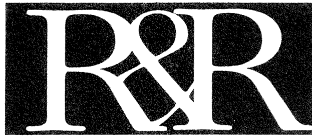

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September 28, 2012

Via Electronic Mail - e-ohpsca-er.ebsa@dol.gov
Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration, Room N-5653
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments regarding the 90-Day Waiting Period Limitation Under Public Health Service Act § 2708

Dear Sir and/or Madam:

My firm, Reid and Riege, P.C. ("Reid and Riege"), was formed in 1950, and since that time pensions and employee benefits have been a cornerstone of our practice. The firm began working with trustees of multiemployer benefit funds in 1956, and this representation remains a critical part of the firm's practice today. Personally, I have been providing legal services to multiemployer retirement and welfare (health) funds and other tax-exempt entities at Reid and Riege for my entire 20-year legal career. Our firm is counsel to over twenty-five (25) multiemployer funds throughout Connecticut and Massachusetts, including seven (7) multiemployer health funds. In addition, since I began practicing in 1992, our firm has served as counsel to two coalitions of multiemployer health funds. Our firm's multiemployer benefit plans department has three (3) full-time attorneys and an assistant/paralegal.

We recently reviewed United States Department of Labor ("DOL") guidance governing the above-noted 90-day waiting period limitation, specifically DOL Technical Release 2012-02 ("Release 02") which was issued on August 31, 2012,[1] and we have prepared this letter to provide you with our firm's comments, two proposed examples which could be utilized by the DOL in subsequent guidance and a requested clarification as to "buy-in" privileges which are common in multiemployer health funds. But before we do so, we wanted to share some background information

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[1] Prior DOL guidance on the same topic, specifically DOL Technical Release 2012-01 ("Release 01") which was issued on February 9, 2012, outlined various approaches that were under consideration by the DOL.

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regarding multiemployer health funds in Section I in order for you to understand the basis for our comments and examples.

I. Background Information

You are aware that multiemployer health funds are tax-exempt entities which are governed by various federal laws, including the Internal Revenue Code of 1986 (the "Code"), the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the Taft-Hartley Act of 1947, as amended. Such funds generally have an affiliation with a specific labor union, and they are normally tax-exempt under Code §501(c)(9) as "voluntary employees' beneficiary associations."

Multiemployer health funds are established, maintained and funded pursuant to the terms of collective bargaining agreements negotiated by the sponsoring unions and respective employers and/or employer groups. The individual health funds are independently managed by a Board of Trustees, normally consisting of an equal number of employee/union representatives and management representatives. Importantly, these funds often provide benefits on a "self-insured" basis (i.e., directly from trust fund assets), although some maintain stop-loss insurance policies and/or life insurance benefits funded through life insurance policies. As the funds are primarily governed by federal law, each fund's Board of Trustees sets the type of benefits provided (e.g., medical, dental, vision, prescription drug, disability benefits, etc.), *the applicable eligibility rules*, and the level of such benefits. Multiemployer health funds are not insurers or insurance companies themselves, but they do provide critical medical and health coverage, along with other benefits, to hundreds of thousands of union employees and their eligible dependents in Connecticut and surrounding states.

Another important aspect of multiemployer health funds and their associated plans is that they normally set their initial and continuing eligibility rules based on work performed by a covered union employee *within a specific time period (or periods) selected by such fund's Board of Trustees*, with health coverage becoming effective at a later date. For example, many of the funds we represent require a set cumulative number of hours of work in "covered employment" within an initial time frame, such as three or six months, to become eligible as of the first day of the month after the month in which the hours of work requirement is met. Thereafter, the union employee must continue to work a set number of hours in covered employment in a specific time period (or periods) selected by the fund, for example a calendar quarter, to maintain eligibility in a

future coverage period. The reason these specific time frames are used is that union employees in the construction trades normally shift from contributing employer to contributing employer, *and hours worked often vary based on the level of work in the specific trade* (i.e., union employees in multiemployer plans are commonly "variable-hour employees"). In addition, it is very common for multiemployer health funds to utilize a "lag period" from the end of the eligibility period to the start of the coverage date in order to allow the contributing employers to send in reports of hours worked and to allow for the plan to determine eligibility.

