**NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS**

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The Honorable Phyllis Borzi VIA: e-ohpsca-er.ebsa@dol.gov
Assistant Secretary
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J. Mark Iwry VIA: Notice.comments@irscounsel.treas.gov
Senior Adviser to the Secretary and
Deputy Assistant Secretary for
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1500 Pennsylvania Avenue, NW
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Re: IRS Notice 2012-59 and DOL Technical Release 2012-2

Dear Assistant Secretary Borzi and Deputy Assistant Secretary Iwry:

The National Coordinating Committee for Multiemployer Plans (the NCCMP) is pleased to submit these comments to IRS Notice 2012-59 and DOL Technical Release 2012-2 "Guidance on 90 Day Waiting Period Limitation Under Public Health Service Act § 2708."

**Background:**

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately 26 million workers, retirees, and their families who rely on multiemployer plans for health, retirement and other benefits. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans, and plan sponsors in every major segment of the multiemployer plan universe, including in the airline, building and construction, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service and trucking industries.

The NCCMP has previously provided comments on a variety of ACA issues. In particular, we provided extensive comments regarding Notice 2012-17, "Frequently-Asked-Questions from Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting

Periods," which raised many of the same questions as the instant guidance. These comments are attached for your reference.

We appreciate the opportunity to comment. However, we also note that the 30-day comment period is unusually short. Multiemployer plans have diverse structures and eligibility requirements, and it takes time to determine how the guidance will apply in different situations. Thus, these comments contain initial reactions to the guidance. We request that the agencies extend the comment period in order to allow further analysis and comments on these important issues.

These comments focus on the waiting period requirement. Simultaneously with the guidance on the waiting period, the IRS issued Notice 2012-58, addressing certain issues with respect to the penalties under section 4980H. Further guidance will be needed to determine how the penalties will be applied in the case of employers who contribute to multiemployer plans. Unlike the case with single employer plans, the plan sponsor and the employer are not the same, thus creating the need for guidance that accommodates this structure. In particular, it is important that employers know, when a contribution is made pursuant to the terms of the bargaining agreement, that a penalty will not be imposed. We are providing separate comments to Notice 2012-58 to discuss these issues.

**Brief Statement**

Several problems with the guidance in Notice 2012-59 and DOL Technical Release 2012-02 are immediately apparent for multiemployer plan sponsors:

- The guidance does not clearly equate 90 days with three months.
- The guidance does not allow multiemployer pans to use a 90-day lag period if they have a 12-month work period. For example, a plan with a 12-month work period and a three-month lag period would not meet the 13-month rule.
- The 1,200 rule will be helpful for some plans. However, it is unclear how it works for plans that cover part-time employees.
- The guidance only addresses eligibility standards based on hours. It is unclear how the guidance applies in the case of plans that have eligibility standards based on projects completed, earnings or other non-hour standards, because these standards cannot be translated into hours standards.

The following rules would provide assistance to multiemployer plans.

1. Plans that have a lag period may have a lag period of up to 90 days or three (3) months.

As an example, a multiemployer plan provides that coverage will begin on the first day of the second benefit quarter following completion of 300 hours of covered employment in a quarter. For example, work performed in January – February – March of at least 300 hours will earn coverage in July – August – September. The first quarter is the measurement period, the second quarter is the lag period and the third quarter is the coverage period. This would be permissible under the 90-day rule as long as 90 days equals three (3) months.

Equating 90 days to three (3) months would add significant administrative flexibility for plan sponsors, without compromising the purposes behind the waiting period limitation.

2. The 90-day rule applies only to initial eligibility to enroll in the plan. If the participant loses eligibility for coverage after having gained initial eligibility, due to failure to meet the continuing eligibility requirements, the 90-day rule would not apply.

   As an example, the same plan has a rule that once the participant satisfies the initial eligibility requirement to maintain eligibility he or she must continue to work a minimum number of hours in covered employment during subsequent quarters. If the participant is credited with at least 300 hours in the work quarter, e.g., January through March, he or she will continue to be eligible in the benefit quarter, e.g., July through September. The plan satisfies the 90-day rule due to its initial eligibility requirement, and the continuing eligibility rule would not be affected by the 90-day rule.

