NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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September 20, 2012

The Honorable Phyllis Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2524
Washington, D.C. 20210

VIA: e-ohpsca-er.ebsa@dol.gov

J. Mark Iwry
Senior Adviser to the Secretary and
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U.S. Department of Treasury
Departmental Offices
1500 Pennsylvania Avenue, NW
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VIA: Notice.comments@irscounsel.treas.gov

Re: IRS Notice 2012-59, DOL Technical Release 2012-2 and IRS Notice 2012-58

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 Notices 2012-58, "Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage (§4980H), and 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 Notice. These comments are attached for your reference.

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.
- It is unclear how the 1,200 hour rule works for plans that cover part-time employees.
- The guidance only addresses eligibility standards based on hours. Plans that have eligibility based on projects completed, earnings or other non-hour standards cannot use this guidance because they cannot translate those standards to 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.

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., February through April, 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. 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.

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.

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,

Randy G. DeFrehn
Executive Director