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U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
Washington

Submitted Electronically

**Re: RIN No. 1210-AB85
Public Comment to Notice of Proposed Rulemaking at 83 Fed. Reg. 614 – 636 (“the NPRM”)**

Thank you for the opportunity to comment on the above-referenced NPRM. This comment will address, and oppose, a premise that evidently underlies the controversy around the NPRM, and fuels Labor’s aim to make available loopholes for “large employers” left in certain market reforms after the Affordable Care Act. That is the claim that the employees of “small employers” can be transformed into employees of a “large employer” by the Association Clause of ERISA, §3(5).¹ If that were true, such employees face lower-quality health coverage, to the extent such reforms have loopholes, when the coverage arrangements involving a set of employers is legally sufficient — whatever the true criteria may be — to trigger the Association Clause’s creation of fictive “employer” status. This comment contends that this claim is contrary to law and unauthorized.

¹ 29 U.S.C. § 1002(5).

Legal abbreviations herein are as usual. ERISA: Employee Retirement Income Security Act, Pub. L. 93-406 (1974). HIPAA: Health Insurance Portability and Accountability Act, Pub. L. 104-191 (1996). ACA: Patient Protection and Affordable Care Act, Pub. Laws 111-148 together with 111-152 (2010). PHSA: Public Health Service Act; because sections of interest here are all in its Title XXVII, which was initially added by HIPAA, §§102 and 111, specification of that title is usually omitted, except to say “Original Title XXVII” to mean the initial 1996 version. IRC: Internal Revenue Code (redesignated as “of 1986” by Pub. L. 99-514, though some sections of interest here pre-date 1986, including ones added by ERISA, Title II).

References to those acts generally will include all amendments. However, a reference like “Original ERISA” will mean just the initiating public law mentioned above, before amendments. A term like “the ERISA Congress” will mean the Congress that enacted such public law.

“The Association Clause” means the ending clause of ERISA, §3(5) — “[The term ‘employer’ ...] includes a group or association of employers acting for an employer in such capacity” — although its meaning, such as the modification “acting for an employer in such capacity” might draw on what precedes it. It is of course the provision that Labor seeks to exploit by this NPRM.

“EWBP” means employee welfare benefit plan, the status of which for a scenario about health coverage has many legal consequences, though those questions are tangential to the disputed use of the Association Clause critiqued here.

An initial issue faced by the NPRM and this comment is: Is the NPRM actually making that claim? The text of the rule being proposed does not impose it on participants of the affected plans. It merely puts into regulation some criteria for triggering the Association Clause, while making them to be more expansive than current sub-regulatory ones. But the policy argument made in Labor's Preamble to the NPRM (hereinafter, "the Preamble") is that lowering the quality requirements for employer-sponsored plans will make them cheaper. Throughout, it disfavors the market reforms added by the ACA, necessarily targeting on those where the ACA apparently left a "large employer" loophole. E.g.: "Expanding access to AHPs will also allow more small businesses to avoid many of the PPACA's costly requirements."² "The ACA has caused individual and small group insurance premiums to increase significantly."³

The claim made for aggregating employee-counts is set out straightforwardly at 83 Fed. Reg. at 618, cols. 2 – 3, and implicitly at 615, col. 2,⁴ and at 619, cols. 1 - 2.⁵ The link of that claim with the desired reduction in coverage quality, and thus price, pervades the Preamble. Failure to object now to the aggregation claim risks the result that it will become effective law without objection, despite the hopping from foot to foot that objection might engender, like with a rejoinder that in all strictness the aggregation claim was not in the scope of this NPRM.⁶ With

² 83 Fed. Reg. at 615, col. 1. "AHP," for "association health plan," seems to be a term broadly and fuzzily covering a range of real-world scenarios where multiple employers — actual or "first-instance" employers rather than ones so labelled by the Association Clause — join in arranging for some health coverage for employees, in some way. "AHP" does not appear in any statutes relevant here, and so of course has no legal definition.

The NPRM uses the term often throughout the Preamble (but not in the rule text), and often it is evidently not concomitant to the term "bona fide group or association of employers" or "BFGAE," a term discussed below, accompanying fn. 13. That is, it is not the case that "AHPs" are exactly those plans established or maintained by BFGAEs. Rather, some but not all AHP scenarios successfully meet the criteria for the "group or association" to be a BFGAE. The NPRM means to expand the set of AHP scenarios that are BFGAE scenarios. The quoted sentence of the Preamble, extolling "access to AHPs," might be a place where such concomitance is intended, in that a "large employer," a BFGAE, is recognized that can evade "costly requirements."

³ 83 Fed. Reg. at 616, col. 1. Just preceding the quoted sentence, the Preamble disingenuously calls "high-quality" the coverage that it aims to impose on affected employees, while promoting its increased "affordab[ility]." Unless the Government is committing to the belief that "free lunches" do exist, the desired lower cost can only result from regressions in quality.

⁴ "Thus, unless the association plan is treated as a single ERISA-covered plan, the size of each [member-employer] determines [that member's small-group/large-group status.]"

⁵ "However, these proposed rules would apply solely for purposes of Title I of ERISA and for determining whether health insurance coverage is regulated by PHS Act provisions that apply in the individual, small group, or large group market, and not, for example, for purposes of taxation under the Code." The only way the NPRM could affect the small/large determination is by imposing an aggregator rule upon employee counts. The unexplained final clause of the quoted sentence will be mentioned again below.

⁶ Additionally, the ultimate issue about aggregating employees is the meaning of "large employer" in ACA, §1304(b)(1). That meaning seems primarily in the purview of Health and Human Services, not Labor. But the vagaries of Health and Human Services and Labor engaging in a leapfrog strategy, to end up in weakening ACA protections, cannot be ruled out.

the Government now committed to quality reduction, every step in that process needs to be opposed whenever presented.

Bearing in mind the perplexities just described, the prime legal effect of the NPRM is to loosen criteria for triggering the Association Clause. But that issue this comment will not reach, except for occasional notes. The same is true of the “working owner” issue within that criteria discussion, and of the many issues of the negative impacts of the NPRM. Such impacts are all important, but other commenters — inside and outside this NPRM process — surely will be cover them well.

The apparent losses of participants’ rights are as to essential health benefits (“EHB”) per PHSA, §2707(a),⁷ the single risk-pool requirement per ACA, 1312(c),⁸ and the long-run benefits to health consumers of risk adjustment under ACA, §1343.⁹ While PHSA, §2701(a)(1)¹⁰ (popularly known as “community rating” for insurance premiums) also has an apparent loophole, the effect is complicated by the addressing of premium discrimination in PHSA, §2705(b)(1):¹¹ The latter alone would leave open regressive discriminations other than health-status, that §2701 does cover, and depends on uncertainties about what a “similarly situated individual” is. The NPRM is roughly in accord with this list, 83 Fed. Reg. at 618, cols. 1 and 2, though regrettably regarding the nullification of those protections as beneficial.

The loss of EHB rights, for instance, is not just a degradation of coverage for those under such plans, but tends to splinter the markets, causing cost increases for those in compliant sub-markets.¹²

Terminological Conventions

This comment will use the term “bona fide group or association of employers” (hereinafter, “BFGAE”) as Labor has coined it.¹³ There is some misfortune there, in that it

⁷ 42 U.S.C. § 300gg-6(a).

⁸ 42 U.S.C. § 18032(c).

⁹ 42 U.S.C. § 18063.

¹⁰ 42 U.S.C. § 300gg.

¹¹ 42 U.S.C. § 300gg-4(b)(1).

¹² Criticisms already in the record include the March 8, 2017 letter of the American Academy of Actuaries, noted by the NPRM at n. 21, and the comment by Mark Hall, Professor at Wake Forest University (posted February 16, 2018). Prof. Hall includes a weighty showing that foreseeable cost reductions from administrative economy and bargaining power are much less than touted, while substantial reductions would come only from the “mechanisms [of] risk selection and reduction of benefits.” *Id.* at 1.

