

Georgetown University Health Policy Institute

CENTER ON HEALTH INSURANCE REFORMS

March 1, 2018

Tim Hauser
Deputy Assistant Secretary for Program Operations
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: Definition of "Employer" under Section 3(5) of ERISA Association Health Plans RIN 1210-AB85

Dear Deputy Assistant Secretary Hauser:

The purpose of this comment letter is to request that the Department withdraw or, failing that substantially delay the proposed regulation "Definition of Employer Under Section 3(5) of ERISA---Association Health Plans". [83 Fed. Reg. 614 (January 5, 2018)] Components of the Department have been served with a Freedom of Information Act (FOIA) (the Request) that seeks the release of important information pertaining to this proposed rulemaking. The attached FOIA Request concerns information, data, statistics and other documents that are in the Department's possession as a result of its enforcement and compliance efforts relating to Multiple Employer Welfare Arrangements (MEWAs), as well as the evaluation of past policy initiatives, regulations, legislation and potential legislation that involved either the regulation of MEWAs or an alteration of the definition of "employee welfare benefit plan" under ERISA that might have expanded the number of MEWAs considered to be single employee welfare benefit plans.

The proposed regulation would broaden certain definitions and requirements under The Employee Retirement Income Security Act (ERISA). The stated purpose of the proposed changes is to permit more employers to form Association Health Plans, a category of MEWAs. The Department admits that "Historically, a number of MEWAs have suffered from financial mismanagement or abuse, often leaving participants and providers with unpaid benefits and bills."(Id. at 631.) The preamble continues by stating that both state insurance regulators and the Department have devoted substantial resources to detecting, correcting and prosecuting wrongdoers. The Department also cites (in footnote 51, Id. at 631) a Gov't Accountability Office Report and two articles detailing the history of financial abuses associated with MEWAs.

What is missing in the preamble is any analysis of the above referenced materials and any data that is contained in those sources. In addition, and perhaps more importantly, what is missing is any presentation of the information, data, or statistics that the Department has in its own files regarding its experience with financially failing MEWAs, or any analysis of the implication of these materials for the costs that the regulation would impose by increasing both the incidence of fraud and the resources required at the federal and state level to police prevent and attempt to remedy such frauds. Similarly missing from the preamble is any discussion of potential methods for preventing such fraud, such as a federal licensing, bonding and actuarial soundness and reserve scheme that might be required for all association health plans or a subset of such of plans (such as AHP sponsored plans that are not fully insured), that should have been included in the NPRM as a means of mitigating the costs associated with the proposal, in light of the missing materials and a reasoned analysis of such materials.

We believe that the data requested from the Department of Labor's own files will demonstrate that the pending NPRM is seriously flawed. The material requested will document a dispiriting and relentless record of fraudulent MEWAS and purported Association Health Plans with characteristics indistinguishable from the entities that the Department legitimizes and seeks to encourage in the proposed NPRM. Tellingly, the NPRM eliminates the requirements that Associations establishing and maintaining employee welfare benefit plans must have "purposes and functions unrelated to the provision of benefits,.. share some commonality and genuine organizational relationship unrelated to the provision of benefits…" and "exercise control over the program both in form and substance." (emphasis added). (Id. at 617.)

Instead the NPRM relies on the mere existence of formal association documents and the inclusion in those documents of the right of Association members to elect the Association's Board of Directors in order to assure that the Association is acting in the interest of its employer members. But the Department's records will show that such nominal and formalistic employer control is a common feature of Associations sponsoring fraudulent MEWAs, easily evaded by having associates of the fraudfeasor act as founding members of the Association who elect the initial Board. Since the fraudulent Associations have no purpose other than the provision of faulty health coverage, the employer members of such Associations have no incentive or inclination to subsequently seek to replace the initial Board, at least until after the fraudulent health arrangement is effectively bankrupt, and the Department files will show that legitimate employers never become (or even seek to become) Board members of Associations that are structurally identical to those that are authorized and encouraged by the NPRM. Likewise, the Department's files will document that fraudulent Association sponsored MEWAs have long gained access to the market for individual coverage by allowing purported employers to self-certify their employer status. The NPRM explicitly permits the very same self-certification that has served to facilitate the rapid expansion of fraudulent Association sponsored employee welfare benefit plans. In short, DOL files will show that under the guise of controlling fraud, the Department does little more than codify the worst practices of the typical fraudulent MEWAs that have bedeviled Department enforcement for decades.

The FOIA Request is intended to bring that information out into the public discourse as part of the cost/benefit and overall analysis of the proposal.

The Department may need some time to complete the production of materials under the Request. In addition, the many interested parties other than the requestor should have access to this material before presenting final comments. Further, the public is properly served only when the Department presents all of the materials coherently and presents their analysis concerning the cost and benefits of the proposal under these circumstances, as well as alternative proposals that might mitigate the fraud.

The time needed for production and then for the Department to do a new analysis and present that data and analysis to the public makes the withdrawal of the current proposal necessary. Even an extension of the current comment period would fail for several reasons. First, an extension would need to be some period of time, at least 60 days, after completion of the production under the Request. That could be a fairly long time after the end of the current comment period in early March. Second, and more importantly, it would fail to put the disclosed information at full public disposal where it belongs in the preamble of the proposal. Finally, the public would lack a full understanding of the Department's comprehensive analysis for proposing an expansion of arrangements with a history of financial fraud and mismanagement without proposing any additional solvency or other substantial safeguards to prevent future financial harm for participants and beneficiaries.

Accordingly, we urgently request that the NPRM published at 83 Fed. Reg. 614 (January 5, 2018) be withdrawn and reproposed after the production of the materials sought in the attached document request and that any reproposal fairly summarize and fully analyze such materials with a view toward appropriately evaluating the risk of fraud presented by any proposal and full discussion of the regulatory steps that might be taken to protect against such fraud, as well as the resources that will be required by the Department to police, prevent and remedy such fraud under the new proposal and alternative proposals weighed and rejected by the Department. In the event that the Department declines to withdraw and repurpose the regulation in light of the materials requested in the FOIA request, the Department should at a minimum, make available online the materials sought by the FOIA request and extend the comment period for 60 days following the completion of production and the online disclosure of the produced materials, so that all commenters have a meaningful opportunity to review those materials and include insights based on the DOL's own experience with MEWAs and Association Health Plans in their comments.

Sincerely,

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