Via electronic submission at www.regulations.gov

March 18, 2013

CC:PA:LPD:PR (REG–138006–12)
Internal Revenue Service
Room 5203
PO Box 7604, Ben Franklin Station
Washington, DC 20044

RE: REG–138006-12
Dept. of Treasury NPRM: Shared Responsibility for Employers Regarding Health Coverage
78 Fed. Reg. 218 (January 2, 2013)

Dear Madam/Sir:

The National Immigration Law Center (NILC) specializes in the intersection of health care and immigration laws and policies, offering technical assistance, training, and publications to government agencies, labor unions, non-profit organizations, and health care providers across the country. For over 30 years, NILC has worked to promote workers' rights and to protect and ensure access to health services for low-income immigrants and their family members. NILC submits the following comments in response to the NPRM and the request for comments in the preamble in order to identify specific provisions that may particularly help or harm low-income immigrant workers' and their families' access to affordable health care coverage.

I. Determination of Applicable Large Employer Status

2. Application of the Aggregation Rules

We SUPPORT Treasury's proposed application of aggregation rules. We believe that these rules appropriately reflect on the ground realities. Calculating the size of an employer by individual members will lead to abuse and allow employers to avoid obligations to provide coverage to employees by creating separate companies or organizations.

II. Identifying Full-Time Employees for Section 4980H Purposes

A. General

We DISAGREE with Treasury's interpretation that the monthly equivalent of 30 hours per week is 130 hours of service. Instead, we RECOMMEND the final rule requires a 120 hour monthly equivalent, if a monthly equivalent is used.

The proposed rule's use of 130 hours of service in a calendar month for a monthly equivalent is contrary to the express language of §4980H(c)(4)(A) which clearly states that an employee who averages at least 30 hours of service per week "with respect to any month" (emphasis added) is a full-time employee. As a monthly equivalent of 130 hours may exclude from designation as full-time employees many employees who in fact work 30 hours per week or more, this approach is inconsistent with the purposes of the statute.

In addition, the 120 hour equivalency to four months is established in other parts of the rule that rely on existing law. For instance, the definition of seasonal worker referenced as part of the regulation at page 222 defines four months as equal to 120 days. As a result, the proposed rule's use of 130 hour equivalency conflicts with other Treasury equivalency rules.

We RECOMMEND the final rule require 120 hours, not 130 hours, of service in a calendar month for a monthly equivalent.

<u>B. Hours of Service Rules</u>

<u>In General</u>

We SUPPORT the proposed rule clarifying that hours of service include all hours for which an employee is entitled to payment, including sick leave and paid vacation, not just hours worked.

In addition, we RECOMMEND the final rule also include on-call hours, which are hours of service when individuals may not work but are expected to be available to work if necessary. If an employee is on-call, while some may or may not receive compensation, he or she is unable to engage in other activities that will prevent them from reporting work. This includes working in other jobs for which they may receive compensation. For this reason, we believe that Treasury should include on-call hours in the definition of hours of service.

We also SUPPORT Treasury's decision to remove the 160 hour limit. We agree with Treasury's explanation that a 160 hour limit may discriminate against employees who are on longer paid leaves for example, maternity or paternity leave and run contrary to the purpose of the Family Medical Leave Act (FMLA).

<u>Calculation of Hours of Service for Hourly Employees</u>

We OPPOSE the proposed rule permitting the use of employer records to calculate hours of service. Without additional protections, solely using employer records for this calculation could incentivize employers to under report hours of service in their records, a problem that already exists. Instead, we RECOMMEND that the final rule require employers to specifically maintain complete and accurate records of hours worked and hours for which payment is made or due, for each employee.

We also RECOMMEND that the final rule include a penalty for an employer's failure to maintain accurate records, similar to that in the Fair Labor Standards Act (FLSA) regulations.