¹³ See, e.g., Labor’s 2013 guidance, “MEWAs: Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and State Regulation,” at 8, 22 (hereinafter, “MEWA Guide”) or apparently in the proposed new 29 C.F.R. §2510.3-5(b).

resembles the term “bona fide association” that is used in the PHSA.¹⁴ The term is understood to denote what the Association Clause calls a “group or association,” whose characteristics — in the whole context, which may include characteristics of the putative “plan” in question — are “sufficient” or “qualifying” (perhaps terms preferable to “bona fide”) to effect the work of the clause, which is to include such entity in the term “employer” (with respect to the health coverage provided to individuals it does not actually employ).

This comment will, for shorthand and clarity, use the term “Employee-Count Test” to mean a rule where some effect depends on the number of employees of an employer being greater than, or not, a given number. An example is the central one for this NPRM, of ACA, §1304(b)(1) and (2).¹⁵

The term “Employee-Count Aggregator” will mean a rule that, given a set of actual employers, takes the sum of their employee-counts, and makes it, in legal contemplation and for purposes of some Employee-Count Test, the “employee”-count of some new “employer,” the latter being a legal fiction that the rule has also effectively created. An example that is clear, and

¹⁴ The PHSA significance of “bona fide association” (“BFA”) is different from that of the Association Clause. Now it affects issues about insurers’ duties of guaranteed renewal, PHSA, §§2703(b)(6) and 2742(b)(5) (42 U.S.C. § 300gg-2(b)(6) and 300gg-42(b)(5)), also in the effectively obsolete §2741(second e)(1) (§300gg-41(second e)(1)) on guaranteed issue. In the Original Title XXVII and before the ACA, BFA also figured in the guaranteed issue section, §2711 (prior 42 U.S.C. § 300gg-11) at (f); and the section the ACA moved to §2703 was at §2712 (§300gg-12).

Also, the BFA definition at PHSA, §2791(d)(3) (42 U.S.C. § 300gg-91(d)(3)) has some resemblance to various criteria for a BFGAE (both in Labor’s existing sub-regulatory policy and the expanded criteria under the NPRM). An especially critical element in the former, §2791(d)(3)(B), that the latter lacks is that the entity’s formative purpose is “other than obtaining [health] insurance [coverage].” That missing requirement that the health plan is only incidental is, of course, sparking major concern that the NPRM will enable pretextual uses of the Association Clause. Compare, MEWA Guide, at 8, where formative purpose is a “factor.”

¹⁵ 42 U.S.C. § 18024(b)(1) and (2)(defining “large” and “small” employer to be those with employee counts over, or not over, 50). That distinction of course then informs the definition at subsec. (a)(3) of the same section, where employees’ health coverage, per a “group health plan,” is legally classified in the large group or small group market.

The ACA Congress renewed those definitions, that are also found in the PHSA, §2791(e)(2) – (5) (42 U.S.C. § 300gg-91(e)(2) – (5)). It did so also with the definition of “group health plan,” at ACA, §1301(b)(3) (42 U.S.C. § 18021(b)(3)) which continues to refer back, intermediated by PHSA, §2791(a)(1), to the definition of EWBP at ERISA, §3(1) (29 U.S.C. §1002(1)). Further, that Congress, through §1551 (42 U.S.C. § 18111), generally adopted all the PHSA, §2791 definitions. Those have included, in the 1996 original at subsecs. (d)(5) and (6), definitions of “employer” and “employee” *simpliciter*, that incorporate those of ERISA, §3.

Those affirmances, by the way, counsel strongly against Labor now having authority to amend the rule at 29 C.F.R. §2510.3-3(c)(1), in place when the ACA was enacted, against so-called “working owners” also constituting “employees,” to support the NPRM’s aim to gather such businesses together into a “large group,” at least for purposes of ACA, §1304(a). *See also, Meredith v. Time Ins. Co.*, 980 F.2d 352, 356 - 358 (5th Cir. 1993).

explicitly tied by the ACA Congress to the last-mentioned Employee-Count Test, is ACA, §1304(b)(4)(A),¹⁶ reading:

(4) Rules for determining employer size

For purposes of this subsection—

(A) Application of aggregation rule for employers

All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of title 26 [IRC, §414] shall be treated as 1 employer.

Also, the term “Entity-Unifier” will mean a rule that, given a set of actual legal entities, causes them to become one, in legal contemplation and for purposes of some other rule where it matters whether they are treated as a unity, or separately. This is a legal fiction, in the effective creation of the new, single entity, and in the annihilation of the separate existence of the “members.” Entity-Unifiers are found often in the statutes in this field, and often use a phrase like “treated as,” “considered to be,” or “deemed to be,” before “one (or a single) employer.” An example is ACA, §1304(b)(4)(A), above. All Employee-Count Aggregators are also Entity-Unifiers (as the terms are intended for this comment). But there are Entity-Unifiers that are not Employee-Count Aggregators, i.e. the other rule for which unification matters is not an Employee-Count Test.¹⁷

¹⁶ 42 U.S.C. § 18024(b)(4)(A). The clarity that ACA, §1304(a)(4)(A) is an Employee-Count Aggregator comes first from its context. It is expressly “[f]or purposes of [the] subsection” in which it sits, i.e., (b). The only legal rules for which employee count matters in subsec. (b) are the large/small employer definitions in paras. (1) and (2), which are Employee-Count Tests.

Secondly, the headings of par. (4) and subpar. (A) expressly tell us that they are “for determining employer size” and that (A) is an “aggregation rule.” While this is not an occasion where doubt is left, after context review, “the heading of a section [is a] tool[] available for the resolution of a doubt about the meaning of a statute.” *E.g., Yates v. U.S.*, 135 S. Ct. 1074, 1083 (2014)(citations omitted).

ACA, §1304(a)(4)(A) renewed and re-affirmed the enactment by the HIPAA Congress of the same rule, and tie to the “large group market” issue, at PHSA, §2791(e)(6)(A) (42 U.S.C. § 300gg-91(e)(6)(A)). Had there been any difference in the definition of “large,” or of the connected Employee-Count Aggregators, at least for purposes of any Title XXVII provision newly added by ACA, Title I, like §2707 mandating EHB, it seems that ACA, §1304(a) would prevail, as it expressly applies to all “[I]n this title [Title I].” 124 Stat. 171. ACA, §1551 (42 U.S.C. § 18111) need not have played a role. But the definitions of “large group market,” “large employer,” and the Employee-Count Aggregators, are substantively identical between the pre-ACA and ACA ones, making it unnecessary to decide which route made ACA, §1304(b)(4)(A) an Employee-Count Aggregator applicable here, and the sole one clearly laid down by Congress.

¹⁷ For one example now, see ERISA, §3(40)(B)(i) (29 U.S.C. §1002(40)(B)(i), where the purpose is to determine whether one or multiple “employers” exist in the scenario, the latter being needed to meet the definition of MEWA. Actual multiple employers with the stated “control” characteristic are fictively made one (thus precluding existence of a MEWA). Indeed that particular point has significance for this NPRM and comment, seen below, accompanying fn. 27.

Language like ACA, §1304(b)(4)(A) achieves such annihilation of the separate existence of the members, by acting first upon them, and not only upon the resulting uniting entity. The former are the “all persons” that are the subject of the sentence. They have “treatment” (or “consideration” or “deeming”) meted out to them, namely of merging into the one entity, losing what is otherwise their separate existence. This is what this comment means by the unification of the entities.

With this understanding already, one sees the crucial contrast with the Association Clause. It acts upon the additional fictive entity,¹⁸ but nothing in it acts upon the involved members of the set of actual employers. The latter are not “treated as” anything. Thus the Association Clause is not an Entity-Unifier at all, and accordingly cannot be an Employee-Count Aggregator. This point will be expanded shortly.

