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Statement of the

AMERICAN STAFFING ASSOCIATION

On the

Impact of the Patient Protection and Affordable Care Act

On the

U.S. STAFFING INDUSTRY

By

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Before the

UNITED STATES HOUSE OF REPRESENTATIVES

Oversight and Government Reform Committee

Subcommittee on Health Care, District of Columbia, Census and the National Archives

October 6, 2011

House Oversight Committee
Subcommittee on Health Care
Oct. 6, 2011

Introduction

The American Staffing Association represents the U.S. staffing industry. ASA member companies provide a wide range of employment and work force services and solutions, including temporary and contract staffing. Staffing firms employ approximately 2.6 million temporary and contract workers every day and about 10 million workers annually.

ASA supports health care reform to expand access to health insurance coverage and reduce health care costs. However, the Patient Protection and Affordable Care Act presents unique operational and compliance challenges for staffing firms that will increase their cost of doing business and potentially harm their ability to create jobs.

ASA and other groups are working with the administration on rules to mitigate the impact of the employer tax penalties on staffing firms and other businesses whose employees' work on a short-term, variable, and unpredictable basis.[1] But we are concerned that the Act may not afford sufficient regulatory leeway to provide adequate relief. Therefore, we urge Congress to repeal those penalties.

Positive Role of Staffing Services in the Economy

Temporary and contract staffing firms play a vital role in the U.S. economy by providing employment flexibility for employees and businesses.[2] Staffing firms recruit, screen, select, and employ workers and assign them to support or supplement the work force of their clients in various work situations such as employee absences, skill shortages, seasonal workloads, and special assignments or projects. Employees work in virtually every job category, including industrial labor, office support, health care, engineering, information technology, and various professional and managerial positions.

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[1] ASA is a member of *Employers for Flexibility in Health Care*, a broad-based coalition representing businesses that employ large numbers of part-time, temporary, and seasonal workers.

[2] "Contract staffing" often is used to describe work performed by higher-skilled employees, especially in the engineering and information technology areas, and often involves longer-term, project-based assignments. "Temporary" is used herein to include contract staffing except where necessary to differentiate them.

Staffing firms generally are the employers of record for the workers they assign to clients and are responsible for paying their wages, withholding and remitting employment taxes (including Social Security and unemployment insurance), and providing workers' compensation coverage.

The advantages of temporary work to individuals are widely recognized by employees, businesses, economists, and policy makers. It affords flexibility, training, and supplemental income for millions of individuals and provides a bridge to permanent employment for those who are just starting out, changing jobs, or out of work.

Temporary work also benefits business. The use of temporary staff gives employers the flexibility to adjust the size of their work forces to meet business and economic exigencies and seasonal fluctuations quickly and at a predictable cost.[3] Labor market flexibility is recognized by economists as a key factor in innovation and job creation.[4]

In weak or recovering economies, temporary work plays a vital role by employing millions of people while allowing companies to gauge business and economic conditions before committing to permanent hires. As economic conditions improve, most temporary workers move into permanent jobs.

Temporary Work Reduces Unemployment

Temporary employment also serves an important role in reducing U.S. unemployment rates. In 1999, Alan Krueger, the recently appointed chairman of the president's Council of Economic Advisors, co-authored a study which concluded that the staffing industry's expertise in matching individuals and their skills to available work assignments accounted for nearly half of the decline in the U.S. unemployment rate during the period of economic expansion that ended in 2000.[5] Temporary

[3] The Conference Board, HR Executive Review: Contingent Employment (Vol. 3, No. 2, 1995); Peter F. Drucker, They're Not Employees, They're People; Harvard Business Review (2002).
[4] See testimony of Alan Greenspan, U.S. Senate Committee on Banking, Housing, and Urban Affairs (Jan. 26, 2000), S. Hrg. 106–526 at p. 21; and see Edward J. Lazear, Why the Job Market Feels So Dismal, Wall Street Journal, May 16, 2011.
[5] See Katz & Krueger, The High-Pressure U.S. Labor Market of the 1990s, Princeton University

employment continues to play an important role in mitigating unemployment in the current economy.

