March 18, 2013

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Internal Revenue Service
CC:PA:LPD:PR (REG-138006-12)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: IRS Proposed Rule for Shared Responsibility for Employers Regarding Health Coverage

Dear Ms. Bjornstad and Ms. Taylor:

The National School Boards Association (NSBA), representing through our state associations approximately 13,800 school districts nationwide, offers the following comments to the proposed rule, *Shared Responsibility for Employers Regarding Health Coverage*, REG-138006-12, issued by the Internal Revenue Service (IRS) on January 2, 2013. NSBA appreciates the opportunity to share with the IRS: (1) the perhaps unanticipated impact certain provisions of the proposed rule may have as public school districts across the country wrestle with questions about which service hours of various categories of staff members are to be included in the full-time equivalent employee counts for "large employer" determinations; and (2) the need for clarification in some before the rule becomes final to minimize any adverse impact on the nation's schools and students' educational outcomes.

I. Who is an "Employee" for Purposes of "Large Employer" Determinations?

In the proposed rule, the IRS states that an employer determines if it meets the definition of a "large employer" for "Shared Responsibility" purposes by totaling the number of full-time employees working an average of at least 30 hours per week, along with a calculation using a formula adding all the service hours of the employer's part-time employees to determine the number of full-time equivalent employees (FTEs) to be added to the employer's total count. It is this second piece of the calculation that causes some concern for public school districts.

The IRS proposed rule specifically addresses teachers and other employees of educational organizations, including public school districts, in terms of the look-back measurement period, breaks in service for summer and winter breaks, a calendar year versus an academic year (typically, a school's "fiscal" year), breaks in service for certain types of leave, variable-hour and seasonal employees, and calculating average weekly hours for school employees (both hourly and non-hourly) when they typically will not work a full twelve-month period.

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Public school districts employ many different types of employees with various work schedules and duties that make it difficult to determine who is an "employee" such that they should be included in the FTE count, and whether such inclusion is appropriate or fair to the school district. Some extremely small districts that do not employ more than 50 full-time employees may come under the heading of an "applicable large employer" when the hours of the part-time workers are included in the calculation of the number of FTEs as required by the IRS proposed rule. The question then becomes "who is an employee?"

The IRS proposed rule states that it has adopted the "common law standard" position for determining when an individual is an "employee". The IRS states in its discussion of this matter that

> "[u]nder the common law standard, an employment relationship exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. Under the common law standard, an employment relationship exists if an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so." 78 Fed. Reg. 218, 221 (Jan. 2, 2013).

While offering some guidance, this standard does not resolve whether many different categories of people who perform work for school districts should be counted as an employee for purposes of determining whether a school district is an "applicable large employer," and, consequently, who must then be offered health insurance. As demonstrated below in the following examples and questions, certain staffing situations exist on a daily,[1] weekly, and monthly basis that make a public school district's frequent calculation of full-time employees (including the FTEs) and subsequent insurance-related responsibilities, as suggested by the IRS proposed rule, administratively arduous and quite confusing.

A. Short-Term Substitute Teachers (typically individual assignments of three consecutive months or less)

Some individuals (both licensed and unlicensed) seeking temporary work on a substitute basis have their names on lists for multiple school districts simultaneously. This occurs not through any type of employment agency but through the individual's own selection of districts for which he/she would like to work. Such substitute work could be for teachers, teaching assistants, bus drivers, cafeteria workers, custodians, etc. For these individuals, school district employers do not have a reasonable expectation at each individual's start date that any one individual will perform an average of 30 hours/week of substitute employee services. Moreover, any one of these individuals may perform substitute services for more than one district in any number of counties or education service agency configurations in any given week or month.

[1] Some services provided in school districts are even hourly, such as "traveling" art and music teachers, and support staff who may only be providing support for certain students, such as speech and language staff, etc. While this is not the norm, it is important to be aware that the school environment is more complicated and involves a web of services that may be intermittent or regular and required for many or few students.