The Merits of the Employee-Count Aggregator Claim: Review of Support and Introduction to the Text

What law is there in support of the claim that the Association Clause is an Employee-Count Aggregator?¹⁹ The Preamble, 83 Fed. Reg. at 618, cols. 2 and 3, provides no analysis of statutory text, with such aides as statutory or legislative history, or perhaps caselaw. Its entire reliance is on a 2011 guidance by CMS,²⁰ quoting its complete relevant passage at said col. 3. There again, the claim is mere assertion without argument. In contrast to this absence of support for the Employee-Count Aggregator claim, the defects of that claim begin with text.²¹

With a first textual pass, staying within the four corners of §3(5), the claim that the Association Clause is an Employee-Count Aggregator is simply false. In a situation of a BFGAE — no matter the effective criteria for that status — the Association Clause makes that entity a fictive “employer” (such that it would not be an “employer” in the absence of the Association Clause). That status as “employer” might be significant for all sorts of purposes in ERISA. But it does not at all go to make employees of the constituent employers of the BFGAE into fictive

¹⁸ The clause might not create a new entity, the “association,” in that the latter might well have substantial existence otherwise — with a name, a charter, a budget, an office, its own actual employees, etc. What the clause does create is satisfaction of the word “employer” — in a way additional to that of having its own actual employees — for purposes of satisfying the need for involvement of an “employer” to make a health plan an EWBP.

¹⁹ Where this comment refers to just “the Employee-Count Aggregator claim,” it is meant to be such claim being made about the Association Clause.

²⁰ Centers for Medicare and Medicaid Services within Health and Human Services. The document is dated September 1, 2011 and its subject is “Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through, Associations.”

²¹ *E.g.*, *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)(“[W]e begin ... in any exercise of statutory construction with the text of the provision in question ...”), *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)(“If the statutory language is plain, we must enforce it according to its terms.”)

“employees” of that entity; and such individuals are certainly not *actual* employees of that entity either.²² The Association Clause says nothing about the legal attributes of such individuals at all. Those making the Employee-Count Aggregator claim would need an additional provision — within the Association Clause, §3(5), or somewhere — to effect that fictional transformation. It is simply not there; and their claim is unsupported.

Not only is there an absence of the needed extra provision, to fictively make members’ employees into “employees” of someone who does not actually employ them, Congress followed §3(5) with the definition of “employee” that simply affirms its ordinary English meaning, in contrast to the special, and fictional, manipulations it made to “employer”: “The term ‘employee’ means any individual employed by an employer.” ERISA, §3(6).²³

For the purposes in ERISA where coming under the term “employer” matters, one need only look to §3(1), and the question whether there is an EWBP. This is the fundamental issue of ERISA’s scope, and a core basic element is that the “plan, fund, or program” is “established or maintained by an employer or employee organization.” “Employee organization” means a labor union in the common sense, and the §3(4) definition expands to some other possible scenarios. But the present context presupposes that the “employee organization” prong is not involved, and the question comes down to whether the establisher/maintainer is an “employer.”

Thus if there is a plan that serves employees of a set of employers, but no one of those employers is the “establisher/maintainer,” and rather such employers’ “association” is the “establisher/maintainer,” then absent the Association Clause fictively applying the word “employer” to that association, there is no EWBP.²⁴ That effect of the clause, regulating the fundamental issue whether scenarios are subject to ERISA, is plenty of “work to do.”²⁵

²² This is not to be confused with the “association” often being an organization with substantial activities, and staff in its own right. That entity would be an actual “employer,” of course, as to such staff. But those are not employees of the member employers, which the NPRM seeks to use in manufacturing a “large employer” out of those members’ smaller workforces.

²³ 29 U.S.C. §1002(6).

²⁴ The same result occurs, with the clause in place, where the scenario does not meet criteria to make the “group or association” a BFGAE. *See*, MEWA Guide at 8 – 9, where Labor continues with the view that there still could be multiple ERISA-subject plans: “Where no bona fide group or association of employers exists, the benefit program sponsored by the group or association would not itself constitute an ERISA-covered welfare plan; however, the Department would view each of the employer-members that utilizes the group or association benefit program to provide welfare benefits to its employees as having established separate, single-employer welfare benefit plans subject to ERISA. In effect, the arrangement sponsored by the group or association would, under such circumstances, be viewed merely as a vehicle for funding the provision of benefits (like an insurance company) to a number of individual ERISA-covered plans.”

²⁵ That is, it well heads off any concern that if the Association Clause is not made into an Employee-Count Aggregator it would be surplusage. *See*, *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 485 (2012), *citing*, *TRW Inc. v. Andrews*, 534 U. S. 19, 31 (2001).

Labor’s Correct Reading of §3(5) as to the “Members” and the “Employees”

Remarkably, Labor agrees with all the premises about the Association Clause, essentially that it does not destroy the existence of the “members” as “employers,” that underlie the foregoing. MEWA Guide, beginning at 20, examines the question whether a scenario contains only a “single employer,” which would thus fall outside the definition of “MEWA.” Turning to scenarios that might meet criteria for existence of a BFGAE (per the Association Clause, that is), the guide at 20 first confirms that the significance — the ample “work to do” — of meeting BFGAE criteria is to make it the establisher/maintainer of a plan within the meaning of ERISA, §3(1):

As discussed earlier, the Department has taken the position that a bona fide group or association of employers would constitute an “employer” within the meaning of ERISA Section 3(5) for purposes of having established or maintained an employee benefit plan.

The analysis then turns to the question for the MEWA definition of how many “employers” are there, where a BFGAE exists? It necessarily must address the fate of the member employers: do they lose their existence, as “employers”? The answer is “no,” in that, in the first sentence that follows, there is not a “single employer” to defeat the MEWA definition: the sentence is saying there is a multiplicity. The guide next confirms that a “member” is not some sort of Potemkin “employer” that has lost its employees, rather that such individuals remain employees of *the member, not of the BFGAE*, per the sentences emphasized in the following:

However, unlike the specified treatment of a control group of employers as a single employer, there is no indication in Section 3(40), or the legislative history accompanying the MEWA provisions, that Congress intended that such groups or associations be treated as “single employers” for purposes of determining the status of such arrangements as a MEWA. *Moreover, while a bona fide group or association of employers may constitute an “employer” within the meaning of ERISA Section 3(5), the individuals typically covered by the group or association-sponsored plan are not “employed” by the group or association and, therefore, are not “employees” of the group or association.²⁶ Rather, the covered individuals are “employees” of the employer-members of the group or association.* Accordingly, to the extent that a plan sponsored by a group or association of employers provides benefits to the employees of two or more employer-members (and such employer-members are not part of a control group of employers), the plan would constitute a MEWA within the meaning of Section 3(40).

²⁶ This is consistent with the guide’s discussion of “who is an ‘employee,’” at 24, where it acknowledges that an employer-employee relationship does not necessarily exist with an entity, specifically including a “group or association,” that has been made an “employer” by the definition: i.e., a BFGAE. It notes the unadorned definition at §3(6) of “employee” to reinforce that such person must be in an employer-employee relationship with the putative “employer,” which relationship does not exist where the latter is merely a BFGAE.

In sum, the Association Clause is not even an Entity-Unifier (in that the members do not vanish as “employers”), and certainly not an Employee-Count Aggregator in that employees necessarily cannot be “treated as” (which would be a fiction) the workforce of the BFGAE.

Additionally, the above Labor analysis correctly contrasts the effect of the “control group” provision within the MEWA definition, ERISA, §3(40)(B)(i)²⁷ with that of §3(5), in the above first sentence and in the parenthetical in the final sentence. The former does effectively destroy the existence of the members, leaving a single employer, while the latter does not. Again, the former is an Entity-Unifier, and clearly so, by acting upon the members of the “group” just as ACA, §1304(a)(4)(A) does. ERISA, §3(40)(B)(i), unlike ACA, §1304(a)(4)(A), is not also an Employee-Count Aggregator: there is no question of “how many employees” for §3(40), only of “how many employers”?²⁸

Statutory and Legislative History

If there were any doubt or ambiguity left after the textual review so far, statutory and legislative history will only reinforce the falsity of the Employee-Count Aggregator claim. One begins with a snapshot of such history: the text of the Original ERISA,²⁹ to see what the ERISA Congress might have thought about employee aggregation.

