



Directors Guild of America-Producer Pension and Health Plans
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LISA READ, CEBS
Chief Executive Officer

September 28, 2012

VIA REGISTERED E-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, D.C. 20210

Re: *Comments on Notices 2012-58 and 2012-59*

To Whom It May Concern:

These comments with regard to Notices 2012-58 and 2012-59 (“2012-58” and “2012-59”, respectively, collectively, the “Notices”) are presented on behalf of the Directors Guild of America-Producer Health Plan (the “Plan”), a multiemployer health plan in the entertainment industry. The Plan, along with other entertainment industry plans, previously submitted comments in response to Technical Release 2012-01 and Notice 2011-36. I refer you also to the comments submitted by the National Coordinating Committee for Multiemployer Plans (“NCCMP”) in response to the Notices. This Plan agrees with those comments and wishes to highlight our particular concerns.

First, we would like to express our appreciation that the guidance in the Notices takes into account some of the challenges and unique characteristics of multi-employer plans. In particular, we appreciate that the guidance allows the waiting period to begin at the end of the measurement period for variable hour employees. The guidance also expands the look-back measurement period of up to 12-months to determine whether new variable hour employees or seasonal employees are full-time employees, which is also helpful to multi-employer plans and the employers contributing to those plans.

Guidance for plans that do not use hours of service to determine eligibility

Of utmost importance to the Plan, and not addressed in the Notices, is the need for guidance for plans that do not use hours of service to determine eligibility. As has been noted in detail in previous letters submitted to you by Bush Gottlieb Singer Lopez (Bush Gottlieb) on

behalf of the DGA-Producer Health Plan and other entertainment industry plansⁱ, eligibility for benefits in this Plan, as well as many of the entertainment industry plans, is based on a participant's earnings rather than on the number of hours that the participant works.

The clear intent of the statute, and of the guidance issued, is that conditions for eligibility not based solely on the passage of time are generally permissible, provided that the condition is not designed to avoid compliance with the 90-day waiting period limitation. Thus, as stated in DOL Technical Release 2012-02, "[e]xcept 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..."

Notice 2012-58 provides for a safe-harbor method for determining whether an employee is full-time by utilizing hours worked during a 12-month measurement period solely based on hours worked. The problem for this Plan, and others like it, is that this safe harbor provides no refuge since hours are not used in determining eligibility and, for reasons we have explained in our previous correspondence, it is practically not possible for contributing employers, or the Plan, to determine hours worked by Plan participants or employees. For example, a director is hired to direct one episode of a television program. The director spends time preparing for this work at a home office, as well as meeting with the crew, actors, and the production team. The director doesn't "clock in" or have a specific schedule. The amount of time ultimately spent directing the episode depends on the needs and pace of that particular production. The employer is not tracking the director's hours and the director is not paid based on the hours worked. Rather, the director is paid a flat rate for the project. It would be difficult, if not impossible, for the employer or the Plan to determine the number of hours worked by the director on this project. It also would not make sense to spend resources to do so, since eligibility for coverage by the Plan is solely based on earnings.

Because of this fact, the introduction of only one safe harbor based on hours will inevitably lead to great practical difficulties, and a good deal of confusion. That safe harbor will lead plans and contributing employers to attempt to do the impossible – convert compensation or contributions to hours worked.

As was discussed extensively in the previous letters sent by Bush Gottlieb, the decades old systems of determining eligibility for participants of this Plan and others like it is clearly not designed to avoid the 90-day waiting period and will result in health plan coverage for any employee even arguably working "full time" during a three month to 12 month measurement period. Furthermore, as previously explained, the coverage that will be provided to those

ⁱ Refer to previous letters dated April 9, 2012 and June 17, 2011 sent by Bush Gottlieb Singer Lopez on behalf of the DGA-Producer Health Plan and other entertainment industry plans.

employees will be for a period of time that extends well beyond any period of time that those employees worked “full time.”

Under those circumstances, we ask that guidance be provided that makes it clear that an employer will have complied with its statutory obligations to “full time employees” so long as it is making contributions for those employees to a multiemployer plan with eligibility criteria that, as demonstrated here, were not established to avoid the application of the 90-day waiting period limitation.

Regulatory guidance on the 90 days measurement period

We have also previously requested that the guidance equate the 90-day waiting period to three months. This is necessary because after an individual becomes eligible for coverage, the Plan will normally begin coverage at the beginning of a calendar quarter. Since there are often a few more than 90 days in a calendar quarter, the Plan could be required to begin coverage before the beginning of a month. The Plan’s administrative process, including computer software systems, is already set up on a quarterly basis, and it would be extremely difficult and costly to implement a system that tracks the 90 days exactly, would be confusing for participants, and would provide no material benefits to participants.

The Directors Guild of America – Producer Health Plan appreciates the opportunity to submit comments on these important issues. Please do not hesitate to contact me if you have any questions about our comments or need additional information.

Respectfully submitted,



Lisa Read
Chief Executive Officer
Directors Guild of America – Producer Pension & Health Plan

cc: Bush Gottlieb Singer Lopez