Thus, under the IRS proposed rule, one individual could be an "employee" of ***more than one employer*** simultaneously. This situation calls into question the applicability of the discussion in the IRS proposed rule about "Employees Rehired After Termination of Employment or Resuming Service After Other Absence," 78 Fed. Reg. at 228. It is uncommon, though not completely impossible, for substitutes to go for long periods of not performing substitute services for any one particular district for several months at a time, all completely unrelated to being "terminated" or on some "other absence". Thus, substitutes are not being rehired for each assignment, nor are they "returning" to service for a substitute assignment, nor experiencing a "break in service" since the school district may still be "open" and operational when they are called in to cover a substitute assignment. And applying "averaging methods" would be inappropriate, since substitutes are not guaranteed any minimum hours of service on any given day, or in any given week or month during the school year. Notwithstanding, issues arise with one individual subbing for more than one school district in any given school year, and what obligations each school district may have regarding each substitute's hours of service.

For example, over the course of one week, Steve Q is a full-day substitute (roughly 7 hours) to cover the Chemistry classes at School District A's high school on Monday. Mr. Q then does a half-day 4th grade substitute assignment (roughly 3.5 hours) at School District B's elementary school on Wednesday. And on Thursday, Mr. Q does a full-day assignment (again, roughly 7 hours) at a School District C middle school to cover 8th grade classes. Mr. Q does not provide any additional substitute services for any other school districts on Tuesday and Friday of that week. Given that schedule for that week, Mr. Q typically would not be performing, nor expected to perform, an average of 30 hours/week ***for a single employer*** over the course of a calendar/fiscal year or other measurement period. Under the IRS proposed rule, Mr. Q. would not meet the definition of a "full-time employee", but that of a variable-hour employee, at last.

However, the same IRS proposed rule seems to suggest that Mr. Q's "part-time" hours for each substitute assignment that week would have to be included in the calculation of FTE hours for each respective school district for which the service hours were performed in the "large employer" determination. Thus, on paper, the IRS proposed rule appears to deem Mr. Q as an "employee" of all three school districts for purposes of determining whether each school district is a "large employer." Yet, for some extremely small districts [less than 50 full-time employees (including FTEs)], the inclusion of Mr. Q's "part-time" hours in the FTE hours calculation might have the effect of pushing one or more of these three small districts into the category of an "applicable large employer", which would then be required to offer health insurance coverage to its full-time employees. Similar to long-term substitute teachers as discussed below, it seems unfair that the federal government would allow ***one individual*** to have this kind of effect on ***multiple*** school districts in any one given year.

NSBA posits that this dilemma would not change if, for example, over the course of an entire school year, Mr. Q completed 65 total hours of substitute assignments for School District A, 36 total hours for School District B, and 47 total hours for School District C. Again, over the course of each week and over the course of the school year (i.e., measurement period), none of these three school districts expects Mr. Q to work an average of 30 hours/week at the start of any of his substitute teacher positions. All the while, the full-time employees who are absent, necessitating the reason for Mr. Q's substitute personnel employment, are also being counted as full-time employees for "large

employer" determination purposes, and are still being paid despite their absence. Thus, it would seem that requiring Mr. Q's substitute hours be included in the FTE calculation for "large employer" purposes results in some "double counting" of employees, in a manner unfair to each school district using Mr. Q's substitute services in any given week or month.

To remedy this wrinkle and not place "small-employer" school districts in such an unfair position, NSBA recommends that the IRS revise the Shared Employer proposed rule to permit "small-employer" school districts to exclude the hours of service of short-term substitutes (although otherwise characterized as variable-hour employees) from the calculation of FTEs for purposes of determining if a school district is an "applicable large employer".

B. Long-Term Substitute Teachers (typically individual assignments of more than three consecutive months)

The IRS proposed rule also discusses the treatment of new, variable-employees who, based on the circumstances at the start date, are expected to work an average of at least 30 hours/week, but for a period of limited duration not to last the entire measurement period. Specifically, the IRS proposed rule states that:

> "[a] new employee who is expected to be employed initially at least 30 hours per week may be a variable hour employee if, based on the facts and circumstances at the start date, the period of employment at more than 30 hours per week is reasonably expected to be of limited duration and it cannot be determined that the employee is reasonably expected to be employed on average at least 30 hours per week over the initial measurement period." 78 Fed. Reg. at 227.