1974: Congress Was Not Interested in Counting Employees, and Enacted No Aggregators

One sees that the ERISA Congress *could not have enacted* an Employee-Count Aggregator at all, by the Association Clause or anything else, because Original ERISA contained no Employee-Count Test. There was no provision for which any employee-counting rule would have significance.³⁰

²⁷ 29 U.S.C. §1002(40)(B)(i). It reads: “[For purposes of this paragraph—] two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group.”

²⁸ Labor is committed to these readings of §3(5) because it holds that all AHPs are MEWAs. The Preamble confirms that position several times, e.g., fns. 4 and 30. Whatever “AHP” means to Labor, surely BFGAE-maintained plans are a subset of the set of AHPs. Thus, all BFGAE-maintained plans are MEWAs.

If the MEWA Guide readings were not true, and the members of a BFGAE did have their separate existence destroyed, there would be but one “employer,” not the many needed for the MEWA definition — just as the quoted analysis says. So it would be false that all AHPs are MEWAs.

²⁹ 88 Stat. 829 – 1035. It is available at <https://www.gpo.gov/fdsys/pkg/STATUTE-88/pdf/STATUTE-88-Pg829.pdf>.

³⁰ Before confirming the absence of an Employee-Count Test, a possible cavil might be that “could not have enacted” is too strong. That would have to indulge that the ERISA Congress thought as follows: “We have no reason to count employees. But a future Congress might add a provision that counts employees, and might raise issues about how to do so. So we will insert one or more employee-counting rules now, that will be ‘ready’ to operate upon some hypothetical future amendment.” This last supposition is entirely fanciful; surely at least a burden is on those relying on it to show clear evidence that the ERISA Congress *actually* intended it.

Combing the Original ERISA, there were three mentions of entities being “small” (and none of being “large.”) One was in Title II affecting the IRC, in a new subsec. (j) of its §401, where “small” merely appeared in the phrase “small business corporation.”³¹ The appearance concerned “shareholder-employee[s],” and thus connected to the provisions of IRC “Subchapter S”³² — in which figure both terms “small business corporation” and “shareholder-employee.” The so-called “S corporation” is just a “small business corporation” that has made a certain election, and the latter term has its definition at IRC §1361(b)(1). That definition is autonomous from ERISA (at least its non-Title II titles) and among its indicia of smallness are the numbers of classes of stock and of shareholders, not employees.³³ Thus no employee-counting rule in ERISA (if there were one) could affect it.

The other two mentions of “small” were in “soft” provisions, in that, first, they used the word but mandated no particular number of individuals to define it.³⁴ One of those merely mandated, to Congress’s own task force, a study of several topics, one being “small employers” and ERISA, Title IV — which concerns plan termination and the Pension Benefit Guaranty Corporation (“PBGC”).³⁵ Thus, no hard legal consequences attached to being classified as small.

In its last appearance, “small” modified “plans” in 4042(a)³⁶, within Title IV. It concerned PBGC’s termination procedures generally, and included that PBGC “*may* prescribe a simplified procedure” as to “small plans.” (Emphasis added.) This is “soft” also in that Congress accepted that such an exceptional procedure might not exist at all. And having given PBGC that degree of discretion, it appears PBGC was free to make its own definition of “small,” which might have measured indicia like dollars or participants, not necessarily employees. But moreover for this mention of “smallness,” since it is said of the plan, an Employee-Count Aggregator could not have had any effect. That is, in a scenario indeed involving a BFGAE, a plan involving multiple actual employers necessarily exists, and that plan has already combined all the participants into one group: no need to decide about aggregating them as employees.

³¹ 88 Stat. 954.

³² Of Ch. 1 of Subtitle A of the IRC, comprising §§1361 – 1379 (in 1974 and today).

³³ Indeed there is a form of entity-unification in the elaborations of that definition, at subsec. (b)(3)(A) and (B). Like the Entity-Unifiers mentioned elsewhere in the comment, Congress made the effect clear, destruction of separate status for a certain kind of subsidiary: It “shall not be treated as a separate corporation.” Subpar. (A)(i). It is not clear, however, how that unification would affect the shareholder count in the basic definition, since it must be an “S corporation” that elects that treatment.

³⁴ Thus a possible counting rule, like an aggregator, had no target to aim at.

³⁵ ERISA, §3022(a)(3) (29 U.S.C. §1222(a)(3)). 88 Stat. 999.

³⁶ 29 U.S.C. §1342(a). 88 Stat. 1021.

Then, Original ERISA did contain one test, and a “hard” legal one, that depended on counting individuals. It was in §4021, of which subsec. (a) states the basic scope of plans subject to Title IV and PBGC, i.e., termination insurance premiums, concomitant with eligibility to be so insured. Subsec. (b) listed exceptions, that of par. (13) being a plan “established and maintained by a professional service employer which [never after ERISA’s enactment date has] more than 25 active participants in the plan.”³⁷ But as with §4042, this size test is on the plan, not an “employer” (whether actual or made by statutory fiction). This search for at least *individual*-count tests is in the realm of plans involving multiple employers, but here again the participants are already combined for a size test.

Indeed, §4021(a)(13) does have attached to it an odd sort of aggregation rule, at subsec. (c)(3), reading: “In the case of a plan established and maintained by more than one professional service employer, the plan shall not be treated as a plan described in subsection (b)(13) if, at any time after [ERISA enactment] the plan has more than 25 active participants.” But subsec. (b)(13) would test in any event the roster of the plan, not of any one workforce (in case of several involved employers). Subsec. (c)(3) just re-states the maximum of 25 to gain excepted status, and if necessary at all it is only because Congress used the singular “a professional service employer” in (b)(13). Congress might have instead there written “one or more professional service employers,” obviating (c)(3).³⁸

Thus, the ERISA Congress could not have meant the Association Clause to be an Employee-Count Aggregator. The proposal that the clause might have had its meaning changed by later legislation, like HIPAA or ACA, is simply extravagant. Meaning might have changed if a later Congress had either —

(A) amended §3(5), of course, or

(B) at least had made reference to it, and its making an “employer” out of the BFGAE it describes, so as to say whether individuals, who do not actually work for such “employer,” will be treated as employees of such “employer.”

Congress has done neither.³⁹ Strictly though, even measures like (A) or (B) would not have changed the *1974 meaning* of §3(5). Even with (B), the later Congress would not be “amending” §3(5) but merely enlisting it as an incorporated test. The later provision, not the Association Clause, would be the Employee-Count Aggregator, presumably clearly stated as such.

³⁷ 29 U.S.C. §1321(b)(13). 88 Stat. 1016.

³⁸ Despite the inelegance, one sees again here that when Congress provides for, or clarifies, aggregation, it does so unmistakably, in supposed contrast to the Association Clause.

³⁹ The incorporation by the HIPAA Congress of ERISA, §3(5) as the definition of “employer” for Title XXVII, §2791(d)(5) (42 U.S.C. § 300gg-91(d)(5)) accomplishes neither (A) nor (B). It left the meaning of §3(5) untouched, and the question remained, “what is that meaning?” The modification made to the definition, requiring at least two employees, may well be significant for the “working owner” issue, at least where the definition of “employer” matters for Title XXVII, or ACA, Title I.

Otherwise, courts hold that (noting some possible exceptions such as (A) or (B)), “later-enacted laws ... do not declare the meaning of earlier law.”⁴⁰

For further examination of what the Association Clause meant in 1974, one can look for any legislative history. The definition of “employer” had the same language as enacted, and today, in the first ERISA bills filed in both House and Senate, 93rd Congress: H.R. 2 (January 3, 1973), H.R. 462 (January 3, 1973), S. 4 (January 4, 1973).⁴¹ Thus if there were any previous debate over a version of the definition, e.g., that had no or a different Association Clause, it is difficult to find.

This commenter’s search of legislative history from ERISA Congress, that is readily available, show no discussion at all of the Association Clause.⁴² And the Index to Subcommittee

⁴⁰ *Almendarez-Torres v. U.S.*, 523 U.S. 224, 237 (1998).

