

July 16, 2013

Mr. J. Mark Iwry
Senior Advisor to the Assistant Secretary and Deputy
Assistant Secretary for Retirement and Health Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue, N.W., Room 3064
Washington, DC 20220

Re: Shared Responsibility for Employers Regarding Health Insurance Coverage (REG-138006-12) and Student Employment in Higher Education

Dear Mr. Iwry:

On behalf of the American Council on Education and the undersigned higher education associations, I am writing to follow up our recent meeting concerning the treatment of student employment in higher education under the proposed regulations concerning employer shared responsibility for employee health insurance coverage. (See 78 Fed. Reg. 218 (Jan. 2, 2013)(“NPRM 4980H”).)

As we indicated in our meeting, we are deeply worried about the effect of the implementation of the Affordable Care Act (“ACA”) on student employment at higher education institutions. In particular, we are concerned that the final regulations will inadvertently impose a terrible choice on colleges and universities: ensuring that needy students have sufficient work necessary to pay for school, or limiting student work hours to avoid additional health insurance costs in already tight budgets. Accordingly, we ask that in crafting the final regulations on this issue, the Department carefully balance the competing concerns of student access to higher education, the central goal of federal higher education policy, and the goal of the ACA to ensure broad access to sufficient, affordable health insurance coverage.

As we discussed in our meeting, there are two broad types of student employment in higher education: 1) students working primarily to earn funds necessary to pay for the cost of college. Often this work is performed on campus; and 2) students working, often though not exclusively, off campus for an employer in an internship or cooperative education program that provides an experiential learning component of the academic program in which the students are enrolled.

Student Employment by the Institution

Institutions work very hard to ensure that students can find sufficient employment to meet their financial needs. Federal higher education policy regards student employment as a form of “self-help” financial aid and promotes it through the Federal Work-Study Program (FWS). This important program provides funds to participating colleges and universities to help pay for part-time employment of undergraduate and graduate students with financial need, allowing them to earn money to help cover educational expenses. Regardless of the funding source, students are employed in virtually all areas on campus, with some jobs directly connected to their educational programs and others less so. In addition, schools sometimes place students in off-campus FWS positions. In some circumstances, the institution remains the student's employer through written agreements with the off-campus entity. Even at mid-sized institutions, student employees can number in the thousands.

In general, students are compensated for these part-time jobs either by the hour or through a salary. Examples of jobs paid on an hourly basis include tutoring, food service, residence hall housekeeping, clerical positions, and security desks. Many institutions limit the number of hours student employees can work so as not to interfere with their academic programs. Often, students with federally-defined financial need who receive an hourly wage are supported by FWS. It is quite common for schools to impose a cap of 20 hours per week under FWS. Examples of students receiving compensation with a salary include resident assistants, graduate assistants, undergraduate student government officers, and students on internships. Payment may be in the form of a single lump sum or payments at regular intervals. The hours of student employees receiving this form of compensation, such as resident assistants, generally are not tracked.

Student employees are not typically covered under an institution's employee health insurance plan. Instead, they receive health insurance coverage in a variety of ways, including through their families' health insurance coverage up to age 26 and under ACA-regulated student health insurance coverage, which schools may subsidize through their financial aid program or provide at no cost as part of a graduate school award package. In addition, as of 2014, students will be able to purchase coverage through individual market exchanges, possibly with premium tax subsidies, or in many states through Medicaid, if income eligible.

Student employees rarely hold a single job on campus where the hours exceed the 30-hour threshold. However, there are instances where students combine one or more jobs that together may exceed the 30-hour threshold. For example, a student may combine a 15-20 hour a week part-time FWS job paid hourly with a job in the residential life system like resident assistant. These student employees are working this number of hours primarily for financial reasons. This presents a significant challenge for institutions because, as noted above, many campus jobs hours are not tracked and schools have little capacity to know whether a student will clear the 30-hour threshold.

In some cases, students earn their FWS awards during the summer, when they may work 30 hours or more per week. Federal regulations allow students to “pre-earn” FWS, but the net wages must be applied to the student's next period of attendance. For example, a school

might award a student \$3,000 in FWS for the 2013-14 academic year, which he would normally earn over roughly 30 weeks (13 hours per week at minimum wage). That student could be permitted to earn some or all of the award during summer 2013 by working more than 30 hours per week.

