



March 6, 2018

The Honorable R. Alexander Acosta
Secretary of Labor
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210-AB85

Submitted electronically via www.regulations.gov

Dear Secretary Acosta:

The National Retail Federation appreciates the opportunity to submit comments on the proposed regulation, “Definition of ‘Employer’ under Section 3(5) of ERISA – Association Health Plans.” The regulation was issued by the Department of Labor (DOL) on January 5, 2018.

NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation’s largest private-sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation’s economy. NRF.com

NRF has long advocated for association-based coverage and has supported many previous legislative efforts to expand Association Health Plans (AHPs). NRF strongly endorsed the House-passed Small Business Health Fairness Act (HR 1101) in the current Congress. Jon Hurst, president of the Retailers Association of Massachusetts, testified in support on NRF’s behalf in the House Education and Workforce Committee on March 1, 2017.

We commend the Trump Administration and DOL in particular for advancing the ability of small businesses to join together through association health plans to provide greater access to affordable health care for their employees. In doing so, this regulation would offer small businesses access to many of the same cost savings available to larger employers under ERISA.

Group health benefits are the key to coverage for more than 170 million Americans. But, not all groups are created equally. NRF has long noted the discrepancy between health coverage options available to smaller and larger companies and thus has supported legislation to help bring more favorable coverage options to smaller employers.

Group health coverage balances the risk of health care utilization between younger and older employees, healthy or less so. Employment-based group coverage can be distinguished from public pools because employees come to the business to work rather than to seek coverage, as opposed to a public pool where the sole objective is to obtain coverage. The difference in presentation of risk, though subtle, is important. Private, employment-based group plans work better than public pools and provide more affordable coverage options.

Smaller employers have fewer employees to balance their employees' various risk profiles. Strategies taken by the Affordable Care Act – the SHOP plans and the rather byzantine small business tax credit – have not helped smaller employees. Steps must be taken to better support these smaller businesses in providing coverage.

Association Health Plans are an important answer in our view. Not only do they offer the potential to band with additional small employers in their local state through bona fide trade or professional associations, but it also offers potential to band together with other employer groups in other states utilizing the federal ERISA law to maintain common benefits across state lines.

These benefits will necessarily have to be robust to compete with other market participants. Employers do care about the cost of coverage, but more importantly, employers care about the quality of coverage offered to our employees and their dependents. We specifically reject the proposition that AHPs will lead a race to the bottom of coverage.

Our reputation as a long-established and well-respected trade association is at stake as would be our continued membership were we to offer less than quality coverage. We are a trade association first and foremost, not an insurance company. Still, we will have the opportunity under the regulation to sponsor a properly constructed AHP in order to help more small retailers find affordable coverage option. We may also be able to sponsor regional coverage with multiple state retail associations in geographically contiguous areas.

NRF strongly favors the present regulatory emphasis on bona fide trade associations. Trade associations – especially long-established trade associations like NRF – have built-in advantages over AHPs formed solely for the purpose of offering health coverage. Our focus is necessarily first and foremost on our members' needs and interests. Our advocacy and educational programs provide a solid foundation to which AHP sponsorship would be an addition. A decision to sponsor an AHP necessarily would be taken with concern for our larger membership focus.

A. Employers Could Band Together for the Single Purpose of Obtaining Health Coverage

The proposed regulation would go beyond the traditional role of bona fide trade associations in forming AHPs to allow employers to join together in organizations that offer group health coverage to member employers and their employees in one large group plan. The proposed regulation would allow these groups to form around (1) the same trade, industry, line of business or profession, or (2) around geographical terms, either up to the boundaries of their same state or the same metropolitan area, even if that exceeds state boundaries. We urge DOL to move cautiously in expanding the definition of employers under ERISA to include single purpose AHPs.

NRF believes that bona fide trade association AHPs are superior to single purpose AHPs because a bona fide trade association has dominant interests beyond health coverage, including advocacy focus, membership and reputation. We also fear that, absent higher barriers to entry, single purpose AHPs could prove unstable or more fraud prone, like many past Multiple Employer Welfare Arrangements (MEWAs). The failure of one AHP to pay medical claims will tar all AHPs, more-or-less equally. Opponents of AHPs will only be too willing to trot out well-worn arguments against all AHPs, given practically any pretext.

