (Vol. 3, No. 2, 1995); Peter F. Drucker, They're Not Employees, They're People; Harvard Business Review (2002).

§4980H of the Affordable Care Act. The guidance provided in Notice 2012-58 will provide essential flexibility to staffing firms by permitting the use of a “look-back/stability period safe harbor” to determine the full-time status of their temporary employees. The guidance appropriately recognizes the need for flexibility to avoid monthly determinations of full-time status of those workers for purposes of benefits eligibility and penalty assessments and the disruption, uncertainty, and enforcement issues such determinations would entail.³

SUMMARY OF COMMENTS

Our comments address the following points:

1. Temporary Employees Employed By Staffing Firms Are “Variable Hour” Employees Within The Meaning Of Notice 2012-58
2. Regulations Issued Should Create A Legal Presumption That Temporary Employees Employed By Staffing Firms Are Variable Hour Employees
3. Regulations Should Allow An Optional Quarterly Reset Feature To Simplify Identification Of “Full-Time” Temporary Employees
4. Regulations Should Prescribe A Minimum Number Of Monthly Hours In Stability Periods
5. Regulations Should Permit Limited Benefit Plans And Stand-Alone Health Reimbursement Accounts To Be Deemed Minimum Essential Coverage

COMMENTS

1. Temporary Employees Employed by Staffing Firms Are “Variable Hour” Employees

Notice 2012-58 gives employers the option to use an initial measurement (or look-back) period of up to 12 months to determine whether “new variable hour employees” or “seasonal employees” are full-time employees. Temporary employees employed by staffing firms clearly fall within the definition of “variable hour employee” set forth in the notice because they generally work for short periods of time and their job assignments are sporadic, intermittent, and unpredictable.

Notice 2012-58 requested comments on the types of safe harbor methods that should be available in determining the full-time status of “short-term assignment employees, temporary staffing employees, employees hired into high-turnover positions, and other categories of employees that may present special issues.” Because temporary employees employed by staffing firms are inherently variable hour

³ ASA is a member of Employers for Flexible Health Care, a coalition representing businesses that employ large numbers of part-time, temporary, and seasonal workers. ASA supports the coalition’s comments on IRS Notices 2012-58 and 59 filed September 27, 2012.

employees within the meaning of the notice and because the look-back safe harbor described in the notice provides an appropriate and workable mechanism for determining the full-time status of those workers, no additional or separate safe harbor is needed.

Recommendation: We recommend that the final regulations under Code §4980H expressly recognize that temporary employees employed by staffing firms fall within the definition of “variable hour employee” provided the terms of the definition are satisfied.

2. Regulations Should Create A Legal Presumption That Temporary Employees Employed By Staffing Firms Are Variable Hour Employees

By its terms, the look-back/stability period safe harbor set forth in Notice 2012-58 applies to new variable hour employees. IRS Notice 2012-17 indicated that the safe harbor would not be available “if a newly-hired employee is reasonably expected to work full-time on an annual basis.” Similarly, Notice 2012-58 indicates that the safe harbor would not apply to new employees who are “reasonably expected to work full-time.” Such employees would be viewed as “non-variable.”

As explained below, a “reasonable expectations” test would be unfair and unworkable for staffing firms because they cannot reliably predict whether a temporary employee will work full time for a defined period of time.

- Staffing firms do not control, and therefore cannot predict, their temporary employees’ hours or work patterns. Hours and schedules are solely determined by the staffing firm’s clients and the employees. Clients determine whether and when they need temporary help. Employees choose when and where to work and determine their own schedules
- If a client does specify the length of a temporary assignment, it never guarantees it; the client typically will say an assignment *could* last a specified length of time, not that it will. Such contingent requests do not provide a sufficient basis for imposing an obligation to offer health coverage or pay penalties
- Even if clients and employees make what appear to be firm commitments to a definite period of full-time employment, the flexibility and choice inherent in temporary work make expectations of ongoing employment illusory. For example, clients can terminate assignments prematurely because work requirements change, or replace employees because of poor fit or underperformance; employees can request assignment to other clients because of work dissatisfaction, or quit to take permanent jobs

- Not only are staffing firms unable to reliably identify “non-variable” temporary employees at the time of hire, there is no compelling policy reason to create additional rules for that purpose. The great majority of temporary employees work for short periods of time—average tenure is three months. The temporary work force, as a whole, turns over at a rate of almost 300% per year. The relatively few employees who do work beyond 12 months are mostly in information technology, engineering, and nursing jobs that already offer health coverage at the time of hire.

