



March 18, 2013

CC:PA:LPD:PR (REG-138006-12)  
Internal Revenue Service  
Room 5203, POB 7604  
Ben Franklin Station  
Washington, DC 20044

Submitted Electronically: <http://www.regulations.gov>

**Re: Shared Responsibility for Employers Regarding Health Coverage, Proposed Rule**

These comments are submitted to the Department of Treasury (Treasury) and the Internal Revenue Service (IRS), pursuant to Section 4980H (§4980H) Shared Responsibility for Employers Regarding Health Coverage, Proposed Rule (Proposed Rule); published in the Federal Register on January 2, 2013, on behalf of the National Federation of Independent Business (NFIB).

NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

**General Comment**

NFIB appreciates the opportunity to comment on the Proposed Rule. The "cost of health insurance" continues as the number one small business problem, a position it has held for 25 years, according to NFIB Research Foundation's latest *Small Business Problems and Priorities* publication.<sup>1</sup> The Patient Protection and Affordable Care Act (PPACA) did little to alleviate this burden, and could very well exacerbate the cost problem for small business owners.

Section 4980H represents a very difficult compliance challenge for small business owners. While the provision in the law only read 3.5 pages, the Preamble and Proposed

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<sup>1</sup> Holly Wade, *Small Business Problems and Priorities*, NFIB Research Foundation, August 2012.

Rule span 144 pages with 44 definitions, many of which are new to Federal tax and employment law. In total, Treasury and IRS have released over 200 pages worth of guidance in the form of Requests for Comment, Notices, Frequently Asked Questions (FAQ), and the Proposed Rule concerning §4980H.

NFIB's small-business members are currently preparing to comply with §4980H size determinations, worker classifications, and potential penalty liability scenarios, but confusion and uncertainty persist. These calculations are administratively burdensome for small-business owners. On behalf of its 350,000 independent business members, NFIB requests clarity on employer aggregation rules; an even playing field for all employers, including protection from increased penalty exposure; a reasonable seasonal employee definition; and thoughtful and substantive special analyses, including an expedited review by the Chief Counsel for Advocacy of the Small Business Administration.

### **Clarity to Employer Aggregation Rules**

The Preamble to the Proposed Rule and subsequent FAQ document mention the “consistent with longstanding standards that apply for other tax and employee benefit purposes.”<sup>2</sup> However, these longstanding pension aggregation standards have not been historically applied to smaller businesses. Many small-business owners lack the technical and legal expertise to fully comprehend the impact of these standards. These rules can be very complex and will require most small-business owners to seek legal help if they are involved in businesses with multiple-owners. Media reports have already described businesses attempting to incorporate or divide in order to avoid requirements and penalties.<sup>3</sup>

The aggregation standards could apply to a significant number of businesses. The owner of approximately one in four (24%) employing, small businesses also owns at least 10 percent of one or more employing businesses separate and distinct from the base business (the business about which he/she was being interviewed).<sup>4,5</sup> Fifty-six (56) percent of those multiple business owners own more than one business in addition to the base business. Those data mean that about 13 percent of all small employers have a 10 percent or greater interest in a *minimum* of three businesses that employ people other than the owners.<sup>6</sup>

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<sup>2</sup> Questions and Answers on the Employer Shared Responsibility Provision Under the Affordable Care Act, December 28, 2012.

<sup>3</sup> Maltby, Emily and Sarah Needleman, *Small Businesses Look for Ways to Cope with Health Law*, Wall Street Journal, December 20, 2012

<sup>4</sup> All data in this paragraph come from: *Businesses Within Families, National Small Business Poll*, NFIB Research Foundation, (ed.) William J. Dennis, Jr., Vol. 12, Iss. 4, 2012.

<sup>5</sup> The Survey of Consumer Finances and the Survey of Small Business Finances, both published by the Federal Reserve, also show that multiple-ownership of businesses by individuals is common.

<sup>6</sup> The reverse is also true. Sixty (60) percent of employing small businesses have more than a single owner. In 43 percent of cases, the other owner(s) are family members; 12 percent of cases non-family members; and 5 percent of cases, both. See, *Families in Business, National Small Business Poll*, NFIB Research Foundation, (ed.) William J. Dennis, Jr., Vol. 2, Iss. 6, 2002.

A second characteristic of multiple-business owners, in addition to their surprisingly large number, is relevant to the current discussion: owners of larger, small businesses (defined by number of employees) are considerably more likely to own multiple businesses than owners of smaller, small businesses. For example, 39 percent of those with a base business employing 20 or more people own multiple-businesses while 21 percent of those employing fewer than 10 people do.<sup>7</sup> Those data imply that the number of people cumulatively employed by these owners is often likely to be near or above the §4980H threshold.

The data illustrates the importance of clarifying the technical rules associated with §414 (b), (c), (m), and (o) that apply more to corporate business structures than smaller entities. NFIB recommends clarification of these technical standards. Please address employer attribution rules in clarifying guidance.