⁴¹ The language match was *verbatim* except that latter two spoke only of a “pension or profit-sharing-retirement plan” rather than an “employee benefit plan.” Indeed these early versions reached only money benefits and plans, not health or other welfare benefits and plans. That is a further aspect of the fact that, when the words of the Association Clause were written, health and health insurance arrangements, such as what came to called “AHPs,” were not at all on their mind. One can infer that the writers were aware of situations in which several employers pooled resources to provide pensions, and decided to ensure that such arrangements would be plans subject to the act — for benefit of *employee-participants* — and its core concerns like vesting rights, adequate funding, and plan termination insurance. They did so by the fictive modification of the word “employer” so that the association would fit into the term “an employer” in the basic language on what is subject to the act, an approach that survived to enactment. For example, in S. 4 that language was found in §104(a), not a §3 definition, but was very like that in §3(1) in H.R. 2 and the eventual Act.

See, Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, *Legislative History of the Employee Retirement Income Security Act* (Comm. Print 1976)(hereinafter, “Subcommittee History”). That print is in three volumes, which as of this writing are available through <https://catalog.hathitrust.org/Record/000732830>. The three bills mentioned here begin, respectively, at 3, 67 and 93 (in Vol. I).

⁴² Besides Subcommittee History, this goes also for —

- *Hearings on S. 4 [etc.] and S. 75 [etc.] Before the Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 93rd Cong.* (Feb. 15 and 16, 1973);

- Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, Retirement Income Security for Employees Act of 1973, S. 4: Bill Text, Summary of Major Provisions, and Background Material (Comm. Print 1973); and

- [Same subcommittee], Employee Retirement Income Security Act, 1974: Public Law 93-406 (H.R. 2): Text of Public Law, Statement on the Part of the Managers, and Summary of the Legislation (Comm. Print 1974).

As of this writing, the first is available through <https://catalog.hathitrust.org/Record/101818500> and the other two through <https://catalog.hathitrust.org/Record/000732830>.

Also, going back into 1972, search was made, with the same results, in —

- *Hearings on S. 3598 [etc.] Before the Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92nd Cong.* (June 20 and 21, 1972). That bill already contained the definition of “employer” just as it would

History has no entry for “association,” in the section for definitions or otherwise.⁴³ In sum, the meaning or wisdom of the clause appears to have been almost unnoticed by the ERISA Congress, such as an effect on counting “employees” or any other, besides the most obvious one of expanding the word “employer” for the purpose of definitions of “plans” that the act would regulate.

Returning to the possibility — called “fanciful” above, n. 30 — that the ERISA Congress inserted an Employee-Count Aggregator, namely the Association Clause, despite enacting no Employee-Count Test for it to act upon, but only to lie dormant for a future test, this absence of attention to the clause augments the implausibility of such a theory. Surely such an extraordinary decision, to insert a provision with no present significance, would have attracted discussion.⁴⁴

By contrast, the ERISA Congress did note the issue of employer unification (for purposes other than the non-existent one of counting employees). The House Ways and Means Committee said of “affiliated employers” (emphasis added):

Affiliated employers. — The committee bill also provides that in applying the coverage test, as well as the antidiscrimination rules, the vesting requirements, and the limitations on and benefits [sic], employees of all corporations who are members of a “controlled group of corporations” (within the meaning of sec. 1563(a) [of the existing IRC]) are to be treated as if they were employees of the same corporation. Thus, if two or more corporations were members of a parent-subsidiary, brother-sister, or combined controlled group, all of the employees of all of the corporations would have to be taken into account in applying these tests. A comparable rule is provided in the case of partnerships and proprietorships which are under common control (as determined under regulations), and all employees of such organizations are to be treated for purposes of these rules as though they were employed by a single person. The committee, by this provision, intends to make it clear that *the coverage and antidiscrimination provisions cannot be avoided by operating through separate corporations instead of separate branches of one corporation.* For example, if managerial functions were performed through one

(limited to money plans) in bills of 1973 to 1974, *Id.* at 7, and was dated May 11, 1972. A search reveals no discussion of the issue.

⁴³ I Subcommittee History at xiv *et seq.* The definitions section entry for “employer” lists numerous references, not surprisingly. Many are simply where §3(5) or its equivalents show up in prints of bills or amendments. If a report or floor statement took note of the Association Clause within §3(5), for support, explanation, criticism, etc., the indexers likely would have noted it in an entry for “association.”

⁴⁴ Such a proposed effect for the Association Clause is unusual enough to invoke the observation that the “dog didn’t bark,” where it probably would have if the remarkable meaning were intended. *E.g., Church of Scientology of California v. Internal Revenue Service*, 484 U.S. 9, 17 – 18 (1987), calling the proposed meaning there “expansive” and “an alteration to the basic thrust of the draft bill.” The Court noted the absence of “bark” — the allusion is to a twist in a Sherlock Holmes plot — in the floor statement of the sponsor of the relevant measure. *Church of Scientology* was more recently cited in *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004)

corporation employing highly compensated personnel, which has a generous pension plan, and assembly-line functions were performed through one or more other corporations employing lower-paid employees, which have less generous plans or no plans at all, this would generally constitute an impermissible discrimination. By this provision the committee is clarifying this matter for the future. It intends that prior law on this point be determined as if this provision had not been enacted.⁴⁵

This is, so far as readily available history material goes, the sole discussion of unifying employers, by an admitted fiction, to further ERISA's objectives. As in the emphasized passage, the intent of unification was to negate, *to the favor of* plan participants (thinking mainly of "pension" rather than "welfare" plans), evasions achieved by separation of entities. This is a far cry from the effort, of the NPRM, to find in Original ERISA a policy of *injuring* welfare plan participants, with the far-fetched theory that the ERISA Congress foresaw later Congresses writing employee-count rules (HIPAA), and making a high employee-count grounds to lessen rights to the quality of benefits (per the ACA, apparently).

Congress Knowing How to Make an Employee-Count Aggregator: Explicitly and Always Involving Common Organizational Control.

One can now review how Congress, including in the process of enacting ERISA, makes Entity-Unifiers (and in some cases, after 1974, Employee-Count Aggregators). Original ERISA contained several Entity-Unifiers. One of major significance was, and still is, at §210(c), reading:

For purposes of sections 202, 203, and 204,⁴⁶ all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) of the [IRC], determined without regard to section 1563(a)(4) and (e)(3)(C) of [the IRC] shall be treated as employed by a single employer.

One looks into such §§202 – 204 to see how entity-unification mattered.⁴⁷ They concerned, respectively, eligibility to participate in an employee benefit plan, vesting and accrual. Sec. 202 created rights to participate that depended, in several ways, on the amount of service for an employer, including duration. That was the only issue in §202 for which it would matter whether several employers, or just one, were in the picture. That is, if an individual switched from one employer to another (being "first-instance" or actual separate employers), s/he would not

⁴⁵ H.R. Rep. No. 93-807 (February 21, 1974) at 50, *reprinted at* 1974 U.S.C.C.A.N. 4670, 4716. Also available in II Subcommittee History at 3170: see n. 41 for an online source.

⁴⁶ ERISA sections 210, 202, 203 and 204 are, respectively, 29 U.S.C. §§1060, 1052, 1053 and 1054.

⁴⁷ The actions of these Original ERISA sections are described in the past tense in the following review, to focus on how the same Congress that wrote the Association Clause also expressed entity unification when it meant to. Indeed, the essentials of these sections remain in today's ERISA.

compile the needed duration of service, unless the law treated the set of such employers as one, with an Entity-Unifier.