Efforts to distinguish between variable and non-variable temporary employees could create perverse incentives if an arbitrarily selected period of “expected” full-time employment were conclusively deemed to be “non-variable.” A bright line test could lead to premature terminations of employment, causing business disruption and loss of employee work opportunities thus adding additional problems to the uncertainty inherent in a reasonable expectations test.

Recommendation: We recommend that final regulations issued under Code §4980H establish a rebuttable presumption that temporary employees employed by staffing firms for assignment to clients are variable hour employees. Such a rule would allow firms to make reasonable business judgments as to whether new temporary employees are likely enough to work full-time time to warrant offering coverage, without undue fear of being second-guessed and penalized. We recommend further that, to rebut the presumption, the government be required to demonstrate, by clear and convincing evidence, that the staffing firm’s judgment lacked any substantial basis or that the firm willfully misrepresented the employment relationship.

3. The Regulations Should Allow An Optional Quarterly Reset Feature To Simplify Identification Of “Full-Time” Temporary Employees

The look-back safe harbor provisions of Notice 2012-58 would require staffing firms to track hundreds of thousands of short-term employees annually for the purpose of identifying the small minority who end up working full-time over the course of the initial measurement period. Each such employee would have to be enrolled in health coverage on his or her anniversary date (after a one-month administrative period).

The guidance also would require staffing firms to distinguish between “ongoing” and “new” temporary employees and to transition employees from initial to standard measurement periods. These steps are unnecessary for temporary employees given their short tenure and high turnover and the fact that few would ever achieve “ongoing” status under a 12 month look-back. Simply put, for the vast majority of temporary workers, the distinction between “ongoing” and “new hire” status is meaningless. These workers move in and out of employment with a frequency that varies widely and unpredictably from worker to worker. In short, there is no “normal.”

Recommendation: To mitigate the problem of individual anniversary date plan enrollments, we recommend that final regulations issued under Code § 4980H provide staffing firms (and other employers with variable hour employees) with the option of resetting the annual or other measurement period on a quarterly basis (this period could be called the “reset measurement period” to distinguish it from the “initial measurement period” and the “standard measurement period.”) Under this method, the employer would look back at the end of each calendar quarter and identify the employees who worked full-time in the reset measurement period immediately preceding the end of the quarter. The employer would enroll those employees (following a one-month administrative period) or pay penalties. Employees who are full-time in any 12-month period would be deemed full-time in the subsequent 12-month stability period as long as they remain employees. For individuals who continue to be employed at the end of the reset measurement period, the corresponding stability period could serve as the next reset measurement period.

Example of Quarterly Testing: On Jan. 1, 2014, employer X looks back over the 12-month reset measurement period Jan. 1, 2013 through Dec. 31, 2013 and identifies all employees who worked full-time (average 30 hours per week) during that period.⁴ X has until Jan. 31 to enroll any full-time employees in coverage. Full-time employees would be deemed full-time during the associated 12-month stability period beginning Feb. 1, 2014 and ending Jan. 31, 2015. On Apr. 1 2014, X looks back over the 12 month reset measurement period Apr. 1, 2013 through Mar. 31, 2014 and identifies all employees who worked full-time during that period. X has until Apr. 30, 2014 to enroll any full-time employees in coverage. The full-time employees in that period would be deemed full-time during the stability period beginning May 1, 2014 and ending Apr. 30, 2015. And so on.

4. Regulations Should Prescribe A Minimum Number Of Monthly Hours In Stability Periods

Notice 2012-58 provides that employees who are full-time during the look-back period will be deemed full-time during the stability period “regardless of the hours worked” as long as they remain employees.

Because of the inherently contingent nature of temporary employment and the difficulty of predicting when assignments begin and end, there should be a minimum monthly hour requirement in the stability period to avoid subjecting staffing firms to a full month’s penalties or health insurance premiums for employees who work fractional hours in a month. Without such a requirement, staffing firms will be forced to end assignments early or defer the start of new assignments to avoid such an

⁴ For the purpose of determining who is employed on the Jan. 1, 2014 testing date and all subsequent testing dates, an employer would include all individuals who performed hours of service during the preceding measurement period who remain employees on the testing date.

economically unsustainable result. This would needlessly disrupt client business operations and adversely affect employment.

The San Francisco Health Care Security Ordinance provides an example of a minimum work requirement. Under that law, employees must work at least 8 hours per week for the employer for purposes of the employer's fee calculation.⁵ A similar rule could be applied during the stability period to determine whether a temporary employee is full-time for purposes of the monthly assessment under §4980H. The following example illustrates how such a rule might work.