We acknowledge that the 90-day waiting period limitation of Public Health Service Act §2708 will apply to multiemployer health funds which are governed by ERISA, as outlined in footnote 1 of Release 02. While we believe Release 02 will generally permit multiemployer health funds to maintain their current initial and continuing eligibility rules, we respectfully request that additional examples be provided which will eliminate potential confusion regarding the application of the various examples in Release 02 to multiemployer health plans. Accordingly, we offer the following comments and two proposed examples in Section II, A and B. We have also requested clarification regarding certain "buy-in" privileges which are commonly offered by multiemployer plans in Section II, C.

II. Comments and Examples

A. <u>Guidance provided in Release 01 and Release 02</u>

We believe both Release 01 and Release 02 express an intention to permit multiemployer health funds which cover variable-hour employees to maintain their current initial and continuing eligibility rules. Release 01 provides as follows in Q & A-7 (emphasis added):

> The upcoming guidance under section 2708 is also expected to address situations in which, under the terms of an employer's plan, employees ... are eligible for coverage *once they complete a specified cumulative number of hours of service within a specific period (such as 12 months)*. It is anticipated that, under the upcoming guidance, such eligibility conditions will not be treated as designed to avoid compliance with the 90-day waiting period limitation so long as the required cumulative hours of service do not exceed a number of hours to be specified in that guidance.

Release 01 goes on to mention the unique situation of multiemployer health funds and their associated plans ("plans that credit hours of service from multiple different employers") and comments were requested on what approach to use with these plans.

Section III, B of Release 02 (entitled "Application to Variable Hour Employees Where a Specified Number of Hours of Service Per Period is a Plan Eligibility Condition") builds upon the statement noted above from Release 01, but it adds a level of confusion *for multiemployer health funds* by referring to a "newly-hired employee." The relevant language of Section III, B, provides (emphasis added and footnote omitted):

> If a group health plan conditions eligibility on an employee regularly working a specified number of hours per period (or working full time), and it cannot be determined that a *newly-hired employee* is reasonably expected to regularly work that number of hours per period (or work full time), the plan may take a reasonable period of time to determine whether the employee meets the plan's eligibility condition, which may include a *measurement period* that is consistent with the timeframe permitted for such determinations under Code section 4980H.... *Except where a waiting period that exceeds 90 days is imposed after a measurement period*, the time period for determining whether such an employee meets the plan's eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later than 13 months from the employee's start date, plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month.

We note that footnote 6 of Release 02 discusses guidance regarding measurement periods under Code §4980H, including IRS Notice 2012-58. The footnote essentially provides that a measurement period of up to 12 months is permissible.

Release 02 then contains four examples which deal with a new employee (example 1), part-time employees who become full-time employees (example 2), variable-hour employees (example 3) and a part-time employee who completes 1,200 hours of service as required by a plan (example 4). *None of the examples expressly deal with multiemployer health funds or specific coverage issues which arise for variable-hour employees under such funds, including the use of a specific time period to satisfy a multiemployer health fund's eligibility rule or rules.*

B. Comments and Proposed Examples

Due to the unique nature of multiemployer health funds, we believe they should be allowed to start the 90-day waiting period limitation "clock" *after* the nondiscriminatory time period (e.g., a calendar quarter, a calendar year, or another set 12-month time period) has expired to determine whether the union employee has worked a sufficient number of hours to become eligible for coverage. We also believe that multiemployer health funds should be permitted to set their nondiscriminatory time period (or "measurement period") for a period not to exceed 12 months. Based on the principles set forth in Release 01 and Release 02, as outlined above in Section II, A, we believe the DOL intends to permit such eligibility conditions as well. Accordingly, to confirm that the common eligibility conditions in the multiemployer health fund context are permissible with respect to variable-hour employees, ***we would recommend adding the following two examples to future DOL guidance on this topic***:

> Example X. (i) Facts. Under the terms of a collectively bargained group health plan, an employee must work at least 1,200 hours in covered employment for one or more contributing employers in a measurement period (which is the calendar year) to obtain coverage which takes effect as of March 1st of the immediately following calendar year. Once coverage is effective, it continues for a 12-month period. Collectively bargained employee *E*, who is a variable-hour employee, commences work in covered employment on March 15 of Year 1, and completes the required 1,200 hours as of September 30 of Year 1. Under the plan, collectively bargained employee *E* will be eligible for coverage as of March 1 of Year 2, and such coverage will end as of February 28 of Year 3.
>
> (ii) Conclusion. In this Example X, the cumulative hours of service required within a measurement period (which is equal to, but does not exceed, 12 months) is not considered to be designed to avoid compliance with the 90-day waiting period limitation because the plan may condition coverage on the completion of a specified cumulative number of hours within a specified measurement period. As coverage will commence for collectively bargained employee *E* earlier than 90 days after the end of the plan's specified measurement period to determine coverage (i.e., the end of the calendar year referred to as Year 1), this is a bona fide eligibility condition that is not considered to be designed to avoid compliance with the 90-day waiting period limitation. This conclusion is not impacted by the fact that collectively bargained

employee *E* accumulates 1,200 hours of work in covered employment as of September 30 of Year 1 and will not be eligible under the plan until March 1 of Year 2.

Example Y. (i) Facts. Under the terms of a collectively bargained group health plan, an employee must work at least 250 hours in covered employment for one or more contributing employers in a measurement period (which are calendar quarters, January 1 - March 31, April 1 - June 30, etc.) to obtain coverage which takes effect after a "skip-month" (i.e., the first day of the second month which immediately follows the applicable calendar quarter). Once coverage is effective, it will continue for a three-month period. Collectively bargained employee *F*, who is a variable-hour employee, commences work in covered employment on July 1 of a calendar quarter, and due to the extremely heavy volume of work in that month completes the required 250 hours as of July 30. Under the plan, collectively bargained employee *F* will be eligible for coverage as of November 1.

(ii) Conclusion. In this Example Y, the cumulative hours of service required within a measurement period (which in this plan is a calendar quarter) is not considered to be designed to avoid compliance with the 90-day waiting period limitation because the plan may condition coverage on the completion of a specified cumulative number of hours within a specified period (not to exceed 12 months). As coverage will commence for collectively bargained employee *F* earlier than 90 days after the end of the plan's specified period to determine coverage (i.e., the last day of the July - September calendar quarter), this is a bona fide eligibility condition that is not considered to be designed to avoid compliance with the 90-day waiting period limitation. This conclusion is not impacted by the fact that collectively bargained employee *F* accumulates 250 hours of work in covered employment as of July 30 and will not be eligible under the plan until November 1.

C. Requested clarification as to "buy-in" privileges

Another common feature in multiemployer health funds is the concept of a "buy-in" privilege to establish eligibility. The basic premise behind a buy-in privilege is that if a collectively bargained employee works a minimum number of hours in a multiemployer health fund's "measurement period," but is not able to

find enough work to meet the fund's eligibility standard, such employee may make a self-payment (or "buy-in") equal to the amount which would allow him or her to have a sufficient number of hours within the measurement period. As a simple example, a multiemployer health fund which requires a collectively bargained employee to work 1,200 hours in covered employment in a measurement period (which is the calendar year) permits such employees to "buy-in" to establish their initial eligibility as of the first day of the calendar month after they have earned 400 hours.

While we do not believe the buy-in process described above would present any conflict with the 90-day waiting period limitation, we believe it would be of assistance to multiemployer health funds if the DOL were to *specifically state* in future DOL guidance that group health plan rules regarding any type of "buy-in" process (other than COBRA, which is otherwise required by federal law) are permissible.

III. Conclusion

We appreciate the opportunity to comment on the above items. In addition we hope that our comments and examples are helpful in: (a) ensuring that multiemployer health funds are in compliance with the 90-day waiting period limitation, and (b) preparing future DOL guidance on the topic.

If you have any questions with respect to this letter, do not hesitate to get in touch with me by utilizing my contact information noted on page 1.

Very truly yours,

Douglas K. Knight

DKK:vmm