Unique Characteristics of Temporary Work

Temporary employment with a staffing firm is contingent on client demand and therefore is generally short-term, intermittent, highly variable, and unpredictable. Many temporary employees work on short-term projects or assignments for multiple clients, sometimes in the same pay period. Some work on multiple assignments for the same client. And because individuals can register for work with more than one staffing firm, an individual may be employed by more than one staffing firm in the same pay period.

Temporary work is a vital bridge to permanent employment. This, however, contributes to high overall employee turnover—typically over 300% annually. As described below, the inherently unpredictable and transient nature of temporary work presents major operational challenges for the staffing firm in providing health insurance coverage and other benefits.

Challenges in Providing Health Insurance to Temporary Workers

High employee turnover and the limited availability to staffing firms of health insurance products for temporary workers create major challenges for staffing firms seeking to comply with PPACA.

Because temporary work generally is a form of supplemental employment, the majority of temporary workers get health coverage from sources other than their employer. According to the U.S. Bureau of Labor Statistics, 56% of temporary workers are covered under the health policies of a parent or spouse, or are covered by Medicare or other government programs.[6]

Working Paper #416 (May 1999) at pp. 40–4.1

[6] U.S. Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements (2005).

The BLS data show that even for staffing firms that find it logistically feasible to offer health insurance benefits to their temporary and contract employees, only 25% of those employees opt to take the coverage. Participation is lowest (8%) among short-term temporary workers and highest (49%) among contract employees, who tend to work in higher-paid, longer-term professional, health care, and IT jobs.

A survey conducted by ASA in 2006 showed that most employees (77%) view temporary work as a good way to find a permanent job. Employees using temporary work as a bridge to a permanent job generally refuse coverage because they do not expect to work for long periods of time and want to maximize their cash income during their short tenure. This accounts for the extremely low rate of participation among short-term temporary workers.

The unpredictable nature of temporary work and low employee participation in staffing firm health plans present serious underwriting challenges for health insurance carriers. As a result, the only health plans most staffing firms have been practically able to offer are so-called "mini-med" plans. If those plans are abolished in 2014, it will be virtually impossible for staffing firms to offer temporary workers minimum essential coverage unless alternative insurance plans can be designed to meet the unique needs of those workers.

One solution to the lack of adequate health insurance coverage options for temporary workers might be to allow staffing firms to offer coverage through the state health insurance exchanges. However, since PPACA currently limits access to the exchanges to "small" employers, i.e., those with fewer than 100 employees, the great majority of staffing firms would not qualify unless Congress changes the law. [7] Moreover, even if coverage is available through an exchange, staffing firms will continue to face serious obstacles in obtaining coverage if health insurance issuers continue to apply traditional underwriting practices (e.g., minimum participation rules) in the case of temporary workers.

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[7] Because temporary employees make up the vast majority of a staffing firm's work force (temporary to permanent staff ratios typically range between 10-to-1 and 20-to-1) staffing firm headcounts relative to revenue are much larger than most employers. Hence, a small staffing firm measured by revenue rarely can qualify as a small business under a headcount test.

Nondiscrimination Rules Must Allow Employers Flexibility in Health Plan Design

A serious potential obstacle to covering temporary workers, whether in the private health insurance market or through state exchanges, are the new PPACA nondiscrimination provisions. Those provisions, for the first time, prohibit insured group health plans from discriminating in favor of highly compensated individuals with respect to eligibility and benefits. Employers that violate the rules face heavy penalties.[8]

The new nondiscrimination provisions technically became effective Jan. 1, 2011 for most (non-grandfathered) health plans, but enforcement has been deferred while the administration wrestles with the complex policy issues involved. Whatever regulations are ultimately issued, it is critical that they provide appropriate "safe harbors" that give staffing firms and other employers flexibility to design plans with varying benefit and premium contribution levels to accommodate diverse groups of workers with different coverage needs—for example a staffing firm's full- time headquarters and branch staff and the temporary workers it assigns to clients.[9]

Staffing Firms Are Uniquely Exposed to Employer Tax Penalties

Because staffing firms have few practical or economic options for providing health coverage to their temporary workers, they are more exposed than most employers to tax penalties under the employer shared responsibility provisions of the Act.