3. Plans that have a measurement period of up to 12 months for variable hour employees may have a waiting period that begins after the measurement period, as long as the waiting period is no longer than 90 days or three (3) months. Consequently, the 13-month rule should be revised to a 15-month rule.

   As an example, a multiemployer plan provides coverage to participants for a calendar year if he/she works at least 1,000 hours in the previous plan year, and files an application to receive benefit coverage. The plan year is October 1 – September 30. For example, 1,000 hours of work performed in the October 1 – September 30 plan year earns coverage in the subsequent calendar year. The plan should be able to satisfy the 90-day rule because it has a waiting period of 90 days or three months (October – December).

4. Clarify that plans may use measurement standards other than hours worked.

   As an example, a multiemployer plan provides coverage to participants for a four-quarter period if he/she earns at least $20,000 in covered employment in a four-quarter base earnings period. There is a three (3)-month lag period between the two periods. For example, earning $20,000 in the January 1 – December 31 period provides coverage in the subsequent April 1 – March 31 period. The plan would satisfy the 90-day rule because it has a waiting period of 90 days or three (3) months.

   Such alternative measurement periods are common in particular industries, such as the entertainment industry. The guidance indicates that a plan may impose eligibility requirements other than waiting periods. That is, the guidance provides that being

"eligible for coverage" means having met the plan's substantive eligibility conditions (such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan). Clarifying that measurement standards other than hours requirements are permitted would be consistent with the guidance. We note the comments filed on behalf of the Directors Guild of America-Producer Health Plan expand upon this issue with particular respect to alternative bases to hours as a particular item of concern in the entertainment industry and urge your consideration of these comments rather than expand upon them here.

5. Plans that provide benefits to part-time employees may use a measurement period that is longer than 12 months.

   As an example, a multiemployer plan provides coverage to part-time employees who work 800 hours per year in each of four years. These participants would be eligible for coverage in the fifth year. This provision should be permissible as long as the coverage begins on the 91st day after the end of the fourth year.

   Providing such additional flexibility will provide greater incentives to cover part-time employees and will help overcome the disincentives the Affordable Care Act contains with respect to covering part-time employees. In particular, because the pay or play penalty is based solely on full-time employees, the penalties do not provide an incentive for coverage of part-time workers.

6. Provide an administrative rule that permits multiemployer plans to use a measurement period that begins with the beginning of the period for which contributions are received

   For multiemployer plans, the "start date" of an employee is often not known, because the multiemployer plan has no employer/employee relationship with the individual, and does not hire the individual. Multiemployer plans find out an individual has been hired in covered employment when the contributing employer informs the plan of the employee's work and sends in the contributions for that work required by the collective bargaining agreement. The relevant period for purposes of the plan is the period for which contributions are made. Consequently, for multiemployer plans, an administrative rule is necessary which allows the multiemployer plan to use the beginning of the period for which contributions are received as the "start date" for purposes of administering the 90-day rule.

7. Clarify that the previous HIPAA definitions related to multiemployer plans and waiting periods do not apply for purposes of the 90-day rule

   Existing regulations under HIPAA (54 CFR §54.9801-3(a)(3)(iv); 29 CFR §2590.701-3(a)(3)(iv); and 45 CFR §146.111(a)(3)(iv), example 5), define the time period during which work is measured as a "waiting period" for multiemployer plans. The rules set

forth in Notice 2012-59 do not appear consistent with the existing regulations. We understand that the Departments will be reviewing pre-existing guidance in light of the Affordable Care Act and related guidance in order to determine the extent to which pre-existing guidance is no longer applicable. As part of this review, we suggest that the Departments clarify that the existing regulations are not applicable for purposes of determining compliance with Section 2708.

We are available to expand upon and clarify any of the points described above at your convenience by phone or e-mail at the address captioned in our letterhead.

Respectfully submitted,

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Executive Director