This proposed rule seems reasonable in the case of a long-term substitute placed on a school assignment that is expected to last longer than three months. Though the same concerns arise regarding "double counting", as mentioned in the Short-Term Substitute section above.

However, the discussion in the IRS proposed rule further states that:

> "Effective as of January 1, 2015, ... , ***the employer will be required to assume*** for this purpose that although the employee's hours of service might be expected to vary, ***the employee will continue to be employed*** by the employer for the entire initial measurement period; accordingly, ***the employer will not be permitted to take into account the likelihood that the employee's employment will terminate before the end of the initial measurement period***." 78 Fed. Reg. at 227 (emphasis added).

This language is both problematic and unfair for school districts, as it has the potential to result in school districts not hiring individuals for long-term substitute assignments, and instead breaking up the assignment into a series of assignments of a short-term duration, bringing in different people for each segment, resulting in a lack of continuity in teaching methodologies for students and even the assignment of less qualified teaching staff which could ultimately affect students' educational outcomes. The next example will demonstrate how long-term substitute assignments work in actual practice:

In School District A, a physical education teacher goes on medical leave in mid-January for the rest of the school year (a total of approximately five months) due to a back injury. The P.E. teacher intends to return to the classroom at full-duty status at the beginning of the following school year. School District A brings on Miss T as a long-term substitute teacher to cover the P.E. teacher's classes during his absence. For purposes of this example, assume this is Miss T's ***first*** substitute assignment for School District A, i.e., she is a new variable hour employee.

At the start of her long-term substitute assignment, the school district and Miss T are fully aware that this is a finite term of service for Miss T while she covers the P.E. classes. Miss T works a full-time schedule during the course of her long-term assignment, just as the original P.E. teacher would have, but for the injury. Additionally, the policies and regulations of School District A contain provisions that specifically state that substitutes and "temporary teachers", such as Miss T, are not entitled to benefits of any kind from the school district during the course of their assignments. Also, there is no guarantee that Miss T will have any future substitute assignments, short- or long-term, at the conclusion of this particular long-term P.E. class assignment.

Is Miss T an "employee" of School District A for "large employer" determinations under the IRS proposed rule? It is true that at the start date of Miss T's long-term substitute assignment, she is expected to work an average of at least 30 hours per week during the approximately 5-month period of service. However, once this current assignment is over, School District A will have no basis to reasonably expect that Miss T will work those same hours during the remainder of the measurement period. Thus, Miss T will not experience a "break in service" at the end of the school year, as discussed in the IRS proposed rule. So, would Miss T be considered a part-time employee, even though she worked full-time hours during those 5 months, such that her hours of service should be counted in the FTE hours calculation?

Additionally, school districts would likely find the "Effective as of January 1, 2015, ... required to assume ... will continue to be employed" language problematic in this and similar situations. Specifically, if School District A is a small district, i.e., unlikely to meet – but is close to - the 50-full-time employee threshold, and including Miss T as a "full-time employee" or including her hours of service as a variable-hour employee for FTE hours calculation purposes would push School District A over the 50-full-time employee (plus FTEs) threshold, it seems unfair to now allow a one-time incident (having a long-term substitute) to result in School District A having the responsibilities of a "large employer" for the following school year or applicable stability period, even if School District A is fully aware that Miss T's period of work ***has long since ended***.

Also, it is not uncommon for individuals who are on multiple school districts' substitute lists to have worked primarily for some portion of a school year in one school district, but ultimately be hired on as a full-time employee ***in another*** neighboring (or even out-of-state) school district mid-school-year, as vacancies occur throughout the school year. Thus, it is unclear what the purpose is of the "Effective as of January 1, 2015" language requiring school districts to assume these types of variable hour employees "will continue to be employed" by those districts for the remainder of the initial measurement period. Thus, NSBA would recommend the IRS final rule regarding Shared

Employer Responsibilities exclude such variable hour employees, i.e., short- and long-term substitutes and temporary teachers of any kind, from this proposed "required assumption".