Example of Minimum Work Requirement: Temporary employee X is first employed by Staffing Firm M on March 1, 2014. M elects a 12-month measurement period with a corresponding 12-month stability period. At the end of the initial measurement period on Feb. 28, 2015, X is determined to have worked full-time during the period. During the ensuing 12-month stability period, the employee works full time each month, except that, in the monthly period June 1 through June 30, the employee performs only 30 hours of service. Because the employee worked less than 35 hours (8 x 4.33) in the month of June, the employee would not be considered full-time and M would have no obligation to offer coverage or pay penalties with respect to M for that month.

Recommendation: We recommend that final regulations under Code § 4980H establish a minimum work requirement during stability periods of at least 35 hours per month.⁶

5. Regulations Should Permit Limited Benefit Plans and Stand-Alone Health Reimbursement Accounts to be Deemed Minimum Essential Coverage

While the look-back safe harbor approach proposed in Notice 2012-58 is, in our view, necessary to ensure that staffing firms can reasonably predict who their full-time employees are, it is not by itself sufficient. The notice fails to address other larger, structural challenges that staffing firms face when attempting to offer health insurance coverage to short-term temporary workers—or even many who work longer periods.

Providing health insurance coverage to temporary employees has always been a challenge. The unpredictable nature of temporary work and the low rates of employee participation, even among some

⁵ Office of Labor Standards Enforcement Regulations Implementing the Employer Spending Requirement of the San Francisco Health Care Security Ordinance, § 3.1 (last revised 7/12 2007).

⁶ We suggest a flat monthly hours test because months vary in length. A flat hours test would avoid employers having to make different average weekly hours calculations for each month which most payroll systems are not set up to do.

longer-term temporary workers, have made it difficult in some cases, and impossible in others, to persuade health insurance issuers to underwrite coverage. And, in instances in which staffing firms are able to offer coverage, participation rates are for the most part dismally low because most temporary employees seek to maximize their cash incomes during their period of short tenure, or because they are already covered under the health policies of parents or spouses or under government programs. Only 8% of short-term temporaries sign up for employer coverage. Even among longer-term professional, health care, and IT contract employees, only 25% take it.⁷

Limited coverage health plans, slated for abolition in 2014, are all that most staffing firms have been practically able to offer temporary employees. Because it is unclear whether health insurance carriers will be able to develop alternative products for variable hour employees, consideration should be given to allowing employers to continue offering limited coverage plans to those workers. Also, because it would be unfair to penalize employers because of the market's inability to provide qualified alternatives, an offer of a limited coverage plan (with an appropriate employer contribution) should qualify as minimum essential coverage for purposes of section 4980H(b) in cases where qualified coverage is demonstrably unavailable.

The underwriting obstacles to obtaining traditional group health coverage for temporary employees could be overcome by treating stand-alone health reimbursement arrangements (HRAs) as "eligible employer sponsored plans" within the meaning of section 5000A(f)(2). Treating HRAs offered by a staffing firm (with an appropriate employer contribution) through a public or private exchange as an offer of minimum essential coverage would substantially enhance staffing firms' ability to offer ACA-compliant health insurance to temporary workers.⁸

Recommendation: We recommend that final regulations issued under Code § 4980H extend and make permanent the temporary safe harbor currently available to limited benefits plans so that those plans may qualify as minimum essential coverage for purposes of the offer of coverage under Code § 4980H(b). We recommend further that stand-alone HRAs be deemed to be minimum essential coverage for purposes of the offer of coverage under Code 4980H(b).

Nondiscrimination rules must provide flexibility

Separately, and outside of the scope of Notices 2012-58 and 2012-59, none of the recommendations set out above will be of much use if fully-insured group health plans established and maintained by

⁷ U.S. Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements* (2005).

⁸ Although state exchanges are limited to employers with less than 100 employees, states can opt to lower the threshold to 50 employees for plan years beginning before Jan. 1, 2016. Relatively few staffing firms would qualify even under the lower threshold.

American Staffing Association

Sep. 28, 2012

Page 8

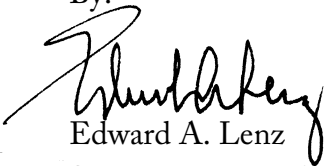
staffing firms are unable to satisfy the yet to be announced nondiscrimination rules under Public Health Service Act § 2706. We submit that the statutory penalties for violating the nondiscrimination rules are so onerous that employers would be forced to discontinue offering health coverage to their regular employees if the rules do not provide sufficient design-based flexibility to allow them to offer health plans suited to the unique needs of their temporary and other variable hour employees.

We appreciate the opportunity to comment and look forward to working with the administration on these important issues as the rule-making process unfolds.

Respectfully submitted,

AMERICAN STAFFING ASSOCIATION

By:

A handwritten signature in black ink, appearing to read "Edward A. Lenz", written over a horizontal line.

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