Section 4980H of the Act provides that "large employers" (more than 50 full-time equivalent employees) are liable to pay an excise tax if any full-time employee is certified to receive a tax

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[8] See PPACA §10101(d), which added §2716 to the Public Health Service Act. Section 2716 provides that insured plans must satisfy the requirements of §105(h)(2) of the Internal Revenue Code under nondiscrimination rules similar to those currently applicable to self-insured plans. An insured group health plan found to be discriminatory may be subject to an excise tax of $100 per day per affected individual.

[9] For decades, staffing firms that offer self-insured health benefits and cafeteria plans have satisfied the Sec. 105(h) testing rules by covering a nondiscriminatory classification of employees—i.e., their regular, full-time staff employees—in all compensation ranges with the lower and middle ranges covered in more than nominal numbers. To ensure consistency and fairness between insured and self-insured plans, the nondiscrimination rules applicable to insured plans should allow similar flexibility.

subsidy to buy health coverage in a state exchange. Penalties are assessed in one of two ways, depending on whether an employer does or does not offer health coverage:

1. Section 4980H(a) provides that an employer that fails to offer "minimum essential health coverage" to its full-time employees (and their dependents) will pay a tax on all of its full-time employees (excluding the first 30 employees);
2. Section 4980H(b) provides that an employer that does offer coverage will pay the tax only on those full-time employees who have been certified to receive a subsidy.[10]

A key question in determining an employer's liability for tax penalties is who is a "full-time employee?"

Section 4980H(c)(4) defines full-time employee as an employee who is employed on average at least 30 hours of service per week *with respect to any month*. Given the inherent unpredictability of temporary employee work patterns and tenure, staffing firms cannot reasonably predict who should be counted as full-time in any month for purposes of the penalty assessments. The Treasury Department recognizes the problem and, in a request for public comment issued last May, has suggested ways to address it.[11]

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[10] Employees may be eligible for subsidies if their annual household income does not exceed 400% of the federal poverty level for a family of four ($89,400 under 2011 guidelines), and the employee's share of the premium under the employer's plan is either "unaffordable" (more than 9.5% of household income) or the plan does not provide "minimum value. Proposed Treasury regulations issued on Aug. 17 (76 F.R. 50931) clarify that plan affordability will be based on the employee's portion of the annual premium of a "self-only plan." Because employers have no way of knowing an employee's household income, the proposed regulations also contemplate a "safe harbor" that would allow employers to determine whether its plan is affordable based on their employee's current W-2 wages, not household income. The meaning of the "minimum value" prong of the eligibility test is unclear.

[11] Treasury Notice 2011-36; 2011-21 I.R.B. 792 (May 23, 2011). According to Treasury, month to month determinations of full-time status may cause employer "uncertainty and inability to predictably identify which employees are considered full-time and, consequently, inability to forecast or avoid potential § 4980H liability." It also creates coverage problems because, as the Notice states, "employees might move in and out of employer coverage as frequently as monthly."

Proposed "Look-Back" Rule for Determining Full-time Status

To address the problems stemming from the monthly penalty assessment language, Treasury requested comments on a "look-back/stability period safe harbor" that would give employers a way to predictably determine full-time employee status for penalty assessment purposes—as well as flexibility in determining who is eligible to enroll in their health plans.

The look-back/stability period safe harbor would allow an employer to elect a "measurement period" (the look-back period) of between three and 12 consecutive months, in which employees working full-time (130 hours per month) during the period would be treated as full-time during a subsequent "stability period" of at least six months. Employees would be deemed to be full-time during the stability period regardless of the number of hours of service during the stability period as long as he or she remained an employee.

Exception for Temporary Workers from "Offer" and "Auto-Enrollment" Requirements

In its request for comments, Treasury also asked whether the challenges in offering health coverage to temporary workers warrant an exception allowing employers to exclude such workers in determining whether an "offer of coverage" is made under §4980H(a).