For instance, in FLSA actions, when an employer's records are inaccurate, incomplete, fraudulent, or non-existent, an ***employee's*** (rather than the employer's) evidence of hours worked is accepted. With respect to ACA §4980H, when an employer fails to maintain complete and accurate records of hours worked and/or hours for which employees are paid or entitled to be paid, other evidence should be accepted for the purpose of calculating hours of service and the employer's calculations should be adjusted accordingly. For example, an employee, who may wish to challenge an employers' determination of hours of service, should be able to submit evidence that demonstrates the employer's records do not accurately reflect hours or in the case that the employer did not maintain records, evidence of hours of service provided by the employee should be used as a base for calculations. As under FLSA, an employer should not reap the benefits of improper recordkeeping in the context of the ACA. A regulatory scheme of this nature will create the proper incentive for employers to maintain accurate and complete records, increase the likelihood that covered employers would be accurately identified, and ease enforcement efforts.

<u>Calculation for Hours of Service for Non-hourly Employees</u>
We disagree with the proposed rule's use of a "days worked equivalency method" to calculate hours of service for a non-hourly employee because it is likely this method will improperly exclude many full-time employees who work longer shifts on fewer days, "flex shifts," particularly in the health care industry. As a result an individual may work fewer days in a week, but longer hours on the days he or she does work. While Treasury includes language in regulations that would not allow the use of this method if it underestimates an employee's hours of services, providing this option to employers while, at the same time, allowing employers to use different methods for different classifications of non-hourly employees, creates the potential for manipulation and abuse. At best, it creates additional monitoring and compliance costs for the regulating agencies – costs that can be avoided simply by eliminating the days-worked equivalency method as an option.

We RECOMMEND the final rule give employers the "weeks-worked" equivalency method to calculate hours of service and eliminate the option to use the days worked equivalency method. In the event that the option to use the days-worked equivalency method is retained in the final rule, we RECOMMEND that rather than credit employees with only eight (8) hours of service per day, employees should be credited with ten hours of service, as is the case in the regulations interpreting ERISA. With a ten hour credit, employees who work three 12-hour shifts will be credited with 30 hours per week and, therefore, will be deemed full-time employees. By increasing the days-worked equivalency to ten hours, employers' incentive to game the system by choosing this method to limit the number of full-time employees will be significantly reduced, albeit not entirely eliminated.

Shorten the Measurement Period

We RECOMMEND that the measurement period be reduced from twelve months to a three month period. Three months is more appropriate as well as reflects the prohibition on waiting periods longer than 90 days and is therefore compliant with the law. Three months is also sufficient time for employers to be able to determine whether an employee is part or full time.

Notification Rules

Employers should be required to notify employees of their “variable hour” status, in writing and no later than the start date of the employee’s measurement period. The notice should explain the implications of this status for the employee’s healthcare coverage options, including stating that the employee may potentially be eligible for subsidized coverage on the Exchange during any period where the employer is not offering minimum essential coverage. Such a notice must cite the full-time standard of 30 hours of service per week, identify start and end dates for measurement, stability and administrative periods, and must clearly identify the date by which an offer of coverage must be made or the employer I liable for the 4980H assessment if the worker is found to be full-time. The notices must describe options for redress if the employee contests his/her status, or believes s/he is inappropriately categorized as “variable hour,” or after the measurement periods, as part-time, rather than full-time.

In addition, the notice should include appropriate contact information for the DOL if individuals wish to register a complaint. Such information may also allow DOL to assist Treasury in oversight and enforcement; if for example, DOL receives a large number of complaints regarding a specific employer. Presentation of such a notice to Exchange should constitute legal proof that the employee does not have minimum essential employer sponsored coverage.

In conclusion, in light of the complexity of the rules and concerns that these rules undermine statutory intent to hold employer’s responsible for providing coverage, Treasury, HHS, and DOL should continue assess the efficacy of the safe harbor provisions, adjust rules as appropriate after implementation, and reopen rules for comments in the future to accommodate new information that comes to light. This process should rely on data gathered above and input from stakeholders including workers and their authorized representatives.

Seasonal Employee Definition

If Treasury determines an appropriate time specific definition, such as the seven month standard included in the preamble, we RECOMMEND the final rule make it clear that the time period, whether days or months, need not be consecutive. This is an important protection for workers who may have unusual work schedules with small breaks in employment throughout the year.