Sec. 203 created minimum rights to vesting of pension benefits — their becoming non-forfeitable — that were similarly measured by amount and duration of service for the employer.⁴⁸ This again was the only issue for which it would matter whether a set of an individuals were made one by the law, or left separate. Sec. 204 demanded of a pension plan several minima in the individual's accrual of benefit rights. It largely spoke of duration of participation in a plan, not directly of employment service. For that issue, the first unifying rule in §210, at its subsec. (a)(1) as to several employers maintaining one plan, might have accomplished the summing of participation durations if an individual moved among such employers. But one test, at subsec. (b)(1)(F), depended on years of service, and subsec. (b)(3)(A) ties the measure of participation back to that of service. In sum, the ERISA Congress did make Entity-Unifiers, and knew how to write them unmistakably.⁴⁹

The unifying of entities was based on concepts of “common control” of organizations, by incorporating IRC §1563(a). That section was passed in 1964 along with §1561, in order to limit such a group to one use of a certain tax exemption.⁵⁰ It defines “controlled group” with the concept of interlocking control among corporations, dependent on stock ownership, with exacting specifications about stock. Its immediate concern was the taking advantage of the tax exemption(s) — as §1561 would list — more than once, by a decision-maker as to organizational structure, who used separate entities.⁵¹ It does not use a phrase like “shall be treated as one,” but the meaning is equivalent.⁵² It is effectively an Entity-Unifier.

IRC, §1563(a) was thus available to the ERISA Congress as a test for entity unity. It was also used, for instance, in the sharp limitations on an employer's pension plan's holding of its

⁴⁸ The condition on compiling a duration of service that it be for the same employer was clear enough from context, and in §§203 and 204 is often not expressed with words like “for the employer.” The question answered by the §210 unifier is thus, “was it the *same* employer”?

⁴⁹ This review of §§202, 203 and 204 also confirms what was set out above, that the ERISA Congress did not enact anything that counted employees.

⁵⁰ Pub. L. 88-272, §235(a). The exemptions addressed in §1561 grew to four, until the recent tax amendments (Pub. L. 115-97) cut them back to one. But §1563 remains as it has since 2004.

⁵¹ The policy behind §§1561 and 1563 regards the economic and governance reality to be that there is one decision-making “person,” and thus that such multiple exemptions are unjustified. Congress's unification of entities can be described as fictive, as this comment does — as against their separate status as recognized by applicable State laws and chosen by the single decision-maker to seek other economic and legal advantages. But unification could also be called an anti-fiction. That is, a unification regards separateness as the fiction, as against the reality of unity, that the Entity-Unifier restores.

⁵² Since the group members still have separate tax liabilities, and return duties, the question immediately arises of how to allocate among them the one amount of the exemption. The original and today's §1561 proceed directly to that, and saying first that they shall be treated as one is would have been unnecessary and cumbersome.

own securities, in ERISA, §407.⁵³ The affected securities are also those of an affiliate, which was defined — per subsecs. (d)(1) and (7) — by reference to IRC, §1563(a). Also, importantly for the later legislation discussed herein, Original ERISA added IRC, §414. Its subsecs. (b) and in turn (c), referred to §1563(a), and shifted to “shall be treated as” language. The former read: “For purposes of sections 401, 410, 411, and 415, all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a) (4) and (e) (3) (C)) shall be treated as employed by a single employer.”⁵⁴ Subsec. (c) covered non-corporation “trades or businesses,” mandating Treasury regulations which must be on “principles similar” to those of subsec. (b).⁵⁵

IRC, §1563, and the Entity-Unifiers that used it, contrast with the Association Clause, according to the claims of the NPRM, in several ways which include —

(A) Clarity that they are Entity-Unifiers at all.⁵⁶

(B) Clarity of content, in the detailed rules on what and how much stock to count, for the percentage tests in §1563. By contrast, the criteria for triggering the Association Clause, to confer what Labor would call BFGAE status, are vague and amorphous, so far as the terse ERISA, §3(5) text goes.

(C) Clarity of policy, to counteract advantages to businesses thought unjustified, because one person could decide to split entities to gain advantages. And the advantages come at the expense of parties such as employees, such as in denying duration of service to one who move around among members of a controlled group. The Entity-Unifier serves to help such other parties. By contrast, the Association Clause being used as an Entity-Unifier, and indeed Employee-Count Aggregator, involves assisting member employers, to the detriment of the rights of employees. The direction of these motivations accords with that in the one discussion of entity unification in the available legislative history, recited above at text to n. 45.

(D) The tight bonds among entities involved in a controlled group, with the hard, legal powers arising from interlocking ownership, which can be fairly called the “structure” of a single organization. It contrasts with the loose connections of a “group or association,” no matter what the criteria for a BFGAE turn out to be. This looseness is apart from the

⁵³ 29 U.S.C. §1107.

⁵⁴ ERISA, §1015. 88 Stat. 925 – 926.

⁵⁵ The original IRC, §414 ended with subsec. (l). Subsecs. (m) and (o), which along with (b) and (c) figure in later Entity-Unifiers and Employee-Count Aggregators that are relevant here, were added later: Subsec. (m), in 1980, identically by Pub. L. 96-605, §201(a) and Pub. L. 96-613, §5(a). Subsec. (o), in 1984 by Pub. L. 98-369, §526(d)(1).

⁵⁶ It is supposed here, *arguendo*, that an Entity-Unifier reading of the Association Clause is at least unclear, rather than foreclosed by the purely textual consideration given earlier.

vagueness of the Association Clause about the criteria, per item (B). Given a status quo of autonomous employers, is it at all likely that they would move from there, to surrender their autonomy, arrange for interlocking ownership, and merge into a §1563(a) group? But Congress demanded this in its clear Entity-Unifiers.

In sum, it is incongruous that the ERISA Congress intended a second means of entity unification, by the Association Clause. Courts often rely on the fact that, elsewhere in its statutes, Congress “knows how to” effect a result, strongly counter-indicates finding the result from creative readings of non-explicit language.⁵⁷

After 1974: Additions of Employee-Count Tests to ERISA

As set out above, the Original ERISA had no Employee-Count Tests. But Congress later added these:

- §210(e)(2)(A)⁵⁸ — for purposes of special rules for “eligible combined plans.” The test, defining “small employer,” appears in IRC, §4980D(d)(2)(A), with a number (modified from 50 to 500 for §210(e)(2)(A)), and includes the often-used Employee-Count Aggregator using IRC, §414(b), (c), (m) and (o).⁵⁹
- §712(c)(1)(B)⁶⁰ — for purposes of exemption from mental health and substance use disorder parity. The 50-employee test defines “small employer,” and includes the Employee-Count Aggregator using IRC, §414(b), (c), (m) and (o).

⁵⁷ *E.g., State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S.Ct. 436, 444 (2016). “[T]he [involved act’s] structure shows that Congress knew how to draft the kind of statutory language that petitioner seeks to read into [a certain section.]” And specifically applicable here where the Entity-Unifiers are so explicit, “[there is a] general principle that Congress’ use of ‘explicit language’ in one provision ‘cautions against inferring’ the same limitation in another provision.” *Id.* at 442, *citing, Marx v. General Revenue Corp.*, 133 S.Ct. 1166, 1177 (2013).

⁵⁸ 29 U.S.C. §1060(e)(2)(A). Such subsec. (e) was added in 2006 by Pub. L. 109–280, §903(b)(1).

⁵⁹ See above, fn. 55 on the additions of IRC, §§414(m) and (o).

They are exceptions to the trend that all Entity-Unifiers considered here trace to an express incorporation of IRC, §1563(a). But both subsections draw on similar concepts of organizational control, and/or connection. For subsec. (m), an “affiliated” group of “service organization” involves both “regular[]” or “significant” performance of services within the group, and ownership relations like shareholder, partnership, or holding of a percent of interests.

Subsec. (o) states an open-ended policy, that “shall” be effected by Treasury regulations, to “prevent the avoidance of [certain] employee benefit requirement[s] ... through the use of ... separate organizations [etc.]” This description presupposes that there is *some person* with the ability to “use separate organizations,” which person is like the controlled group expressly mentioned in other Entity-Unifiers. Its attention to a decision to “use” separation suggests regarding that person’s unity as the truer reality, as discussed above, n. 51, and separation is disfavored. Moreover, the aim is to help employee/participants by unification, in complete contrast to the harmful effect of the Association Clause, that the NPRM proposes.

⁶⁰ 29 U.S.C. §1185a(c)(1). Such §712 was added in 1996 by Pub. L. 104–204, title VII, §702(a).