ASA strongly supports such an exception.[12] Without it, a staffing firm could be assessed a penalty on all of its full-time headquarters and branch staff employees irrespective of whether they are getting subsidies and even if they are covered under the firm's group health plan. Such "double payments" would create a major disincentive to offering coverage to any workers. Of course, as previously noted, the nondiscrimination rules would have to allow such an exception since the penalties for violating those rules could exceed the penalties under §4980H.

[12] See ASA comments on Treasury Notice 2011-36 (attached hereto as Appendix A).

A corollary to any exclusion of temporary workers from the offer of coverage provisions is an exclusion from the auto-enrollment requirement.[13] Mandated automatic enrollment in employer health plans for workers who come and go with such high frequency and unpredictability, and who will mostly opt out in any event, would be virtually impossible to administer and would impose administrative and compliance costs on staffing firms with no meaningful benefit to the workers.

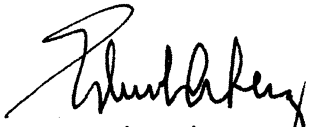
Employer Tax Penalties Should Be Repealed

While ASA strongly supports a look-back rule for determining full-time employee status under Code § 4980H, their final form and ability, in practice, to provide substantial relief is uncertain. The employer tax penalties will increase employer costs and drive up the price of goods and services. Job losses are inevitable—hundreds of thousands by the most conservative estimates—mostly affecting low income workers.[14] The actual toll may not be known for some time, but the specter of those penalties, and the uncertainty regarding their financial impact, is a significant present damper on economic activity and job creation. Therefore, we urge Congress to repeal those penalties.

We appreciate the opportunity to testify and look forward to working with the committee and others in Congress on these complex issues.

Respectfully submitted,

AMERICAN STAFFING ASSOCIATION



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[13] PPACA §1511, which added §18A of the Fair Labor Standards Act, requires employers with more than 200 full-time employees who offer enrollment in one or more health plans to automatically enroll new employees in one of the plans offered.

[14] See "A Job-Killing Law?" FactCheck.Org, http://factcheck.org/2011/01/a-job-killing-law

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June 16, 2011

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2011-36)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

RE: Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (Section 4980H)

Dear Sir or Madam:

These comments are submitted by the American Staffing Association in response to the request by the Treasury Department and the Internal Revenue Service in Notice 2011-36[1] for comments under the following provisions of the Patient Protection and Affordable Care Act (PPACA)[2]:

i. Section 1513, adding Internal Revenue Code (the "Code") § 4980H (relating to Employer Responsibility);

ii. Section 1201, adding new Public Health Service Act ("PHS Act") § 2708 (capping group health plan waiting periods at 90 days).

The American Staffing Association represents the U.S. staffing industry. ASA members provide a wide range of employment and work force services and solutions, including temporary and contract staffing, recruiting and permanent placement, outplacement, training, and human resource consulting. Staffing firms employ approximately 2.6 million temporary and contract workers every day and about 10 million workers annually.

Summary of Comments

We submit the following recommendations in response to the requests for comments contained in Notice 2011-36 (Notice):[3]

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[1] 2011-21 I.R.B. 792 (May 23, 2011).
[2] Pub. L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152.
[3] ASA is a member of *Employers for Flexible Health Care*, a coalition representing businesses that employ large numbers of part-time, temporary, and seasonal workers. ASA supports the coalition's comments on Treasury Notice 2011-36.

APPENDIX A

(1) That employers be given the option of using the date on which an individual first performs an "hour of service" within the meaning of Labor Reg. § 2530.200b-2(a) as the commencement of the measurement period used to establish full-time status (for Code § 4980H purposes) under the "look-back/stability period" rules described in Section V of the Notice.

(2) That employees who are deemed full-time by virtue of their service during the look-back period be required to meet a minimum threshold number of hours worked during the stability period in order to retain their full-time status for Code § 4980H purposes.

(3) That applicable large employers be permitted to exclude temporary employees with respect to whom there is no offer of coverage when calculating assessable payments under Code § 4980H(a).

(4) That employers be granted, for purposes of applying the 90-day waiting period under PHS Act § 2708, discretion to treat employees hired in temporary or variable-hour categories of employment as ineligible for enrollment in the employer's group health plan, despite otherwise satisfying the plan's eligibility requirements for the employer's regular employees, unless the employee's status changes to a benefits-eligible classification.