C. Independent Contractors

The IRS proposed rule does not address independent contractors, and it is not clear under what circumstances, if any, a school district may need to include an independent contractor either as a full-time employee or as an FTE in the total employee count for purposes of "large employer" determinations and for the "assessable payment" (i.e., penalty) provisions contained in the IRS proposed rule. The IRS states in this proposed rule that it plans to follow the "common law standard" for determining who is an employee for consideration of shared employer responsibilities. As such, it is unclear if the IRS intends for such employment arrangements to be considered as establishing an employment relationship and thus an independent contractor could come under the definition of an "employee". Since the "common law standard" explained by the IRS in this proposed rule looks at the nature of the work itself being done, and the authority of the employer to direct, supervise, and manage such work, it is worth looking at a few examples of typical independent contractors a school district might engage, and into some of the elements of the employment contracts being entered into.

An independent contractor who performs work for a school district usually does so for a finite period of time. For some independent contractors, the period of work may run longer than three months;[2] for others, it may run shorter. For example, an independent contractor might be a construction company hired to build a new school over the course of a school year. Another might be a private law firm hired under an annually negotiated contract to provide representation to a school board of a public school district in all special education matters before administrative tribunals, and state and federal agencies and courts. Yet another may be a trainer who will provide one week of professional development for a school district's building principals on new employee evaluation procedures. And still another may be a private auditor who will be conducting an internal investigation of a school district's finance department, the audit and final reporting of which is expected to last the duration of one school year or nine months.

Ordinarily, the types of independent contractors suggested above are either self-employed or are wholly separate business entities outside the school district, with these entities administering and managing the health insurance plans of the individuals who will be performing the contracted work for the school district. Another possibility is that, for example, the trainer and/or the auditor, if solo practitioners, might have their own individual health insurance policies or be included in their spouses' policies.

The specifically identified terms of a contract for the services of an independent contractor are usually negotiated between the school board and the independent contractor, and typically are governed by state law. Such contract terms may include the rate of compensation; the scope of work; the expected duration of the contract; what outcomes and forms of work product are expected and by when; the methods and levels of access, if needed, to school property, student/staff records, and

[2] The end of the initial three-month time period of completed service seems to be the important cut-off under this rule for determining if an employer should offer the employee health insurance. Clarification is needed from the IRS as to whether the three months of service needs to be ***consecutive***, and ***at full-time status*** for the district to be required to offer health insurance.

district staff both at school sites and at the Central Administration Office; areas of liability in the event of injury or work stoppages; where the independent contractor(s) would be physically performing their work under the contract; the levels of confidentiality in any information gained by the independent contractor in the course of the work; and most importantly, the degree to which the work under the contract can be directed, supervised, and/or controlled by school district employees.

Also, these independent contractor services contracts may, and typically do, contain provisions, negotiated in good faith, that for the life of the contract, the independent contractor(s) performing the work is not considered an "employee" of the school district, and is not eligible for any health or other benefits typically made available to school district employees. This last provision about the lack of eligibility for health or other district benefits is also sometimes contained in school district policies and regulations, similar to short- and long-term substitutes and "temporary" teachers.

While the construction company, the private law firm, and the trainer would seem to provide the easiest examples of individuals working as independent contractors who would not consider *themselves* to be "employees" of the school district for purposes of this IRS proposed rule, nor likely would the school district, a more definitive statement to this effect from the IRS would be helpful to ensure that all entities are of the same mind with regard to the application of this proposed rule.

The example of the auditor, however, is not as clear. For the sake of argument, assume that while performing her contract, the auditor is given office space at the central administration building, a phone, a school district email address, unlimited access to office supplies and equipment, and is even given a badge to be able to move freely from school to school, and through the various departments. The auditor also has unfettered access to district staff during the internal investigation, and provides regular reports, both verbally and in writing to the superintendent and department of risk management. To some degree, the Superintendent, both directly and through his senior staff, is able to direct the work of the auditor during the course of the contract, but cannot impede the investigation, nor affect the findings and recommendations of the auditor. And during the life of her contract, the auditor averages to work consistently at least 40 hours per week.

