



TOPIC:

Guidance issued on the 90 day waiting period under the ACA and for determining which employees are full-time for purposes of the employer shared responsibility penalty

**EXECUTIVE
SUMMARY**

ON AUGUST 31, 2012 THE DOL, TREASURY, AND HHS ISSUED GUIDANCE INTERPRETING THE 90-DAY WAITING PERIOD RULE ENACTED AS PART OF THE AFFORDABLE CARE ACT. PLAN SPONSORS MUST COMPLY WITH THE RULE FOR PLAN YEARS BEGINNING ON OR AFTER JANUARY 1, 2014.

ADDITIONALLY, THE TREASURY DEPARTMENT ALSO ISSUED GUIDANCE WHICH SETS FORTH RULES FOR EMPLOYERS TO DETERMINE WHICH EMPLOYEES ARE FULL-TIME EMPLOYEES FOR PURPOSES OF THE EMPLOYER SHARED RESPONSIBILITY PENALTY WHICH ALSO BECOMES EFFECTIVE IN 2014.

WHILE WE REALIZE THAT MANY OF YOU PREVIOUSLY SUBMITTED EXTENSIVE COMMENTS TO THE AGENCIES TO REFLECT HOW THESE RULES WOULD AFFECT YOUR PLANS, UNFORTUNATELY, NEITHER OF THESE PRONOUNCEMENTS ADDRESS HOW THE RULES APPLY TO MULTIEMPLOYER PLANS OR TO EMPLOYERS THAT CONTRIBUTE TO THEM.

THE DEPARTMENTS SET A DEADLINE OF SEPTEMBER 30, 2012 FOR COMMENTS ON THE GUIDANCE AND HAVE STATED THAT FUTURE GUIDANCE ON THIS MATTER WILL BE FORTHCOMING. DRAFT COMMENTS PREPARED BY THE NCCMP ARE ATTACHED FOR YOUR REVIEW AND COMMENT PRIOR TO SUBMISSION. WE ALSO ENCOURAGE YOU TO CONSIDER SUBMITTING COMMENTS IN SUPPORT OF THE NCCMP SUBMISSION AND WHICH HIGHLIGHT ASPECTS OF THE GUIDANCE THAT ARE OF PARTICULAR CONCERN TO YOUR PLANS.

PURPOSE:

REQUEST FOR REVIEW AND COMMENT

CATEGORY:

REGULATORY GUIDANCE

ISSUERS:

DEPARTMENTS OF LABOR, HHS, AND TREASURY

TARGET
AUDIENCE:

HEALTH FUND TRUSTEES AND PROFESSIONAL ADVISORS

FORWARD
COMMENTS TO:

Multi-Elert@nccmp.org

REFERENCE:

VOL. XII, ISSUE 7

DEADLINE FOR
COMMENTS:

5:00 PM EASTERN TIME, THURSDAY, SEPTEMBER 27, 2012

FOR ADDITIONAL
BACKGROUND SEE:

**IRS NOTICE 2012-59, DOL TECHNICAL RELEASE 2012-02, AND IRS
NOTICE 2012-58**

Federal Agencies Issue Guidance on 90-day Waiting Period and on Determining Full-time Employees for Purposes of the Employer Shared Responsibility Penalty

ON AUGUST 31, 2012, THE DEPARTMENTS OF TREASURY, HEALTH AND HUMAN SERVICES (HHS) AND LABOR ISSUED GUIDANCE INTERPRETING THE 90-DAY WAITING PERIOD RULE ENACTED AS PART OF THE AFFORDABLE CARE ACT (NOTICE 2012-59 AND DOL TECHNICAL RELEASE 2012-02). PLAN SPONSORS MUST COMPLY WITH THE 90-DAY RULE FOR PLAN YEARS BEGINNING ON OR AFTER JANUARY 1, 2014. GROUP HEALTH PLANS MAY RELY ON THE 90-DAY WAITING PERIOD GUIDANCE AT LEAST THROUGH THE END OF 2014.