(5) That employers be allowed an administrative grace period following the close of the look-back period to allow sufficient time to enroll their full-time employees in coverage.

Background

The PPACA's employer responsibility, auto-enrollment, and waiting period provisions present unique and significant compliance issues for the staffing industry and its employees, the vast majority of whom are "temporary" workers whose hours are variable and unpredictable.[4] The Notice recognizes the difficulties in applying a month-by-month method of calculating assessable payments under Code § 4980H and in coordinating the enforcement of those provisions with the waiting periods under PHS Act § 2708. We applaud the constructive approaches set out in the Notice for addressing many of these issues.

To assist in the further development of guidance, we offer below a detailed background on the nature of the temporary work force along with suggestions on how the approaches described in the Notice should be applied to this segment of the work force.

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[4] The requirements of PHS Act § 2716 (imposing non-discrimination requirements on fully-insured group health plans) pose similar, and particularly difficult, compliance challenges, which also fall most heavily on staffing firms and other industries with large numbers of part-time, seasonal, and temporary employees. These rules, the implementation of which have been delayed by Notice 2011-1, 2011-2 I.R.B. 259 (Jan. 10, 2011), are not covered by Notice 2011-36 and are not further discussed in this comment.

Role of Temporary and Contract Staffing Services in the Economy

Temporary and contract staffing firms play a vital role in the U.S. economy by providing employment flexibility for employees and businesses.[5] Staffing firms recruit, screen, select, and employ their own employees and assign them to support or supplement the work force of their clients in various work situations such as employee absences, skill shortages, seasonal workloads, and special assignments or projects. Employees work in virtually every job category, including industrial labor, office support, health care, engineering, information technology, and various professional and managerial positions.

Staffing firms generally are the employers of record for the workers they assign to clients and are responsible for paying their wages, withholding and remitting all employment taxes (including Social Security and unemployment), and providing workers' compensation insurance.

The advantages of temporary work to individuals are widely recognized by employees, businesses, economists, and policy makers. It affords flexibility, training, and supplemental income for millions of individuals and provides a bridge to permanent employment for those who are just starting out, changing jobs, or out of work.

Temporary work also benefits business. The use of temporary staff gives employers the flexibility to adjust the size of their work forces to meet business and economic exigencies and seasonal fluctuations quickly and at a predictable cost.[6] Labor market flexibility is cited by economists as a key factor in innovation and job creation.[7]

Unique Characteristics of Temporary Work

Individuals seeking temporary work generally apply with a staffing firm by completing a formal application, either at the staffing firm office or online. Depending on the availability of work and the individual's interests, qualifications, and experience, qualified applicants may wait some time before being contacted by the staffing firm with an offer of work. Some individuals may not get an assignment, generally because suitable work is unavailable or because the individual accepts work elsewhere, often with another staffing firm.

Temporary work generally is short-term, intermittent, highly variable, and unpredictable. Many temporary employees work on short-term projects or assignments for multiple clients, often in the same pay period. Some work on multiple assignments for the same

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[5] "Contract staffing" often is used to describe work performed by higher-skilled employees, especially in the engineering and information technology areas, and often involves longer-term, project-based assignments. "Temporary" is used herein to include contract staffing, except where necessary to differentiate them.

[6] The Conference Board, HR Executive Review: Contingent Employment (Vol. 3, No. 2, 1995); Peter F. Drucker, They're Not Employees, They're People; Harvard Business Review (2002).

[7] See testimony of Alan Greenspan, U.S. Senate Committee on Banking, Housing, and Urban Affairs (Jan. 26, 2000), S. Hrg. 106–526 at p. 21; and see Edward J. Lazear, Why the Job Market Feels So Dismal, Wall Street Journal, May 16, 2011.

client. Because individuals can register for work with several staffing firms, individuals may work for more than one firm in the same pay period. Temporary work is inherently contingent on client demand and assignments can sometimes end abruptly, with little or no notice. As a result, temporary workers can experience varying periods of unemployment between assignments.

Most individuals use temporary work as a bridge to a permanent job, which contributes to high overall employee turnover in the industry—more than 277% in 2010. But some project-based assignments, generally in the health care, information technology, or engineering areas, can last a year or more.