Again, the primary purpose of campus work is to make higher education affordable to students with need, and to provide work experience related to the academic program. It is with these considerations in mind that we proposed two safe harbors in our regulatory comment letter dated March 18, 2013 in response to the NPRM 4980H: one based on the Department of Labor's approach toward students under the Fair Labor Standards Act and one focused on student employment under a work-study program. As we discussed in our meeting, we continue to believe that those proposed safe harbors, set out again below, provide a reasonable and fair approach to addressing the issue of student employment under the employer shared responsibility requirement:

- ***Nature of Work Safe Harbor***

[A]n appropriate safe harbor would track the existing rules and guidance on employed students for purposes of the Fair Labor Standards Act as reflected in the DOL's *Field Operations Handbook* at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24, considering whether the student works as part of his or her overall educational program, and would also consider any other rulings on the status of particular groups of students from a federal court, the DOL, or the NLRB. We request that the Department issue guidance clarifying that, for purposes of calculating a student's hours under ACA Section 4980H, institutions of higher education may apply the standards set forth in the DOL's *Field Operations Handbook* at sections 10b03(e), 10b11, 10b14, 10b18, and 10b24. To the extent a student works more than one job (either for the college or university or as part of a work-study program), each job should be evaluated independently to determine whether it meets the DOL standards. We also request that the Department issue guidance clarifying that an individual college or university that receives a ruling or determination specific to that institution with respect to the status of a particular group of students may rely on that specific ruling.

- ***Work-Study Safe Harbor***

Other students whose work is separate from their educational programs typically take on such campus roles as a form of financial aid under work-study programs in order to remain enrolled and make progress toward their degree. Such campus roles are not typically considered to be job paths for students as much as a way to support their continued educational progress. As such, these campus roles do not necessarily fit within the "nature of work" safe harbor set forth above. Nevertheless, these positions are a key component of the strategic arsenal of federal student aid programs created to expand opportunities for students who would not otherwise have the financial resources to attend college. Students who participate in work-study programs are afforded access to student health insurance programs by the

institutions they attend. Treating students who hold these work-study positions as “employees” for purposes of ACA Section 4980H places an economic burden on a program that is meant to provide individuals with financial need meaningful access to higher education. It would be an odd result, indeed, to apply 4980H in a manner that would strain institutions’ ability to provide access to higher education to such students, which would include access to student health plan coverage in many instances. We therefore recommend that the Department issue guidance clarifying that, for purposes of calculating the hours worked by a student for purposes of ACA Section 4980H, an institution of higher education may exclude the hours worked by a student who is enrolled in classes at least half-time at the institution and who receives a wage as part of a job under a work-study program.

Students Working as Part of Internship or Cooperative Educational Programs

Since filing our letter on March 18, we have become aware of another area of concern regarding the potential adverse effect of the employer shared responsibility requirement on students engaged in work as part of an internship or cooperative educational program sponsored by a college or university.

Increasingly, colleges and universities are incorporating internships or cooperative educational programs into their undergraduate and graduate academic programs because they aid students in their future careers and enable them to support themselves financially while in school. In these experiential educational programs, students alternate semesters of academic study with semesters as an intern or on “co-op” in full-time employment with a private employer, often off campus, in positions related to their academic or career interests. Students usually work for a semester (3 months) or longer, sometimes “doubling up” co-ops to work for 6-9 months. Some students may even continue working part time for the same employer after returning to classes. Frequently, these internships or co-op placements lead to full-time employment for students post-graduation.

Based on feedback from employers participating in such programs, we are concerned that the ACA’s employer shared responsibility requirements could undermine these experiential education programs. Specifically, if employers believe they are obligated to offer interns or co-op students employee health insurance coverage, they may either limit the length of the internship or co-op placement or, worse, choose not to participate in the program at all because of the additional cost.

As we discussed in our meeting, we propose that the final regulations permit employers to deem students working as part of a college- or university-sponsored internship or cooperative educational program as *per se* seasonal employees exempt from the employer’s obligation to offer health insurance coverage under the employer shared responsibility requirement. We believe such students would not be deprived of health insurance coverage as they are likely to be insured in the manner described above. Further, we recommend that the Department define such internship or cooperative educational programs in a manner similar to the approach codified in Title 20 of the U.S. Code (see 20 USC §1161n or 20 USC §2302).

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Thank you for considering our views. If you have any questions or need additional information, please do not hesitate to contact Steven Bloom at 202-939-9461 or sbloom@acenet.edu.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry W. Hartle". The signature is fluid and cursive, with a large initial "T" and a stylized "H".

Terry W. Hartle
Senior Vice President

TWH/ldw

On behalf of:

American Association of Community Colleges

American Association of State Colleges and Universities

American Council on Education

Association of American Universities

Association of Public and Land-grant Universities

College and University Professional Association for Human Resources

National Association of Independent Colleges and Universities

National Association of College and University Business Officers

National Association of Student Financial Aid Administrators