THE DEPARTMENTS SET A **COMMENT DEADLINE OF SEPTEMBER 30, 2012**, FOR COMMENTS ON THE GUIDANCE, AND HAVE STATED THAT THEY EXPECT TO ISSUE FUTURE GUIDANCE ON THIS REQUIREMENT. THE TREASURY DEPARTMENT ALSO ISSUED NOTICE 2012-58 ON AUGUST 31, 2012, WHICH SETS FORTH RULES FOR EMPLOYERS TO DETERMINE WHICH EMPLOYEES ARE FULL-TIME EMPLOYEES FOR PURPOSES OF THE EMPLOYER SHARED RESPONSIBILITY PENALTY, WHICH ALSO BECOMES EFFECTIVE IN 2014.

THE WAITING PERIOD AND EMPLOYER SHARED RESPONSIBILITY GUIDANCE DO NOT ADDRESS HOW THE RULES APPLY TO MULTIEMPLOYER PLANS OR TO EMPLOYERS THAT CONTRIBUTE TO MULTIEMPLOYER PLANS.

BACKGROUND

SECTION 2708 OF THE AFFORDABLE CARE ACT PROVIDES THAT FOR PLAN YEARS BEGINNING ON OR AFTER JANUARY 1, 2014, A GROUP HEALTH PLAN OR HEALTH INSURANCE ISSUER CANNOT APPLY A WAITING PERIOD OF MORE THAN 90 DAYS FOR AN EMPLOYEE OR DEPENDENT WHO IS OTHERWISE ELIGIBLE TO ENROLL IN THE PLAN. THE GUIDANCE DEFINES A "WAITING PERIOD" AS THE PERIOD OF TIME THAT MUST PASS BEFORE COVERAGE FOR AN EMPLOYEE OR DEPENDENT WHO IS OTHERWISE ELIGIBLE TO ENROLL UNDER THE TERMS OF THE PLAN CAN BECOME EFFECTIVE. BEING "OTHERWISE ELIGIBLE TO ENROLL" MEANS THAT THE EMPLOYEE HAS MET THE PLAN'S SUBSTANTIVE ELIGIBILITY CONDITIONS.

THE GUIDANCE CLEARLY STATES THAT PLANS CAN HAVE CONDITIONS FOR ELIGIBILITY, SUCH AS A REQUIREMENT THAT A PARTICIPANT WORK FULL TIME OR WORK A SPECIFIED NUMBER OF HOURS IN A WORK PERIOD TO EARN COVERAGE IN AN ELIGIBILITY PERIOD. HOWEVER, THERE ARE NO RULES THAT SPECIFICALLY ADDRESS EITHER COLLECTIVELY BARGAINED EMPLOYEES OR PARTICIPANTS IN MULTIEMPLOYER PLANS.

THE GUIDANCE PERMITS PLANS TO TREAT PARTICIPANTS AS "VARIABLE HOUR EMPLOYEES." THE GENERAL RULES FOR IMPLEMENTING THE 90-DAY WAITING PERIOD RULE FOR VARIABLE HOUR EMPLOYEES ARE AS FOLLOWS:

- THE PLAN MAY TAKE A REASONABLE PERIOD OF TIME TO DETERMINE WHETHER THE EMPLOYEE MEETS THE PLAN'S ELIGIBILITY CONDITIONS.
- THIS TIME PERIOD MAY INCLUDE A MEASUREMENT PERIOD OF UP TO 12 MONTHS.

- THE TIME PERIOD FOR DETERMINING WHETHER AN EMPLOYEE MEETS THE PLAN'S ELIGIBILITY CONDITIONS IS PERMISSIBLE IF COVERAGE IS MADE EFFECTIVE NO LATER THAN 13 MONTHS FROM THE EMPLOYEE'S START DATE (PLUS, IF THE EMPLOYEE'S START DATE IS NOT THE FIRST DAY OF A CALENDAR MONTH, THE TIME REMAINING UNTIL THE FIRST DAY OF THE NEXT CALENDAR MONTH).