Full-time employee status for purposes of calculating employer assessable payments under Code § 4980H is determined month-to-month. As the Notice observes (p. 13), this may cause employer "uncertainty and inability to predictably identify which employees are considered full-time and, consequently inability to forecast or avoid potential § 4980H liability." It also creates coverage problems because, as the Notice states, "employees might move in and out of employer coverage as frequently as monthly." [8]

The Notice recognizes that these difficulties are particularly acute in the case of "employees whose hours vary from month-to-month or who are employed for a limited period." Because those employees are the vast majority of a staffing firm's work force (temporary to permanent staff ratios typically range between 10-to-1 and 20-to-1), staffing firms would face a heavy burden if full-time employee status had to be determined monthly.

To address these concerns, the Notice suggests as an option an elective "look-back/stability period safe harbor method" that would provide employers with a predictable way to determine full-time employee status for the purpose of calculating their potential assessable payment liability, as well as flexibility regarding their plan eligibility and enrollment practices. We believe that a look-back rule is essential for determining full-time employee status under Code § 4980H and offer below specific suggestions as to how such an approach should work in practice to address the unique operational concerns of staffing firms.

The look-back/stability period safe harbor described in the Notice would allow an employer to elect a "measurement period" (the look-back period) of between three and 12 months, in which employees working full-time (130 hours per month) during the period would be treated as full-time during a subsequent "stability period" of at least six months. Employees would be deemed to be full-time during the stability period "regardless of the number of hours of service during the stability period as long as he or she remained an employee" (p. 15).

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[8] As discussed in detail beginning on p. 6, the generally short-term and highly transient nature of temporary work presents logistical and operational challenges that have made it practically impossible for most staffing firms to offer traditional health coverage to their temporary employees.

The example provided in the Notice as to how the safe harbor would work assumes that the employer "did not hire any new employees in calendar year 2014" and that issues would arise in the case of "new employees" who were not employed during the entire measurement period or "employees who move into full-time status during the year." Because temporary employees come and go with high frequency throughout the year, it would make sense, as the Notice suggests on p. 17, to start the first measurement period based on each individual's start date. This would avoid issues relating to employees who come and go in a calendar year.

To minimize audit issues, we agree that employers should be required to use a uniform measuring period for all temporary employees. Of course, employers could elect not to apply a look-back period to employees—e.g., a staffing firm's internal staff—classified as full-time at the outset of their employment.

Comments

(1) Employers should have the option of using the date on which an individual first performs an "hour of service" within the meaning of Labor Reg. § 2530.200b-2(a) as the commencement of the measurement period used to establish full-time status (for Code § 4980H purposes) under the "look-back/stability period" rules described in Section V of the Notice.

In determining whether and when an individual is employed for the purposes of the measurement/stability period rules, employers should have the option of using an "hours of service" test.

Some staffing firms consider temporary workers to be "hired" when the firm completes the Employment Eligibility Verification Form I-9—after the individual completes the initial application process and is deemed qualified for assignments. But most applicants are not assigned to a client right away and, therefore, should not be viewed as employed until they actually begin performing services for compensation. In such cases, "hours of service" is the appropriate test for determining when the measurement period begins.

We would propose an hours of service definition as described on p. 6 of the Notice—i.e., periods when an employee is "paid or entitled to payment" for the performance of duties for the employer or for time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military, or leave of absence." This definition tracks the definition of "Hours of Service" under Labor Reg. § 2530.200b-2(a).

(2) Employees who are deemed full-time by virtue of their service during the look-back period should be required to meet a minimum threshold number of hours worked in the stability period to retain their full-time status.

The Notice proposes that employees determined to be full-time during the look-back period should be considered full-time during the stability period (as long as they remain

an employee) "regardless of the hours worked" during the stability period. This could result in a staffing firm paying a full-month's assessable payment on an employee who worked just one hour in a month.

Because the employment relationship between a staffing firm and the individuals assigned to clients is contingent on client demand, and because individuals are completely free to accept or reject assignments, the fact that a person works full-time during a particular measurement period is not necessarily predictive of the person's future work patterns. Therefore, the regulations should prescribe a minimum level of work during the stability period as a condition of full-time status.

