



September 30, 2012

VIA: [Notice.comments@irscounsel.treas.gov](mailto:Notice.comments@irscounsel.treas.gov)

VIA: [e-ohpsca-er.ebsa@dol.gov](mailto:e-ohpsca-er.ebsa@dol.gov)

CC:PA:LPD:PR (Notice 2012-58)  
Internal Revenue Service, Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

Office of Health Plan Standards & Compliance  
Assistance, Employee Benefits Security Administration  
Room N-5653,  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: Notice 2012-58 – Determining Full-Time Employees for Purposes of  
Shared Responsibility for Employers Regarding Health Coverage (4980H);  
and  
Notice 2012-59 – Guidance on 90-Day Waiting Period Limitation under  
Public Health Service Act Section 2708

Dear Ladies and Gentlemen:

UNITE HERE HEALTH (UHH) is pleased to submit comments in response to recent guidance provided by the Internal Revenue Service (IRS), Department of Labor, and Department of Health and Human Services offering employers and plans optional safe harbor methods for determining employee full-time status, as well as guidance on the 90-day waiting period. UHH is a multiemployer Taft-Hartley trust fund that provides comprehensive health care benefits to more than 170,000 people in over 20 states. We previously worked with the National Coordinating Committee for Multiemployer Plans (NCCMP) to submit comments detailing our concerns over the conflict created by the Shared Responsibility penalty, the 90-day waiting period limitation and the structure, financing, operations, and stability of the Taft Hartley

health coverage market. Certain concerns raised in those comments are not addressed by Notices 2012-58 and 2012-59.

Our primary position in this comment letter is that the Shared Responsibility provisions under the Affordable Care Act (ACA) should not apply to employers contributing to a multiemployer plan on behalf of collectively bargained employees. Employers contributing to multiemployer plans should be deemed to have satisfied their Shared Responsibility for those participating employees and should be free from penalty. Our specific comments on the recent notices are as follows:

### **1. Shared Responsibility Penalties should not apply to employers contributing to a multiemployer plan**

Multiemployer Taft Hartley funds are created by the Labor-Management Relations Act (LMRA), 29 U.S.C. Sections 141-197, and funded by employer and employee contributions that are negotiated through the collective bargaining process. The guidance in Notice 2012-58 will interrupt and interfere with existing collective bargaining agreements (CBAs) and will interfere with health plan rules that predate the ACA. To our knowledge, nothing in the ACA indicated that the law was intended to supersede the LMRA. As such, the ACA, as implemented through Notices 2012-58 and 2012-59 should not interrupt the existing Taft Hartley funds and the underlying collectively bargained benefits offered through those plans. Where a conflict exists between the guidance in the Notices and the collectively bargained benefits, the collectively bargained benefits should control and the contributing employer should be exempt from penalties. Any other interpretation seriously interferes with and unravels the existing CBAs and health plans.

The following examples illustrate ways in which current, well-functioning multiemployer plan arrangements could be disrupted by use of the new safe harbors, and why confirmation of an exemption is needed:

- Stability periods impact collectively bargained plan contributions and funding. In most cases, Taft Hartley health plan eligibility is based on hourly contributions for the number of hours that employees work, which are negotiated through collective bargaining and supported by a legally binding CBA. These contributions are part of the employees' negotiated compensation. This structure would be eliminated if replaced with the "stability period," which requires coverage regardless of the hours worked.
- Safe harbor definitions of part-time and full-time employee status may disrupt CBA terms. Employers and unions collectively bargain whether to characterize employees as full-time or part-time employees for purposes of benefit coverage. Neither side may make this decision unilaterally. Accordingly, the CBA's definition of full-time employee and part-time employee should preempt any definition under the ACA. Failure to provide this exemption would likely result in delayed or reduced

coverage for employees participating in multiemployer plans, which is the exact opposite result of what was intended by the ACA.

The exemption confirmation could be provided in the form of an additional safe harbor stating where a conflict exists between the guidance in Notices 2012-58 or Notice 2012-59 and the collectively bargained benefits offered under a multiemployer health plan, the collectively bargained benefits will control and the contributing employer is exempt from penalties.

## **2. Three months should equate to 90 days for waiting period purposes**

Additionally, please confirm that three months is the equivalent of 90 days for purposes of the 90-day waiting period rule described in Notice 2012-59 and DOL Technical Release 2012-02. As a practical matter, most plans use a lag period that is measured by months, rather than days.

We sincerely appreciate the opportunity to provide these comments, and we hope that you will take them under advisement in developing future guidance. Please feel free to contact me if you need clarification on any of the issues discussed above.

Respectfully submitted,

A handwritten signature in black ink that reads "Matthew Walker" with a stylized flourish at the end.

Matthew S. Walker  
Chief Executive Officer