We do think that franchised operations might offer a stronger case for single purpose AHPs. A franchisor could offer franchised stores or restaurants membership in a single purpose AHP or sponsor a separate single purpose AHP for its franchisees. In this case, the single purpose AHP would be more like a bona fide trade association with resources, reputation and regard for franchisees. NRF represents many chain restaurants through our division, the National Council of Chain Restaurants.

We do share a concern raised by others regarding whether a plan offered by a franchisor to franchised stores or restaurants might support a finding that employees of franchised stores or restaurants are jointly employed by the franchisor. We urge DOL and Congress to consider structuring a safe harbor for AHPs offered in a franchised structure from potential joint employer liability.

We are also concerned by geographic criteria supporting single purpose AHPs. We urge DOL and states to monitor definition of geographic areas for potential discrimination. Redlining of geographic areas for insurance purposes is not unknown or a facet of the remote past. AHP boundaries should not be gerrymandered or quartered by risk.

B. The Group or Association Must Have an Organizational Structure and Be Functionally Controlled by its Employer Members.

NRF supports the proposed regulation's requirements for a clearly-defined organizational structure functionally controlled by its employer members. But, such a structure will require a detailed review and ongoing oversight to determine control. In addition, financial, fiduciary and regulatory obligations will need to be clearly spelled out. Federal requirements alone pertaining to a large group plan are quite complex and time consuming. AHPs will not function in a Hobbesian state of regulatory nature but rather will need to be able to navigate a complex society of rules and requirements. Outside agencies such as third-party administrators and large brokerages may be able to help. But, ERISA's fiduciary obligations will remain.

C. Group or Association Plan Coverage Must be Limited to Employees of Employer Members and Treatment of Working Owners

NRF appreciates the distinction DOL draws between employers, employees and others. The essence of association plans is commonality of interest beyond obtaining coverage. We agree that to do otherwise would essentially promote unlicensed group health coverage inconsistent with ERISA and state requirements. The potential presence of former employees (absent COBRA coverage) is more troubling. We urge DOL to provide greater clarity here.

The proposed definition of sole proprietors as "working owners" for coverage purposes also is a little more troubling. We recognize the dysfunction of many exchange markets with perhaps a single health plan available to individuals, including sole proprietors. But, sole proprietors are uniquely subject to financial pressures and may not be able to maintain payments to an AHP on a regular basis. Restoration of a strong individual and small group market might provide better options for working owners than an AHP.

Perhaps only permitting entry into plans on a very limited open season basis might help promote greater stability. In addition, allowing self-attestation by business owners might be too difficult for an AHP to verify. Other documentation – such as a current Schedule C, a business license or a history of paid invoices could provide greater assurance that a working owner is exactly that.

D. Health Nondiscrimination Protections

NRF supports extension of HIPAA and ACA nondiscrimination provisions to AHPs, but urges caution in application against existing association health plans. This is less an issue for bona fide trade associations: our overriding interest in obtaining new members and retaining existing members outweighs any potential benefit of selecting between potential members based on industry or health status of a member employer's employees. Our reputation and strength in advocacy is at stake.

We believe that competition will help guard against any desire to tailor benefits, e.g. to attract healthier employer groups. The association business is highly competitive on membership. An association that offers substandard or gimmick-ridden coverage will quickly find membership difficult to maintain. But, nondiscrimination protections will be a welcome addition.

E. Conclusion

NRF sincerely appreciates the opportunity to provide comments on the proposed rule. We look forward to working with you in the year ahead. If you have any questions or need additional information, please do not hesitate to contact Neil Trautwein, NRF Vice President for Health Care Policy at either (202) 626-8170 or trautweinn@nrf.com.

Sincerely,

A handwritten signature in black ink, appearing to read "David French". The signature is stylized and cursive.

David French
Senior Vice President, Government Relations
National Retail Federation