Under the IRS proposed rule, would this auditor be considered an "employee" during the life of the contract under the "common law standard" used by the IRS, such that the auditor's hours of service pursuant to the contract must be included in the school district's calculation for determining "large employer" status? If so, would this still be the case even though the contract specifically states that the auditor is not an employee of the district during the life of the contract? In essence, can/does the IRS proposed rule trump whatever language is in the contract that was negotiated in good faith between the school board and the auditor?

Similarly, assuming the IRS would deem the auditor to be an "employee" of the school district, despite the negotiated terms of the employment contract, since the auditor consistently worked at least 40 hours per week for the life of the contract, should the school district have offered the auditor health insurance coverage at the end of the auditor's third completed month of work? If so, would this still be the case even though the contract specifically contains a negotiated provision, which is also consistent with the district's policies and regulations, that the auditor would not be eligible for the district's benefits?

Under this proposed rule, if the IRS should deem the auditor to be an "employee" such that the school district should have offered the auditor health insurance coverage after the end of month three, it seems that the IRS proposed rule is encroaching on a school board's rights with regard to crafting contract language in such transactions. Additional information would be helpful about whether school boards can continue to include language in those negotiated, good faith contracts as to the independent contractor's eligibility for district benefits, including health insurance, and for "employee" status.

D. Individuals Performing Extracurricular or Additional Duties

In addition to staff members that help a school district run day-to-day, there are individuals who perform extracurricular or additional duties for after-school activities for which they receive additional pay above their existing annual school district salary, or a separate stipend whether they are a current school district employee or a private citizen. Such individuals ("coaches") may be athletic coaches, student mentors, leaders of student clubs such as drama or debate, cheerleading, foreign language clubs, music clubs, etc. As school districts of all sizes begin analyzing how the IRS proposed rule is to be implemented, questions have arisen as to how coaches are to be accounted for, both for "large employer" determinations and for determining who must be offered health insurance coverage to avoid the "assessment payments" (the penalty provisions in this proposed rule).

1. Are Coaches "Seasonal Workers" to be Included/Excluded in the FTE Count?

Under the IRS proposed rule, "if an employer's workforce exceeds 50 full-time employees for 120 days or fewer during a calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal workers, the employer is not an applicable large employer." 78 Fed. Reg. at 222 (the "seasonal worker exception"). The discussion in the proposed rule also states that "an employee would not necessarily be precluded from being treated as a seasonal worker merely because the employee works, for example, on a seasonal basis for five consecutive months." *Id.* Lastly, but most importantly, the discussion in the proposed rule related to the look-back measurement method specifically states that "[i]t is not a reasonable good faith interpretation of the term seasonal employee to treat an employee of an educational organization, who works during the active portions of the academic year, as a seasonal employee." 78 Fed. Reg. at 227. This issue is very relevant and significant for extremely small school districts, and for certain individuals in large districts, given the timing and amount of work performed by coaches. To assist the IRS in its analysis of these comments related to coaches, we provide a brief description of how coaching services operate at the school site.

After-school athletic teams and certain other extracurricular activities usually run for a defined period of time during the school year: (Depending on the school calendar,) Fall sports typically run from August to October; Winter sports – February to late March; Spring sports – April to late May. These "seasons" are usually defined by each state's athletic associations. Coaches for these activities typically provide their "coaching" services for two to four hours a day, up to all five school days each week during the particular activity's "season". This does not include any outside "planning" that a coach may engage in to prepare for each practice and/or competitive event. Also, coaches generally do not perform coaching services on a full-time basis in public school districts. These services are provided outside of the regular school day.

