National Business Group on Health

20 F Street, NW, Suite 200
Washington, D.C. 20001
202.558.3000 • Fax 202.628.9244
www.businessgrouphealth.org

Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow

April 9, 2012

Submitted via e-mail: e-ohpsca-er.ebsa@dol.gov

The Honorable Phyllis C. Borzi
Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Technical Release No. 2012-01 – Frequently Asked Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods

Dear Assistant Secretary Borzi:

The National Business Group on Health is pleased to comment on the Department of Labor's, Department of the Treasury's, and Department of Health and Human Services' (collectively, the Departments') proposed guidance regarding the automatic enrollment, employer shared responsibility, and waiting period requirements under the Patient Protection and Affordable Care Act (Affordable Care Act).

The National Business Group on Health represents approximately 345 primarily large employers, including 67 of the Fortune 100, who voluntarily provide health benefits and other health programs to over 55 million American employees, retirees, and their families. Our members employ and provide health benefits for employees under a wide variety of work arrangements, including full-time, part-time, seasonal, and temporary. In addition, our members often operate multiple lines of business and tailor employee work and benefit arrangements to the specific needs of each line of business.

As our members prepare for implementation of state insurance Exchanges and the above-referenced Affordable Care Act requirements, a primary concern will be minimizing the administrative and cost burdens associated with those requirements. Allowing plan sponsors flexibility to adapt their Affordable Care Act compliance procedures to existing work, benefit, and payroll arrangements will reduce these burdens and allow plan sponsors to devote more resources toward maintaining and improving health benefits for their employees. Therefore, the National Business Group on Health welcomes the

Departments' efforts to ensure that plan sponsors have workable options, greater predictability, and adequate preparation time in complying with § 18A of the Fair Labor Standards Act (FLSA), § 4980H of the Internal Revenue Code (Code), and the 90-day waiting period limitation under § 1201 of the Affordable Care Act. **Specifically, the National Business Group on Health supports:**

(1) Delaying the effective date of FLSA §18A requirements to the first day of the first plan year beginning at least 12 months after the issuance of final implementing regulations;

(2) Allowing employers up to 12 months, coinciding with the plan or fiscal year and the look-back/stability period safe harbor for current employees, during which the employer will not be subject to Code § 4980H payments, to determine whether a newly-hired employee is full-time for purposes of Code § 4980H;

(3) The Departments' proposal that the 90-day waiting period begins when an employee is otherwise eligible for coverage under the terms of the group health plan;

(4) The Departments' proposal that, at least for the first 3 months following an employee's date of hire, an employer sponsoring a group health plan will not, by reason of failing to offer the employee coverage during that 3-month period, be subject to the employer responsibility payment under Code § 4980H; and

(5) Coordination between § 4980H with the 90-day waiting period limitation such that a waiting period of up to 90 days commences after the measurement period under the look-back/stability period safe harbor.

We provide further discussion of these recommendations below.

I. Automatic Enrollment under FLSA § 18A

The National Business Group on Health commends the Departments' efforts to provide coordinated guidance, a smooth enrollment process, and sufficient time to comply. We emphasize, however, that complying with FLSA § 18A will require substantial investments in time and resources for our members, nearly all of which employ more than 200 full-time employees. Implementing the automatic enrollment requirement under FLSA § 18A will involve significant changes to our members' health plan enrollment and communications processes, particularly during annual open enrollment periods. Our members will need time to finalize plan offerings; contract and coordinate with third-party vendors performing payroll, information technology, and plan administration functions to develop automatic enrollment and opt-out processes; amend plan documents and participant disclosures (such as summary plan descriptions and enrollment materials) accordingly; and distribute the disclosures to plan participants and beneficiaries. Because

automatic enrollment will involve substantial changes to our members' current plan administration, it is also likely that many will need to renegotiate agreements with plan vendors to provide services related to automatic enrollment. It is crucial that our members have adequate time to complete these steps. Therefore, we recommend delaying the effective date or delaying enforcement of FLSA § 18A until the first day of the first plan year beginning at least 12 months after the issuance of final implementing regulations.

We also make the following recommendations with respect to the implementation of FLSA § 18A:

- The Departments should allow employers to give employees an opportunity to opt out of health coverage before automatically enrolling such employees in coverage.

- The Departments should allow employers a "cure period" of up to 90 days during which they can correct mistaken enrollments and disenroll employees from health coverage without adverse tax consequences.

- The Departments should clarify that disenrollments due to correction of mistaken enrollments do not constitute rescissions for purposes of the ACA's prohibition on rescissions of coverage.

II. Determining Full-Time Employee Status under § 4980H

The National Business Group on Health supports the Departments' proposal to allow a look-back/stability period safe harbor for purposes of determining full-time employees under Code § 4980H. This safe harbor would make assessable payments more predictable for plan sponsors, provide greater stability in coverage for employees, and simplify the process of determining whether employees are full-time for Code § 4980H purposes, particularly for businesses where employees' work hours vary frequently.