Change in position of employee

We disagree with Treasury’s determination that an ongoing variable hour employee who becomes a full-time employee in the middle of a stability period must wait until the end of the stability period, regardless of whether it is over 90 days away, to receive an offer of coverage. This violates PHSA Section 2708), which requires employers to make an offer of coverage to full-time employees within 90 days of eligibility. Although we agree that allowing employers to circumvent the 90 day waiting period rules in these cases provides predictability to employers, we believe that the this rule violates the law and deeply disadvantages employees in favor of employer concerns.

Furthermore, it is unclear why new employees are treated differently than ongoing employees. An employee's status as a new or ongoing employee should not affect the ability of an employee to access employer coverage. The current rules discriminate against ongoing employees verse new employees. However, we do not suggest that Treasury remedy this discriminatory policy by eliminating the requirement that new employees who experience a change in status must wait until the end of the measurement period. This too would violate requirements that an offer in coverage be made within 90 days of eligibility.

We RECOMMEND the final rule change the standard to state that an employee who experiences a change in status must receive and offer of coverage from an employer the sooner of 90 days after the change in status or the end of the stability period, whichever is sooner.

<u>Employers Rehired After Termination of Employment or Resuming Service After Other Absence</u>

We SUPPORT Treasury's determination that employees who experience limited breaks in service or employment should not be treated as new employees subject to new measurement periods upon returning to work. This helps address concerns that employers would terminate and re-hire employees as a way to avoid obligations to provide coverage. We RECOMMEND that Treasury evaluate if the 26 weeks standard and the rule of parity are appropriately tuned to prevent abuse and make changes as necessary after we have practical experience with the use of safe harbor.

We also RECOMMEND that the final rule does not extend the employee break period rules for educational employees to all employers. These rules provide essential protections to employees and prevent incentives for employers acting in bad faith to avoid obligations to provide insurance from cutting hours or using creative employment patterns that not only reduce benefits to which employees are entitled, but also reduce wages in the case of workers paid by the hour.

However, we also RECOMMEND that the final rule should apply the break in service rules for educational employers to all employers, as well as apply the averaging methods included in the rules to both continuing and employees who experience a break in employment. This is to remove incentives for employers to take suspect actions if hours during the break in service are not counted.

Temporary Staffing Agencies

We SUPPORT Treasury's consideration of employees who work for temporary staffing agencies and responding to reports of developing employer policies that would undermine the purpose of the ACA employer responsibility rules. We believe that the attribution and anti-abuse rules included in the regulation will help protect employees from employers who inappropriately develop employment schemes to avoid the law and providing employees with appropriate benefits based on the actual hours of service.

We also RECOMMEND that the final rule applies rules for temporary staffing agencies to employees employed by multiple employers if the employers split employees' hours between them to purposely evade the rules. If employers do set up agreements to split employee hours between them with intent to purposely evade the rules, then all employers participating in the agreement should be found responsible for a share of the penalty that would be owed under 4980H had the employee worked for a single employer (combining all hours worked for each separate employer). The penalty could be attributed to employer based on the proportion of hours worked for each. Alternatively, Treasury could require such employers to pay the full penalty. This acts as an additional punitive element that both increases revenue for the government and acts as an appropriate deterrent to prevent employers from engaging in these agreements with the intent of evading the law.

III. Compliance with Section 4890H – In General

A. No Aggregation in Determining Liability of An applicable Large Employer Member

We SUPPORT Treasury's decision to apply penalties based on each individual large employer member.

B. Certification of Payment of Subsidy

Though it will be the subject of future rulemaking, we encourage Treasury to hold employees harmless for re-payment of premium tax credits if an employer, once notified at the end of the year of potential liability by the IRS, successfully appeals the application of a penalty. It is burdensome for individuals to participate in the appeals process, especially one that was not initiated by the employee who may not otherwise be aware of inconsistencies. In addition, individuals would not likely be able to rectify the situation by retroactively disenrolling from a qualified health plan and retroactively enrolling in employer coverage. Even if this is possible, this creates serious administrative problems if it would require both plans to reprocess claims. Employers have the ability to appeal and employee's eligibility for premium tax credits and an assessment of a penalty at the time the Exchange makes the determination. An employee should not be penalized because an employer did not appeal this decision in a more timely fashion.