- §4222(f)(3)(A)⁶¹ — affecting withdrawal liability dispute procedures. The 500-employee test defines “small employer,” and includes the Employee-Count Aggregator, in subpar. (B), based on “common control” per §4001(b)(1),⁶² whose substance draws from IRC, §414(c).

Notably, all three provisions make largeness a detriment to the employer, plan, etc., in that having an employee count less than the stated number for “small” status gives relief from, or easing of, obligations. Again, the proposed use of the Association Clause as an Employee-Count Aggregator is just the opposite. Indeed, these three provisions share all the points of contrast with the Association Clause discussed above (points (A) – (D) near n. 56) about explicitness,⁶³ and use only of a kind of unification — ownership and control — where it makes inherent sense to treat the scenario as one entity, and so in turn to count the workforces as one.

The HIPAA additions of Employee-Count Tests and Aggregators

The HIPAA Congress enacted its clear Employee-Count Aggregator, applicable to its interest in counting employees to distinguish large and small employers, for certain issues in the new Title XXVII:⁶⁴ §2791(e)(6)(A). It used the often-used standard, importing control and ownership concepts, of reference to IRC, §§414(b), (c), (m) and (o): “[A]ll persons treated as a single employer” under those provisions, “shall be treated as 1 employer.” In much the same way as for the ACA version, the employee-count aggregation effect is indisputable: Employee-count is the only question in the involved subdivision for which treating employers as one, could matter. And the catchlines confirm.

A search through the two committee reports readily available for Pub. L. 104-191 show no discussion at all of complications about the definitions of “large” and “small,” or of “employee” and “employer.”⁶⁵ There are just bare-bones listings of those terms as among those being defined, and for the latter two that they are incorporated from ERISA. In the conference

⁶¹ 29 U.S.C. §1401(f)(3)(A). Such subsec. (f) was added in 2004 by Pub. L. 108-218. Sec. §1301(b)(1) is 29 U.S.C. §4001(b)(1), whose language was in Original ERISA.

⁶² 29 U.S.C. §1301(b)(1). It is an Entity-Unifier that, of its own force, applies to all of ERISA, Title IV. Its “common control” concept applies to all trades or businesses, under prescribed PBGC regulations that must be “consistent and coextensive” with Treasury regulations for IRC, §414(c). Therefore §4001(b)(1), too, substantively refers back, via IRC, §414(b), to IRC, §1563(a). See above, text accompanying n. 54.

⁶³ Thus, for each of these three Employee-Count Tests, their own Employee-Count Aggregator refer expressly to it, and of course there is no reference to the Association Clause, i.e., to criteria for being a BFGAE. Moreover, combing all of today’s ERISA, there appears to be not one explicit reference to the clause, which might be flagged by appearance of the phrase “association of employers,” or even to §3(5). As discussed above, near n. 26, and well recognized by MEWA Guide, the Association Clause does operate by implicit reference in §3(1) by being the definition of “employer,” to play the important role in the definition of “EWBP.”

⁶⁴ They concerned “guaranteed issue,” and disclosure, in (pre-ACA) §§2711 and 2713.

⁶⁵ These are H.R. Rep. No. 104-496 (March 25, 1996) and H.R. Conf. Rep. No. 104-736 (July 31, 1996), *reprinted at* 1996 U.S.C.C.A.N. 1865 et seq., and also available through — <https://www.congress.gov/bill/104th-congress/house-bill/3103/committees>.

report, see Item IX at 232 – 233 (1996 U.S.C.C.A.N. 2045 – 2046). As to “employer” and ERISA, §3(5), there is no mention of doing anything remarkable, like making it into an Employee-Count Aggregator. Indeed the report does not even mention that the clear aggregator — eventual PHSA, §2791(e)(6)(A)— was attached to the large/small definitions. The committee said all it had to say about employee count, through the bill text for those definitions and their aggregator.⁶⁶

Thus, in HIPAA’s text and history, there is only confirmation of the trend of Congress “knowing how to” write a true Employee-Count Aggregator, and no help for the Employee-Count Aggregator claim about the Association Clause.

Effects on Other Provisions Where Employee Count Matters and §3(5) Applies

The legally “large” status that Labor desires to give to employers that are actually small has an apparent effect on other laws that count employees, which the NPRM does not discuss. This commenter sees no reason why such “enlargement,” by a legal fiction, would not extend to IRC, §4980H (popularly called “the employer mandate”) and IRC, §45R (tax credit for smaller employers that provide health insurance).

For both, large status is a detriment to employers. This effect may be so jarring to understandings of all about the ACA’s scheme — and not just of the current Administration — as to work a *reductio ad absurdum* of the underlying Employee-Count Aggregator claim.

Section 4980H has its own definition of “large employer” at subsec. (c)(2)(A): an Employee-Count Test. It basically matches that of ACA, §1304(b)(1) as to number: 51 and over is “large.”⁶⁷

Supposing the Employee-Count Aggregator claim to be true, so that where an ERISA, §3(5) BFGAE exists, the employees of the members of that BFGAE are, in legal fiction, “employees” of that legally fictive “employer” (the BFGAE), then the aggregate employee-count is the one that matters for meeting the 51 employee test. This is because, first, IRC, §4980H(c)(2)(A) reads: “‘applicable large employer’ means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.” Next, ACA, §1551⁶⁸ adopted, for all of Title I, PHSA, §2791

⁶⁶ By contrast, an Employee-Count Test was drafted as to availability of “medical savings accounts,” and the committee gave substantial attention to a difficult employee-count issue there, of going above and below the line of 50 from year to year. H.R. Conf. Rep. No. 104-736 at 283 – 284.

⁶⁷ However the IRC, §4980H(c)(2)(A) version expressly calls for a count of “full-time employees,” which ACA, §1304(a)(1) (42 U.S.C. §18024(a)1) does not, coupled with a recognition for the count, in a method set out at subsec. (c)(2)(E), of full-time equivalents as if full-time employees. Also, for the ACA, §1304(b)(1) number, there is the State option under subsec. (b)(3) to increase it.

⁶⁸ 42 U.S.C. § 18111. It sits within ACA, Title I, and provides that “[u]nless specifically provided for otherwise, the definitions contained in [PHSA §2791 (42 U.S.C. §300gg–91)] shall apply with respect to this title.”

definitions, and §2791(d)(6) incorporates the ERISA, §3(5) definition of “employer.” IRC, §4980H are within ACA, Title I (same for §45R). It seems all would agree that, where a BFGAE arises under ERISA, §3(5), the BFGAE can be plugged in for “employer” in IRC §4980H(c)(2)(A) to yield “applicable large employer” means ... [a BFGAE] who employed ... at least 50 full-time employees ...”

Then, by the fiction of the Employee-Count Aggregator claim, the employees of the members of the BFGAE are, in law, “employees” of the BFGAE. They are the individuals who count for the phrase “[a BFGAE] who employed ...” If they sum to over 50, the definitional element for the subsection-(b) tax⁶⁹ will have been met.

The triggering clause for that tax is subsec. (b)(1)(B): “1 or more full-time employees of the applicable large employer has been certified to the employer under [ACA, 1411] as having enrolled for such month in a qualified health plan [with a premium tax credit under IRC, §36B] allowed or paid with respect to the employee.” Again one can substitute “BFGAE” for “applicable large employer” and “employer” without dispute, and, according to the Employee-Count Aggregator claim, “employees of the members of the BFGAE” for “employees.” With those, and one such employee taking the §36B credit, the tax is imposed.

It might seem at first that the applicability of §4980H is moot, because in every case where a BFGAE does exist for health coverage purposes, coverage is being offered that might make all employees ineligible for the IRC, §36B credit, per its subsec. (c)(2)(B). But not all coverage meets the minimum-value and affordability tests of §§36B(c)(2)(C)(i) and (ii), excepting from subsec. (c)(2)(B). While some coverage inherently exists if BFGAE status is attained, it is not legally required to meet those tests to attain that status. Surely the text of ERISA, §3(5) does not so suggest. Failure to meet them is exactly how IRC, §§4980H(b)(1)(A) and (B) can both be true: Coverage is offered, but it is of low quality. And the subsection-(b) tax is imposed.