In reviewing the proposed rule and its application to coaches, school districts need clarification from the IRS on the following situations:

a. Given the above factual descriptions about how coaching activities operate in practice, can each coach be considered a "seasonal worker", allowing a school district to exclude their coaching hours of service from the calculation for a "large employer" determination?

b. Under the "seasonal worker exception", given that a coach typically performs coaching services for roughly 2-4 hours per day, does that 2-4 hour time period each afternoon constitute a "day" toward the 120-day limit in the proposed rule?

c. If an individual performs coaching services for a separate sport in each of the three seasons, again not at full-time status, is that individual's coaching hours to be included in the FTE count because the 4-month time period has been exceeded? What if even though the four-month period has been exceeded, but the 120-day period has not?

d. When an existing full-time school division employee is also a coach in a given school year, irrespective of for how many seasons that year, and that employee is *already included* in the full-time employee count for "large employer" determinations due to the employee's non-coaching full-time job, does the school district also have to include that employee's coaching hours of service in the FTE count too? Or can the school district exclude the coaching hours of service to avoid "double-counting" that employee? It does not seem fair or reasonable for a small school district that has already included the employee in the count for the full-time work, to then be pushed over the edge into "large employer" status because *that same employee* is also a coach.

e. When a person performing coaching duties, irrespective of the number of seasons each school year, is NOT otherwise employed by the school district in any capacity but is paid a small stipend for the coaching services provided, is that coach an "employee" under the common law standard to be used by the IRS? Even if, for example, that coach has a separate job wholly unrelated to the school district? And if so, is the school district required to include that coach's service hours in the FTE count for "large employer" determinations? Would the outcome change if the non-district-employee coach is also a parent of one of the student-athletes on the team?

E. School Board Members

In some local jurisdictions throughout the country, school board members are paid a small salary or per diem for the work they perform on the school board. However, typically, school board members also have jobs elsewhere during the day that are their primary source of income, or they are simply retired workers who are serving on the school board. Questions that affected school districts have are:

1. Under the IRS proposed rule, are those school board members receiving salaries considered "employees" of the school division, given that the school board itself is the *governing body* of a school district, and is not directed, managed, or supervised by any school district staff, as referenced by the "common law standard"?

2. Since the work involved in being a school board member does not constitute a full-time job, is the school district required to include in the FTE count for "large employer" determinations the hours of service worked by each member in serving on the school board?

F. Re-hired Retired Employees

Many school districts have re-hired employees who have retired from the district or another school district. Such re-hired, retired employees often receive health insurance as part of their retirement package. The IRS proposed rule does not appear to provide school districts with the flexibility to NOT offer health insurance to these rehired retirees who are already receiving health insurance otherwise. It would be beneficial for school districts if the IRS created an exemption or waiver to give school districts the flexibility to accommodate these re-hired retirees.

II. Issues in the IRS Proposed Rule for Which Public School Districts Seek Clarification

In addition to the individual inquiries of clarification raised in Part I, there are certain broader provisions of the IRS proposed rule for which school districts need assistance from the IRS.

As discussed in the IRS proposed rule, a large employer may be "liable for an assessable payment" (i.e., "penalty"), if (a) for any month, any full-time employee is certified to receive an applicable premium tax credit or cost-sharing reduction because the employer did not offer to at least 95% of "its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage (MEC) under an eligible employer-sponsored plan; or (b) if an employer does not offer an MEC to its full-time employees (and their dependents) under an eligible employer-sponsored plan for which the employer covers at least 60% of the costs of the coverage to the employee, or the MEC costs to the employee for self-only coverage is not affordable to the employee.

A. Section 4980H(a) – Employer Offers MEC to at Least 95%

In those states that have collective bargaining for school district employees (not all of them do), some school districts have more than one, and perhaps even several bargaining units within the

district. For example, a school district could have a bargaining unit for its teachers, a bargaining unit for its custodians, a bargaining unit for its bus mechanics, a bargaining unit for its bus drivers, a bargaining unit for the cafeteria workers, etc. And each bargaining unit has its own collective bargaining agreement (CBA) that is negotiated and entered into wholly separate and apart from all the other CBAs. As the health insurance exchanges are coming online in various states, individual school districts are beginning to face an unexpected dilemma, one that was likely unanticipated by the IRS in drafting this proposed rule.