### **Even Playing Field**

The Preamble and Proposed Rule touch on some potential discrepancies between States and types of employer-sponsored health insurance arrangements that could be problematic and discriminatory to small business.

#### *Medicaid Expansion*

It is well known that many states plan to expand Medicaid coverage to individuals up to 138% of the Federal poverty level (FPL) beginning in 2014, while many others do not plan to expand this eligibility. This decision is ultimately up to state policymakers. In non-expansion states, another proposed rule from Treasury and IRS has extended access to cost-sharing subsidies and tax credits,<sup>8</sup> and still another proposed rule from the Department of Health and Human Services (HHS) has extended hardship exemptions<sup>9</sup> to individuals between 100-138% FPL. Individuals in one state may have access to Medicaid coverage, while individuals in another state may have access to cost-sharing subsidies and tax credits for the purpose of providing private health insurance coverage in an Exchange. Some have interpreted these regulatory decisions as potentially increasing exposure to §4980H penalty liabilities for businesses.<sup>10</sup>

NFIB strongly recommends that businesses in non-expansion states should not be subject to increased §4980H penalty liability. Protection should be afforded to businesses who employ individuals between 100-138% FPL in order to avoid §4980H (a) and (b) penalty liability. A business should not face expensive penalties for state and regulatory decisions beyond their control. Increased penalty liability could cause a more rapid erosion of employer-sponsored health insurance and increased costs to Federal taxpayers.

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<sup>7</sup> *Businesses Within Families*, *op. cit.*

<sup>8</sup> Proposed Rule on Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, January 30, 2013.

<sup>9</sup> Proposed Rule on Exchange Functions: Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions, February 1, 2013.

<sup>10</sup> Radnofsky, Louise, *In Medicaid, A New Health-Care Fight*, Wall Street Journal, February 10, 2013.

### *Multiemployer plans*

NFIB opposes special rules for multiemployer plans that would afford certain employees access to cost-sharing subsidies without employer penalties, while other employers would be exposed to penalties.<sup>11</sup> If there were a safe harbor for employers of low-wage employees, it should apply to all employers and not exclusively employers who utilize multiemployer plans.

### **Definition of “Seasonal Employee”**

The Proposed Regulations reserve the definition of “Seasonal Employee.” The Preamble to the Proposed Regulations reiterate that, as provided in IRS Notice 2012-58, until further guidance is issued, employers will be permitted to use a reasonable, good faith interpretation of the term “seasonal employee.” The Proposed Regulations also note that the final regulations might include a specific time limit (in the form of a defined period) in the definition of seasonal employee.

Defining “Seasonal Employee” by linking its application to time periods determined by identified holidays is not neutral, for the obvious reason that within a diverse country like the United States, there are a multitude of holidays affecting various sectors of the economy (retail, travel and lodging, manufacturing, etc.). There also are secularly-determined seasons (for example, “primary season”) that increase the need for employees in some sectors of the economy (for example, public opinion research). There are seasons that are loosely associated with various times of the year, such as golf season, when labor demands increase for employers that serve their customers’ outdoor recreational interests. Finally, there also are seasons in what might be called the meteorological or climatic sense, and there are more than four of these (for example, separate horticultural and agricultural “planting seasons” in addition to spring, summer, fall and winter). Thus, the term “Seasonal Employee” should be treated as a term of art that is decoupled from the various meanings of the word “season” in everyday language.

Although it may be less obvious, placing an artificial limit on the duration of seasonal employment also can compromise the goal of neutrality. For example, the period over which additional labor is needed at a resort featuring outdoor recreational activities is longer in South Carolina than it is in Idaho. Any rule that artificially limits the period to a number of days or months less than the maximum some employers in the same industry require effectively creates a differential burden on employers based on a consideration completely unrelated to the Act, namely their geographic location.

NFIB recommends the term “Seasonal Employee” should be defined broadly and neutrally so that it applies to any employee whose period of employment is less than one full year and is related to any cycle that in the ordinary course recurs annually for the employer during roughly the same period of the calendar year.

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<sup>11</sup> Adamy, Janet and Melanie Trotman, *Some Unions Grow Wary of Health Law They Backed*, Wall Street Journal, January 30, 2013.

## **Special Analyses**

NFIB is disappointed in the determination that section 553(b) of the Administrative Procedure Act does not apply to this regulation. Employers, including small entities, for all intents and purposes will be required to collect and verify significant amounts of data and information on their business, employees, wages, and health insurance premiums. Worse, employers do not yet know how to report and verify health insurance coverage under §6056 of PPACA. While this requirement will not occur until 2015, preparations must be made now so the sooner this information is released, the better businesses can prepare for the reporting requirements.

Finally, NFIB urges the Chief Counsel for Advocacy of the Small Business Administration to promptly release comments on its impact on small business before the public hearing scheduled for April 23, 2013.

Thank you for the opportunity to provide these comments. If you have any questions concerning this letter, please contact Kevin Kuhlman at (202) 314-2091.