V. Section 4980H(b) Liability

B. Affordable Coverage (also incorporating comments on IV. Compliance With Section 4980H(a), B. Offer of Coverage to the Employee and the Employee's Dependents)

We remain disappointed in the Department of Treasury's determination that affordability of employer coverage will be based solely on the cost of employee-only coverage and that dependents who receive an offer of coverage from an employer, regardless of affordability and value of the plan offered, will be unable to access premium tax credits and cost-sharing subsidies. This rule to use "self-coverage" to measure affordability of employer coverage most likely will result in individuals being unable to obtain affordable coverage in violation of the Affordable Care Act's intent. We understand the proposed rule's definition of dependent to mean only individuals under the age of 26, not spouses, may be an attempt to limit the burden on low-income families who may not be able to afford the cost of employer offered spousal coverage because the Treasury's rules on affordability and premium tax credits are now final. However, we remain concerned that this attempt is still insufficient to overcome the barriers created by what is commonly referred to as the "family glitch."

We RECOMMEND that the final rule make clear that though adult children up to age 26 may be able to access coverage through their parents' employer, that such an offer of coverage does not bar dependents not identified as such in their parents' tax filings from accessing premium tax credits and cost-sharing subsidies on the exchange. For this reason, Treasury should reference §1.36B2 of the premium tax credit regulations in § 54.4980H-4 to clarify the interaction between the provisions.

Although the change in definition of dependent may now allow spouses not offered coverage to receive coverage through the exchange as well as premium tax credits and cost-sharing subsidies, we RECOMMEND that Treasury revisit these rules after examining the real world implications. Dependent coverage takes various forms and in some cases, is not offered to individual dependents but under a family plan. If insurance structures do not evolve to reflect new rules, spouses may remain uninsured despite the change in definition of dependent.

In addition, some employees may desire spousal coverage, and while affordable to higher earning employees, low wage workers would find the cost of that coverage unaffordable. If an employer offers spousal overage at the request of employees who are able to afford such coverage, low-income employees would be potentially unable to purchase spousal coverage from the employer but due to the offer of insurance, the employee's spouse would be unable to receive premium tax credits on the exchange.

The rules regarding measuring affordability of employer coverage also creates other complications. Eliminating spousal coverage as dependent coverage may encourage employers to drop spousal coverage; in many cases, this may be helpful to low-income workers, but it may further erode availability of employer coverage. For those who are not eligible for other coverage, for example, individuals excluded from the Exchange and tax credits such as individuals granted Deferred Action for Childhood Arrivals (DACA) and immigrant workers who may in the future obtain a conditional status through immigration reform but are excluded from the ACA. For many of these individuals, employer coverage may be the only option to obtain affordable coverage or remain uninsured.

For these reasons, we continue to strongly RECOMMEND that affordability of employer coverage be based on the cost of family coverage, not self-coverage. Such a policy would hold employer's responsible and ask them to pay their fair share for coverage and allow low-income individuals and families to access affordable coverage. **In the very least, even if employers are not held responsible with a penalty, the offer of unaffordable family coverage should permit an individual to receive premium tax-credits and cost-sharing subsidies**. The current rules advantage employers and deeply disadvantage low-income populations who may still face serious barriers to accessing affordable comprehensive coverage, which will continue to exacerbate health disparities based on income disparity. The rules also set up an overly complicated system that will be difficult for the public and employers to navigate.

Thank you for the opportunity to provide these comments. If you have any questions, you may contact Sonal Ambegaokar at ambegaokar@nilc.org or at (213) 639-3900 ext. 114.

Sincerely,

Sonal Ambegaokar

Ms. Sonal Ambegaokar
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