The San Francisco Health Care Security Ordinance provides an example of such a "maintenance of effort" requirement. Under that law, employees must work at least 8 hours per week for the employer for purposes of the employer's fee calculation.[9] A similar rule could be applied during the stability period for determining whether an individual is full-time for purposes of the assessable payment provisions of § 4980H. The example below shows how such a rule might work for a particular employee who commenced work after those provisions become effective on Jan. 1, 2014.

> **Example:** Employee X is first employed by Employer M on March 1, 2014. Employer M elects a 12-month measurement period with a corresponding 12-month stability period. At the end of the measurement period on Feb. 28, 2015, Employee X is determined to have worked full-time (at least 130 hours per month) during the period. During the ensuing 12-month stability period, the employee works 130 hours each month, except that, in the monthly period June 1 through June 30, the employee performs only 30 hours of service. Because the employee worked less than 35 hours (8 x 4.33) in the month of June, the employee would not be considered full-time and Employer M would have no assessable payment obligation with respect to the employee for that month.[10]

(3) Applicable large employers should be permitted to exclude temporary employees with respect to whom there is no offer of coverage when calculating assessable payments under Code § 4980H(a).

Section 4980H(a) provides that an "applicable large employer" may be liable for a monthly assessable payment if it fails to offer "minimum essential coverage" to its full-time employees and their dependents, provided that at least one full-time employee is allowed or paid a tax subsidy. In such case, the tax would be payable on all of the employer's full-time employees (less 30).

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[9] Office of Labor Standards Enforcement Regulations Implementing the Employer Spending Requirement of the San Francisco Health Care Security Ordinance, § 3.1 (last revised 7/12 2007).

[10] Because months vary in length, employers should be permitted to use a flat monthly hours test rather than having to make different average weekly hours calculations for each month. Most employer payroll systems are not set up to make such calculations.

The Notice states (p. 18) that the regulations will likely clarify that "an employer offering coverage to all, or substantially all, of its employees would not be subject to the § 4980H(a) assessable payment provisions." It further asks whether the challenges in offering health coverage to temporary workers warrant an exception from those provisions, and how the 90-day waiting period would interact with such an exception.

For the reasons set forth below, we recommend an exception to the assessable payment provisions of Code § 4980H(a) that would allow employers to not offer health coverage to temporary employees.

Providing traditional health insurance to temporary workers has been a major challenge for most staffing firms due to high employee turnover and the limited health insurance products available for those workers. Moreover, there may be few, if any, practical health insurance options available to employers in 2014 that will enable them to offer coverage to temporary workers. Since there is no evidence that Congress intended to penalize employers that have no practical way to offer health coverage to certain segments of their work force, an exception allowing employers to not offer health coverage to temporary employees would be consistent with the statute.

Temporary work is most often used as a form of supplemental employment. As a consequence, the majority of temporary employees get health coverage from sources other than their employer. According to the U.S. Bureau of Labor Statistics, 56% of those employees are covered under the health policies of parents or spouses, or are covered by Medicare or other government programs.[11] The BLS data show that even for staffing firms that find it logistically feasible to offer health insurance benefits to their temporary and contract employees, only 25% of those employees opt to take the coverage. Participation is lowest (8%) among short-term temporary employees and highest (49%) among contract employees, who tend to work in higher-paid, longer-term professional, health care, and IT jobs.

An employee survey conducted by ASA in 2006 showed that most employees (77%) view temporary work as a good way to find a permanent job. Employees using temporary work as a bridge to a permanent job generally refuse coverage because they do not expect to work for long periods of time and want to maximize their cash income during their short tenure. This accounts for the extremely low rate of participation among short-term temporary employees.

