

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Attention: Definition of Employer – Small Business Health Plans RIN 1210-AB85.

Comments on Proposed Rule – Definition of Employer under Section 3(5) of ERISA – Association Health Plans

Background of Commenter:

Brody and Associates, a boutique Labor, Employment, and Benefits law firm representing management in all employment law issues, has been servicing clients nationally and locally since 1997.

Our clients range from international, Fortune 500 companies to small, family-owned businesses. We represent clients in many diverse industries, including many nonprofit entities.

Background of Principal Author of the Comments:

John F. Woyke is an attorney with over 50 years' experience in all aspects of employee benefits law and has advised employers on all aspects of funding and providing health benefits to their employees, including the provisions of the Affordable Care Act (ACA) as it applies to their organization. He is a member of the Connecticut Bar, the American Bar Association, and the American College of Employee Benefits Counsel.

He is also a Member of the American Academy of Actuaries and is a fellow of the Conference of Consulting Actuaries.

Overall Comment on the Proposed Regulation:

We strongly support the proposed regulation and believe it will significantly expand affordable health care coverage in the smaller employer market. We believe the proposed regulation and its extensive preamble, including statements of its purposes and description of its operation, are well crafted and comprehensive.

Based on our knowledge and operation of the existing markets for small and large group insurance, we believe the regulation will expand the availability of affordable healthcare. Furthermore, we believe that the regulation will not significantly affect the operation of state exchanges under the ACA. We base this upon the following observations and experience:

Large Groups Have Economies of Scale:

Based on our experience with larger companies, it is clear there are significant economies of scale in larger groups. For companies with large numbers of employees, their per capita cost of health care is generally less than companies that employ less than 50 employees.

We are also aware of companies that constitute controlled groups and these groups benefit similarly by purchasing insurance as a single employer. In one instance, the controlled group had over 50 members and more than one thousand employees in the combined group.

Existing Rules Effectively Cause Smaller Employers to Subsidize Larger Employers:

Because smaller groups cannot purchase health insurance in the large group market, these smaller employers pay more for health insurance per capita, effectively subsidizing large companies.

The Affordable Care Act (ACA) may have been designed under the assumption that by creating a separate marketplace for smaller employers, these employers could avoid paying this inherent subsidy. However, this did not occur. The proposed regulation will allow smaller employers access to the large group market, and will accomplish this goal.

The Rule is Crafted to Ensure Adequate Protection to Employees:

We believe that the proposed rule is well crafted to ensure employees of these Association Health Plans (AHPs) will be protected. The rule incorporates the financial protections provided under state and federal law by ensuring the Association Health Plans will be considered Multiple Employer Welfare Arrangements (MEWAs) and therefore subject to the registration, antifraud, and financial solvency rules.

Employees are also protected from losing coverage by the incorporation of the health nondiscrimination rules into the regulation. We believe the incorporation of these rules will stop AHPs from dropping groups because of bad experience, whether by denying them access to the plan or by charging discriminatory renewal premiums.

In this context, we note that smaller employers are often encouraged to become nominally self-funded and then purchase stop-loss insurance. Brokers who market these programs blatantly require potential groups to provide health data for their employees. The result may be lower health premiums initially based on the health make-up of the group, but, should the health of employees deteriorate, the group will face high losses and ever-increasing costs for stop-loss insurance, or even outright refusal to renew.

The proposed regulation avoids this by requiring non-health related premiums and guaranteed renewability.

The Rule Would Not Adversely Affect State Exchanges Under the ACA:

The proposed rule has been criticized as an attempt to destabilize the ACA exchange markets. We disagree. First, the ACA markets are already unstable, resulting in high costs of insurance for those not entitled to subsidies. These high costs already have the effect of removing healthier individuals from this portion of the market. We believe the proposed regulation will have the effect of increasing coverage in the small plan market. While some of the participants would have otherwise purchased insurance on an exchange, we believe this effect will be small and would be outweighed by the increase in total coverage.

Specific Comments:

As noted above, we believe that there is a significant societal good from encouraging smaller employers to form AHPs. In light of this fact, we recommend expanding the availability of AHPs.

Special Need to Cover 501(C)(3) Organizations:

The rule requires members of the association have a commonality of interest. This is defined as being in the same trade, industry, line of business or profession or, alternatively, having a principal place of business in the same State or metropolitan area.

We suggest all tax-exempt employers be considered as having a commonality of interest. Small charities have few employees and are burdened by current rules as well. While many of these could be considered in the same trade or business, such as tax-exempt schools, the charitable purposes of small charities vary widely. Requiring them to be in the same trade or business would only serve to make many ineligible to join an association large enough to obtain the needed economies of scale.

We suggest adding words such as “or being exempt from income tax under Section 501 of the Internal Revenue Code” to “trade, industry, line of business or profession.”

Recommendation That the Regulation Include Language Discussing Associations That Have an Additional Purpose Besides Purchasing Health Care:

The section dealing with commonality of interest does state that commonality of interest is based on all facts and circumstances and may be established by showing members are in the same trade, industry, line of business or profession. The criteria for showing other facts and circumstances are not set forth in the text, however. The explanatory preamble does state the prior rulings, which require the association have a purpose other than the provision of health insurance, still apply. We believe the regulation should contain specific language outlining and perhaps clarifying that this rule should be included in the text of the regulation itself. We suggest in addition to the same trade, industry, line of business or profession (and, if our prior comment is accepted) being tax-exempt, the regulation would add reference to associations that provide significant services other than the purchase of health insurance.

Coverage of Prior Employees:

The regulation provides employees or former employees of members may be covered. The proposed language does not explain what would happen if the employing entity were to cease business. This leaves former employees at risk of losing their coverage through no fault of their own.

This is a particular risk for sole proprietorships and other entities that have no employees other than the owners or owners.

We suggest either the regulation itself or the explanatory material would make it clear that former employees who have been continuously covered can continue their coverage under the same terms as if they were sole proprietors, by paying premiums and membership dues as if they were a sole proprietorship.