As we discussed in our comment letter responding to IRS Notice 2011-36 (available at http://www.businessgrouphealth.org/pdfs/Policy_Letter_061711.pdf), we recommend allowing plan sponsors flexibility to use measurement and stability periods of 3 to 12 months such that the safe harbor stability period coincides with the plan sponsor's fiscal year or plan year. We also support allowing group health plans a 3-month administrative interval between the measurement and stability periods during which plans can perform the look-back calculation, notify employees of plan eligibility, and enroll employees in coverage, if necessary.

With respect to newly-hired employees, we support the Departments' efforts to allow employers time—during which employers will not be subject to Code § 4980H payments—to determine whether such employees are full-time for Code § 4980H purposes. However, we have specific concerns pertaining to the Departments' proposals for determining full-time status of newly hired-employees:

- For many of our members, it is unlikely that they will be able to determine whether newly-hired employees should be "reasonably viewed" as full-time within the first 3 to 6 months of employment, particularly in industries with high employee turnover or where employees' work hours vary frequently; and

- Requiring determinations of likely full-time status at 3 and 6 months of employment for new employees will present a significant burden on employers, especially if employers must perform determinations of full-time status for current employees (using the applicable look-back/stability periods) that do not coincide with new employees' initial 3 and 6-months of employment.

We believe that the substantial costs of implementing a system to determine full-time status at the initial 3 and 6 months of employment will outweigh any benefits of doing so. Such expenses are also likely to hurt employers' ability to grow jobs at a time when the nation needs to increase employment. Therefore, we recommend allowing employers up to 12 months, coinciding with the plan or fiscal year and the look-back/stability period safe harbor for current employees, during which the employer will not be subject to Code § 4980H payments, to determine whether a newly-hired employee is full-time for purposes of Code § 4980H. This rule would allow employers to maintain uniform, efficient processes for determining employees' full-time status while ensuring that all employees receive the same treatment for Code § 4980H purposes.

III. 90-Day Waiting Period Limitation

As noted above, the National Business Group on Health supports allowing plan sponsors flexibility to adapt their Affordable Care Act compliance procedures to existing work, benefit, and payroll arrangements. Because many of our members administer health benefits for very large and varied employee populations and experience high employee turnover, maintaining eligibility rules based on employee classification (e.g., part-time vs. full-time) and waiting periods of up to 90 days are often critical to the efficient administration of our members' group health plans. Requiring plan sponsors to change eligibility and enrollment rules to satisfy the 90-day waiting period limitation could present substantial administrative and cost burdens, which would reduce resources available to maintain health benefits. Therefore, we support the Departments' proposal that the 90-day waiting period begin when an employee is otherwise eligible for coverage under the terms of a group health plan. We also recommend that health plans be permitted to:

- Require continuous service to satisfy a waiting period of up to 90 days;

- Enroll employees in coverage on the first day of the month (or quarter) after completing 90 days of service;

- Enroll employees in coverage 90 days after completion of a required probationary period;

- Enroll employees in coverage 90 days after changing from seasonal, temporary, or part-time status to full-time status;

- Enroll employees in coverage 90 days after satisfying eligibility requirements during a look-back measurement period under the safe harbor; or

- Enroll employees in coverage 90 days after meeting plan eligibility requirements and completing the plan's enrollment process.

We also support the Departments' proposals to allow eligibility conditions such as full-time status, a bona fide job category, receipt of a license, or completing a specified cumulative number of hours of service within a specified period that participants must satisfy before a health plan's 90-day waiting period begins.

Likewise, the National Business Group on Health supports the Departments' efforts to coordinate look-back/stability period safe harbor rules with the 90-day waiting period limitation. We support the Departments' proposal that, at least for the first 3 months following an employee's date of hire, an employer sponsoring a group health plan will not, by reason of failing to offer the employee coverage during that 3-month period, be subject to the employer responsibility payment under Code § 4980H.

However, we stress that the measurement period and waiting period serve different purposes. The measurement period under the safe harbor would allow plan sponsors predictability and stability in determining which employees have full-time status for purposes of the Affordable Care Act's assessable payments. Waiting periods allow a plan sponsor to provide health coverage to employees who maintain a stable employment relationship with the plan sponsor. Because the measurement period and waiting period serve different purposes, a plan sponsor should be permitted to apply a waiting period of up to 90 days after any applicable measurement period.

Again, thank you for considering our comments and recommendations on the automatic enrollment, employer shared responsibility, and waiting period requirements under the Affordable Care Act. Please contact me or Steven Wojcik, the National Business Group on Health's Vice President of Public Policy, at (202) 558-3012 if you would like to discuss our comments in more detail.

Sincerely,

Helen Darling
President