CONSEQUENTLY, A PLAN SPONSOR WITH A WORKFORCE OF VARIABLE HOUR EMPLOYEES COULD HAVE A PERIOD OF UP TO 12 MONTHS IN WHICH TO DETERMINE WHETHER AN EMPLOYEE INITIALLY MEETS THE PLAN'S ELIGIBILITY CONDITIONS. HOWEVER, COVERAGE MUST BE EFFECTIVE NO LATER THAN 13 MONTHS FROM THE EMPLOYEE'S START DATE (PLUS TIME REMAINING IN THE CALENDAR MONTH). THIS MEANS THAT A PLAN SPONSOR WITH A 12-MONTH ELIGIBILITY PERIOD WOULD HAVE A MAXIMUM ONE-MONTH LAG OR ADMINISTRATIVE PERIOD IN WHICH TO MAKE ELIGIBILITY DETERMINATIONS, BECAUSE IT USES THE FULL YEAR AS ITS MEASUREMENT PERIOD. A PLAN SPONSOR WITH A MEASUREMENT PERIOD OF LESS THAN 12 MONTHS COULD HAVE A LONGER LAG OR ADMINISTRATIVE PERIOD, PROVIDED THE LAG OR ADMINISTRATIVE PERIOD DOES NOT EXCEED 90 DAYS AND THE 13-MONTH RULE IS STILL SATISFIED. A PLAN SPONSOR MAY HAVE A SHORTER MEASUREMENT PERIOD THAN ONE YEAR.

THE GUIDANCE CONTAINS ONE EXAMPLE ABOUT GROUP HEALTH PLANS THAT PROVIDE COVERAGE TO PART-TIME EMPLOYEES. IN THIS EXAMPLE, A PLAN SPONSOR PROVIDES COVERAGE TO PART-TIME EMPLOYEES AFTER THEY HAVE COMPLETED A CUMULATIVE 1,200 HOURS OF SERVICE. AN EMPLOYEE BEGINS WORKING 25 HOURS PER WEEK ON JANUARY 3, AND IS CONSIDERED A PART-TIME EMPLOYEE UNDER THE PLAN'S DEFINITION. THE EMPLOYEE SATISFIES THE PLAN'S CUMULATIVE HOURS OF SERVICE CONDITION ON DECEMBER 15.

THE EXAMPLE PROVIDES THAT THIS CUMULATIVE HOURS OF SERVICE CONDITION WITH RESPECT TO PART-TIME EMPLOYEES IS PERMISSIBLE AND THAT COVERAGE WOULD HAVE TO BEGIN NO LATER THAN THE 91ST DAY AFTER THE EMPLOYEE WORKS 1,200 HOURS. HOWEVER, THE EXAMPLE STATES THAT IF THE PLAN'S CUMULATIVE HOURS OF SERVICE REQUIREMENT WERE MORE THAN 1,200 HOURS, THE DEPARTMENTS WOULD CONSIDER THE REQUIREMENT TO BE DESIGNED TO AVOID COMPLIANCE WITH THE 90-DAY WAITING PERIOD LIMITATION.

THE PART-TIME RULE CAN BE SUMMARIZED AS FOLLOWS:

- IF A PLAN PROVIDES PART-TIME BENEFITS TO INDIVIDUALS WHO ARE REGULARLY SCHEDULED TO WORK PART TIME, THEN IT MAY HAVE A WAITING PERIOD AFTER THE EMPLOYEE MEETS THE HOURS OF SERVICE REQUIREMENT.
- THE MAXIMUM NUMBER OF HOURS FOR THIS SERVICE REQUIREMENT IS 1,200 HOURS.
- BENEFITS MUST START NO LATER THAN THE 91ST DAY AFTER THE EMPLOYEE WORKS (AT MOST) 1,200 HOURS.

ADDITIONAL INFORMATION ABOUT THE EMPLOYER SHARED RESPONSIBILITY PENALTY AND THE IMPACT ON CONTRIBUTING EMPLOYERS TO MULTIEMPLOYER PLANS WILL BE FORTHCOMING IN THE NEAR FUTURE.

We strive to ensure that the information contained in this and every issue of Multi-Elert is correct to the extent information is available. Nevertheless, the NCCMP does not offer legal advice. Plan fiduciaries should rely on their own attorneys and other professional advisors for advice on the meaning and application of any Federal laws or regulations to their plans.

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If you have questions about the NCCMP, or about this or other issues of Multi-Elert, please contact the NCCMP, by phone at (202) 737-5315 or by e-mail at nccmp@nccmp.org.