So if the new Administration were to succeed in imposing the Employee-Count Aggregator claim for other purposes — which it should not — it apparently would expand the reach of the “employer mandate.” A BFGAE might either pay the tax,⁷⁰ or at least experience the strictures of the minimum-value and affordability rules.

Similar results appear to hold for the §45R credit, omitting the walk-through of its language here. It may be that, from now, few additional small employers would use their two years of availability for the subsidy, and it was never generous in amount. Also, small employers seeking both to join a BFGAE and use §45R could apparently not have avoidance of

⁶⁹ That is, the tax within §4980H that is distinguished from that of subsec. (a) in that the employer did “offer[] [certain coverage] to its full-times employees,” per subsec. (b)(1)(A).

⁷⁰ Under the concluding matter of subsec. (b)(1), the tax presumably falls on “the employer,” that is on the BFGAE, recalling that the BFGAE substitutes for “the employer” here, and in every IRC section added or affected by ACA, Title I.

EHB (ACA, §2707) as a goal, because the credit requires “qualified health plans” per ACA, §1301(a)(1), which must be EHB-complaint. Subpar. (B). Nevertheless, some small employers might see §45R as advantageous. But if they are in a BFGAE they might find, if Labor’s Employee-Count Aggregator claim becomes effective, that they have been made not small.

Countervailing effects of that claim seem to spread elsewhere — anywhere ERISA, §3(5) is applicable, directly or by some path of incorporating references. So, there seems no reason it does not spread to the three provisions in today’s ERISA with Employee-Count Tests, set out above at notes 58 - 62 and surrounding text. For the second of those — in ERISA, §712 — the direct applicability of §3(5) is clear, carrying with it — by supposition — employee-count aggregation over a BFGAE.⁷¹

Difficult issues of ERISA, §3(5) applicability, set out in the margin, also attend IRC, §4980D — the excise tax on any non-compliance with IRC, Ch. 100, which post-ACA takes in most of the ACA market reforms in PHSA, Title XXVII. Section 4980D includes, by an Employee-Count Test, substantial relief for small employers (50 employees and under) at subsec. (d)(2)(A). If such small employers form a BFGAE, and §3(5) does apply, carrying with it — by supposition — the employee-count aggregation effect, those employers cease to be small and lose that relief.⁷²

⁷¹ There may be reasons to dispute such applicability for the first and third of those, not explored here.

⁷² To explore the issues of §3(5) applicability:

For IRC, §§4980H and 45R, being in ACA, Title I, the path of incorporations to ERISA, §3(5) is clear, through ACA, §1551 and PHSA, §2791(d)(6). One notes on the other hand that IRC, §4980D was not originally a part of ACA, Title I, but added by HIPAA: §402(a). And the PHSA, §2791 definitions impliedly apply to all of Title XXVII, but not elsewhere, without more.

A less straightforward path from §4980D(c)(2)(A) to ERISA, §3(5) can still be made out, as follows. The ACA dramatically expanded the scope of IRC, §4980D(a) of “the requirements of chapter 100 [IRC, §§9801 et seq.] (relating to group health plan requirements).” The ACA added to such chapter 100, §9815, providing in subsec. (a)(1) that all requirements — with two exceptions made by §9815(b) — of PHSA, Title XXVII, Part A “shall apply to group health plans,” etc., making them requirements of Ch. 100, and in turn encompassed by IRC, §4980D(a).

Such §9815 was part of ACA, Title I (added by subsec. (f) of its second §1563, like as subsec. (e) of that §1563 folded PHSA, Title XXVII into ERISA, at §715).

The question then is, what is the definition of “group health plan” in IRC, §9815(a)(1)? ACA, §1551 applies at first blush to this Title I language, making PHSA, §2791(a)(1) superior. It mainly adopts the EWBP definition at ERISA, §3(1).

But IRC, §4980D(f)(1) had adopted a “group health plan” definition in a pre-ACA provision in IRC, Ch. 100, §9832(a). In turn, that adopts the “group health plan” definition given by IRC, §5000(b)(1). The latter has similarities to ERISA, §3(1) in requiring involvement of an “employer” or “employee organization.” But it is not necessarily bound by ERISA’s definition of “employer,” §3(5), with its Association Clause and — by supposition — the Employee-Count Aggregator claim.

Deciding this question may depend on the “unless specifically provided for otherwise” clause of ACA, §1551. Does the chain of pre-ACA definitions, IRC, §§4980D(f)(1) to 9832(a) to 5000(b)(1) count as one “specifically provided for otherwise”? Alternatively, is “provided for” understood to mean “provided for by ACA, Title I itself”? To

The statutes that lead to these consequences — by supposition — do not provide any “opt-out” to Labor, or to employers. BFGAE members would not be able to pick and choose the effects of their manufactured “large” status that they like. When Congress creates an option, it knows how to do so clearly, generally using the word “elect,” and has often done so in the IRC. An example is in the tax version of the mental health and substance use disorder parity requirement, IRC, §9812, where subsec. (c)(2) provides an exemption arising from compliance-cost increases, that a plan may “elect[] to implement,” par. (2)(E)(i), or not, par. (2)(A).

Labor or Treasury also would have no statutory authority to ignore these hypothetical effects. Labor might vary the criteria for BFGAE status somewhat, as reasonable interpretations of the terse Association Clause. But once that status exists, and were the law to have it entail aggregation of the employee count, the obligations and possible taxes would also exist.⁷³

In sum, the Administration’s embrace of the Association Clause to degrade coverage for beneficiaries to achieve cheapness, and to appeal to small employers, appears to have incongruous boom-a-rang effects of making those employers “large,” where largeness is detrimental. The incongruities should give more reason to conclude that this agenda — Employee-Count Aggregator claim — is unlawful. But review of the text and history have already shown that.

Conclusion

This commenter urges Labor and other agencies to review the statutes with care, and free of agenda bias, and conclude that they are inconsistent with the Employee-Count Aggregator claim about the Association Clause. Imposing that claim would be an unauthorized modification of ACA, §§1304(b)(1) and (2), the general Employee-Count Test that determines the correct group market.

follow on the latter alternative, a place to “specifically provide[] for” a non-PHSA, §2791 definition might have been in IRC, §9815 itself — being within ACA, Title I. It might have stated that it is the IRC, §5000(b)(1) definition attached to “group health plan” as it appears in §9815. That might have shed the Employee-Count Aggregator claim attached by way of ERISA, §§3(1) and (5), to the PHSA, §2791(a)(1) definition of “group health plan.” But no such thing appears in IRC, §9815.

Supposing that the IRC, §9815(a)(1) sense of “group health plan” equates to that of the ERISA, §3(1) EWBP, does the effect of the Employee-Count Aggregator claim — here supposed *arguendo* to attach to the word “employer” in §3(1) — then carry eventually over the reference in IRC, §4980D(a) to the requirements of Ch. 100? That is, does that meaning of “employer” — for which “BFGAE” is to be substituted — include the employee count of the BFGAE?

If yes, then small employers become large employers, and lose the relief given by §4980D(d)(2)(A).

⁷³ One might revisit here the final phrase of the statement in the Preamble, quoted above, n. 5. It purports that “these proposed rules” would not “apply ... for purposes of taxation under the [IRC].” This is cryptic as to what “proposed rules” are meant — does that include the Employee-Count Aggregator claim? — and as to what taxes are meant. Does it mean IRC, §4980D, so that a BFGAE plan that does not comply with EHB, though escaping consequences under the PHSA, nevertheless is taxed for the non-compliance? Or does it silently allude to §4980H and the like, so that the NPRM suggests further relief to employers, that the statutes do not support?

If aggregation is removed from the picture, so that many small-employer employees are not subjected to large-group treatment, much of the harm that justifiably concerns critics of the NPRM also leaves the picture — such as loss of EHB and community rating.

Respectfully submitted,

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