The transient and unpredictable nature of temporary work and the low rates of employee participation present serious underwriting challenges for health insurance carriers. As a result, the only health coverage most staffing firms have been practically able to offer are so-called "mini-med" plans that provide limited coverage. If those plans are abolished in 2014, it will be virtually impossible for staffing firms to offer temporary employees minimum essential coverage unless alternative insurance plans can be

[11] U.S. Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements (2005).

designed—in a manner consistent with applicable non-discrimination rules—to meet the needs of those employees.[12]

An exception allowing employers to not offer health coverage to temporary employees for the purposes of Code § 4980H(a) would mean that a staffing firm could satisfy the requirements of Code § 4980H(b) by offering minimum essential coverage only to those employees whom the firm classifies as its regular, full-time employees—for example its headquarters and branch office staff. In such case, a staffing firm would be potentially liable for assessable payments under Code § 4980H(b) only with respect to full-time employees (including temporary employees determined to be full-time under a look-back rule) who are allowed or paid a subsidy.[13]

It bears repeating that, for such an exception to be meaningful, it would be critical to ensure that such a benefits structure is permissible under applicable nondiscrimination rules. This is particularly important in the case of the new insured plan nondiscrimination rules, since the penalties for violating those rules could exceed the penalties under Code § 4980H.

(4) For purposes of applying the 90-day waiting period under PHS Act § 2708, employers should be granted discretion to treat employees hired in temporary or variable-hour categories of employment, as ineligible for enrollment in the employer's group health plan, despite otherwise satisfying the plan's eligibility requirements for the employer's regular employees, unless the employee's status changes to a benefits-eligible classification.

The Notice (p. 21) asks whether it would be appropriate to allow employers to consider "employees hired as seasonal workers or into certain other temporary or variable-hour categories of employment" as ineligible for enrollment in the employer's group health plan even if they satisfy the plan's eligibility requirements for the employer's regular employees. The Notice points to existing Treasury, DOL, and HHS regulations that leave such eligibility determinations to employers.

In our view, the regulations cited allow employers to treat temporary workers as ineligible for coverage and therefore an employer could determine, as the Notice suggests, that the maximum 90-day waiting period allowed under the PPACA would not

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[12] One approach that might obviate the need for an exception might be to allow staffing firms to offer their temporary employees coverage through the state exchanges, provided, of course, that such an offer would be considered an offer of minimum essential coverage under § 4980H(b). However, since the law expressly limits access to the exchanges to employers with fewer than 100 employees, the majority of staffing firms would not qualify unless the law is changed.

[13] Without an exception under § 4980H(a) for temporary employees, a staffing firm could be assessed a penalty on all of its full-time headquarters and branch staff employees irrespective of whether those employees are getting subsidies and even if they are enrolled in the firm's group health plan. Such "double payments" would create a significant disincentive to offering coverage to any employees.

come into play unless the employee's status "changes to one that is eligible to enroll in the plan." This is consistent with the exception, previously discussed, that would allow employers not to offer coverage to temporary workers for purposes of the assessable payment provisions of Code §4980H(a).

(5) Employers should be allowed an administrative grace period following the close of the look-back period to allow sufficient time to enroll their full-time employees in coverage.

Despite the challenges in covering temporary workers, some staffing firms, depending on the demographics of their individual work forces, may find it logistically feasible to offer coverage to their temporary workers who are determined to be full-time during the look-back period. In such cases, the employer should have the option, described on p. 16 of the Notice, of taking an "administrative interval" (at least one month) to perform the look-back calculation, notify employees of their eligibility, and enroll them in coverage.

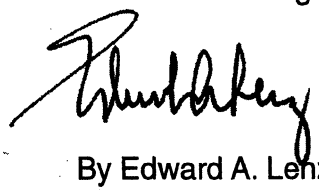
Finally, we agree with the suggestion that firms using a measurement period of less than one year be allowed to use different stability periods to account for employees who may become full-time at different points in the employer's plan year.

* * *

We appreciate the opportunity to comment on the topics raised by the Notice, and we look forward to working with you on these important issues.

Respectfully submitted,

American Staffing Association



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Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name:

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2008. Include the source and amount of each grant or contract.

NONE

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

AMERICAN STAFFING ASSOCIATION – SENIOR VICE PRESIDENT FOR LEGAL AND PUBLIC AFFAIRS (SEE ATTACHED BIO)

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

NONE

I certify that the above information is true and correct.

Signature:

Date: Oct 3, 2011

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