Assume the following facts (which are similar to those some school districts are actually experiencing right now):

- School District XYZ has 1,000 full-time employees. The district has been involved in negotiations of the CBAs for some of the district's bargaining units for the past few months. The district's CBA negotiators are preparing to enter negotiations with the bargaining unit for custodians. The custodians' bargaining unit makes up 10% of the district's full-time employees. As the negotiation period draws near, the custodians' bargaining unit has informed the district that it has been reviewing the health insurance plans becoming available through the state's exchange. As a result, the bargaining unit has decided that it does not want to be offered MEC by the district, and wants the forthcoming CBA to reflect that. The district has notified the bargaining unit that it will not do that, because if that language (not offering MEC) was included in the CBA, the district would be put under the 95% threshold stated in Section 4980H(a), subjecting it to the $2,000 per person penalty in that provision for the other 90% of full-time employees (minus the first 30).

- In response, the custodians' collective bargaining unit warns the district that if it does not include such language in the CBA, the bargaining unit will bring the district before the state's labor commissioner, who may rule in favor of the bargaining unit and order the district to draft a CBA that specifically does NOT include any provision about offering MEC to the bargaining unit.

- Thus, the district will be placed in the untenable situation of either violating the labor commissioner's order and including the MEC offer language in the CBA to meet the 95% threshold, or complying with the commissioner's order and excluding the language in the CBA, but then falling under the 95% threshold and being subjected to an astronomical penalty for each year the custodians' CBA is in effect.

Given that this is surely NOT what the Affordable Care Act intended, how does the school district handle this situation? NSBA recommends creating an exemption or waiver of some sort from this penalty provision when a district is **forced** NOT to offer MEC to at least 95% of its full-time employees *through no fault of its own*. Also, districts question whether the penalty under Section 4980H(a) should be the same whether the employer offered MEC to 94% of its full-time employees, or 0% of its full-time employees? Clarification is needed to assist school districts as they navigate through the implementation of the IRS proposed rule.

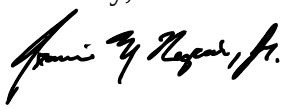
B. Administrative Burdens for "Long-Term" Assignments

Separate and apart from the aforementioned issues regarding long-term substitutes, the IRS proposed rule requested comments on whether any special rules would be appropriate with respect to "short-term employees" (which the IRS seems to define as those employed for three months or less, 78 Fed. Reg. at 229), with regard to the application of the Section 4980H "assessable payments" (i.e., penalties) provisions. In that discussion, the IRS stated that "section 4980H issues may arise for short-term employment exceeding three months." 78 Fed. Reg. at 229. In school district parlance, "short-term employment" assignments typically exceed three months, thus bearing the moniker of "long-term" assignments, but they may not typically last a full school year. The dilemma school districts face is that, under the IRS proposed rule, if an individual takes on a temporary assignment of longer than three months, but not for a full school year, the individual might become an "employee" during the assignment, and the school division would be required to at least offer health insurance coverage to that *temporary* employee by the completion of the third month of service.

The administrative burden of offering health insurance coverage by the end of the third continuous month of service to such a temporary employee, ***knowing*** that the particular employee is only going to be employed for a 4-month or 6-month or whatever ***non-permanent*** period of time is an unreasonable one for the IRS to place on public school districts, given their extremely limited, and ever-decreasing funding resources. The administrative costs and burdens of insuring such an employee for such a limited duration cannot possibly be what the Affordable Care Act intended for public school districts to endure, at the ultimate cost of drawing funding streams away from classrooms and the education of this nation's students and future leaders. NSBA recommends that the proposed rule be revised to incorporate language that removes the requirement that a school district must offer a long-term (more than three months) ***non-permanent*** employee MEC after the end of the third month.

NSBA thanks the IRS for its review and consideration of the issues specific to school districts raised as a result of the IRS proposed rule regarding Shared Employer Responsibilities. NSBA and its members look forward to the IRS' response to, and resolution of, these comments, and urge the IRS to do so in a way that minimizes the potential adverse impact on school districts, and the educational services they provide to our nation's students.

Sincerely,



Francisco M. Negrón, Jr.
General Counsel
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