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CC:PA:LPD:PR (REG-138006-12)
Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: IRS Regulation 138006-12 Regarding Employer Shared Responsibility

To Whom It May Concern:

We submit this letter in response to IRS Regulation 138006-12 regarding the employer responsibility provisions of the Affordable Care Act (ACA).

Look-Back Period Only Available to Employers using Method for Ongoing Employees

In the preamble of the draft regulations, the IRS states that "If an applicable large employer member uses the look-back measurement method for its ongoing employees, the employer may also use the optional method for new variable hour employees and for seasonal employees." We support this proposal. However, we did not find language implementing this requirement in the proposed amendments. We suggest that the regulations be clarified to reflect that only employers who use the look-back measurement method for ongoing employees may use the method for new variable hour and seasonal employees.

Change in Employment Status

We support the IRS proposal that a new variable hour or seasonal employee who has a change in employment status during an initial measurement period be treated as a full-time employee on the first day of the fourth month following the change in employment status, if not earlier. However, this same rule should be extended to ongoing employees who have a change to full-time status during a stability period. We believe this amendment is required in order to comply with the 90-day waiting period provision under Section 2708 of the ACA. Specifically, we recommend that an employer be subject to penalties if an ongoing employee who experiences a

change in status to full-time employment does not receive an offer of coverage within 90 days or the end of the stability period, whichever is sooner.

Employment Break Periods

The IRS requests comments on whether the proposed rules for calculating hours of services for employees with employment break periods should be extended to all employers. We support the extension of this rule to all employers, not just educational organizations, in order to ensure that all employees with schedules that are not year-round are categorized fairly under the employer responsibility provisions. Extension of this rule should also apply to employees who are terminated and then rehired within 26 weeks, regardless of whether their employer is an educational organization or another type of employer.

Temporary Staffing Agencies

The IRS invites comments on "whether and, if so, how a special safe harbor or presumption should or could be developed with respect to the variable hour employee classification of the common law employees of temporary staffing agencies." We recommend not allowing a special safe harbor or presumption for employees of temporary staffing agencies because some employees of temporary staffing agencies are full-time employees with predictable hours, as stated by the IRS. We are concerned that creating a special safe harbor or presumption would increase the incentive for employers to use temporary staffing agencies in order to evade the employer responsibilities.

We support the incorporation of an anti-abuse rule under which employees who perform the same or similar services for an employer through direct employment and through employment through a staffing agency would have all hours of service attributed to the employer. We also support a rule in which employees performing similar services for the same client via two or more staffing agencies would have all hours of service attributed to the client or one of the temporary staffing agencies.

Even if a special safe harbor or presumption is not adopted, we remain concerned that the safe harbor methods for all employers open up a number of possible ways in which the penalties could be evaded through the use of temporary staffing agencies. For example, in order to continuously keep an employee in "new employee" status and categorize the employee as variable hour, firms may hire the same worker through successive temporary staffing agencies at the end of each initial measurement period or move them back and forth between regular employment and employment through a temporary staffing agency at the end of each initial measurement period. We suggest that the IRS closely monitor the employment patterns reported by temporary staffing agencies to ensure that this type of abuse is not occurring.

Affordability Safe Harbors and Wellness Incentives

For the purposes of the safe harbors used to determine whether an employer's coverage meets the 9.5 percent affordability test, the IRS should clarify how any wellness incentives will be taken into account in calculating "the required employee contribution toward the self-only

premium for the employer's lowest cost coverage that provides minimum value." We recommend that in cases in which wellness incentives affect the premium, the highest premium should always be considered. For example, if wellness incentives offered reduces the premium for some employees, the premium before the wellness incentive should be used. If a wellness program contains penalties and the potential to increase the premium, then the premium with the penalty should be used.

The research evidence on the impact of wellness programs on health is inconclusive.[1] The evidentiary basis for a link between health risk factors used in wellness incentive programs and medical costs is weak, as is the evidence that wellness incentives reduce medical costs. [2] Recent research suggests that the savings from these programs may come from shifting costs, "with the most vulnerable employees—those from lower socioeconomic strata with the most health risks—probably bearing greater costs that in effect subsidize their healthier colleagues."[3]

The purpose of the threshold is to ensure that employees have a means to access affordable coverage. The threshold should not be designed in such a way that it creates an incentive for employers to adopt wellness programs in order to evade or reduce their liabilities for penalties.

Variable Hour Employee Definition

We support the proposed definition of variable hour employees, including that the "employer will not be permitted to take into account the likelihood that the employee's employment will terminate before the end of the initial measurement period."

However, we believe further clarification is needed in regulations in order to ensure that the variable hour designation is not abused. We support the addition of the following factors for consideration in determining whether an employee is variable hour, as suggested by the IRS: "(1) Whether the employee is replacing an employee who is a fulltime employee; and (2) whether the hours of service of ongoing employees in the same or comparable positions actually vary."

We also recommend consideration of a third factor: whether the overall workload for the firm is variable, which could be measured based on the variation in the total monthly number of hours worked across the workforce. If the overall workload is not variable, the employer is likely to have more control over workers' hours, and therefore more predictability.

The IRS should monitor the designation of "variable hour employees" by firms to detect abuse. Firms with an especially high share of variable hour employees with hours of service that are consistently stable from month to month should no longer be able to use the look-back method or measurement periods. The IRS should develop a measure of variability in hours of service that is statistically sound and easy to administer.

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[1] Volk, J., & Corlette, S. (2012). *Premium Incentives to Drive Wellness in the Workplace: A Review of the Issues and Reccomendations for Policymakers.* Georgetown University Health Policy Center.

[2] Horwitz, J., Kelly, B. D., & DiNardo, J. E. (2013, March). Wellness Incentives In The Workplace: Cost Savings Through Cost Shifting To Unhealthy Workers. *Health Affairs, 32*(3), 468-476.

[3] Horwitz, Kelly & DiNardo (2013)

Monitoring and Enforcement

In general, the proposed look-back approach allows for significant potential for evasion of the penalties. The IRS should closely monitor and strictly enforce the use of this approach. The right for employers to use the look-back approach should be viewed as conditional on an employer not using the methods to evade the penalties or waiting period limitation.

Thank you for the opportunity to submit these comments.

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