

Nebraska State Bar Association

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March 6, 2018

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

Re: Definition of "Employer" Under Section 3(5) of ERISA-Association Health Plans, 83
Fed. Reg. 614 (Jan. 5, 2018)
RIN 1210-AB85

Dear Sir or Madam:

The Nebraska State Bar Association (the "NSBA") submits these comments on the Department of Labor's (the "Department's") proposed regulation addressing the definition of "employer" under Section 3(5) of the Employee Retirement Income Security Act ("ERISA"). 83 Fed. Reg. 614 (Jan. 5, 2018) (the "Proposed Regulation").

The NSBA supports the Department's efforts to expand access to association health plans and submits its comments in this letter to clarify the Proposed Regulation's interaction with the current guidance addressing association health plans and to ensure that association health plans remain a stable source of quality coverage. In summary, the NSBA urges the following:

1. Under the definition of working owner, the final regulation should eliminate the requirement that a working owner must not be eligible to participate in any subsidized group health plan maintained by any other employer of the individual or of the spouse of the individual;
2. The final regulation should permit the use of rate bands in determining employer premiums or contributions, based on certain guidelines or parameters, in order to promote risk pool stability;
3. The final regulation should permit groups or associations to impose reasonable contractual limitations on membership to promote plan stability; and
4. To ensure that a group or association acts in the interests of its employer members and those members' employees and dependents, the final regulation should require the employer members of an association have a genuine organizational relationship unrelated to the provision of benefits.

About the NSBA

The NSBA made the decision to support an effort by its membership to develop and offer a group health plan for qualifying members. This group of employers, with NSBA membership, will work together to obtain affordable health insurance coverage. The NSBA initiated these efforts late last year and is in the process of developing a plan that will provide insured health coverage to qualifying members and their employees and dependents.

The NSBA is established pursuant to the Nebraska Supreme Court Rules and has provided services to both its membership and the State of Nebraska since 1937. All attorneys admitted into the practice of law in Nebraska are members of the NSBA. As articulated by court rules, the purposes of the NSBA include the improvement of the administration of justice; fostering and maintaining high standards of conduct, integrity, confidence, and public service by Nebraska attorneys; safeguarding and promoting the proper professional interests of the members of the Bar; providing improvements in the education and qualifications required for admission to the bar, the study of the science of jurisprudence and law reform, and the continuing legal education of the members of the bar; improving the relations of the bar with the public; carrying on a continuing program of legal research; and encouraging cordial relations among the members of the bar. These purposes aim to ensure that the public responsibilities of the legal profession are effectively discharged. To this end, the NSBA provides a wide range of services, programming, practice tools, and resources for its membership.

Based on its obligations to uphold the requirements of the Nebraska Supreme Court Rules and its longstanding reputation with its membership as well as the citizens of Nebraska, the NSBA considered, and will continue to ensure, that its efforts to support its membership in developing a group health plan will not jeopardize its current standing with that membership. To that end, the NSBA offers the following comments on the Proposed Regulation.

1. Under the definition of working owner, the final regulation should eliminate the requirement that a working owner must not be eligible to participate in any subsidized group health plan maintained by any other employer of the individual or of the spouse of the individual.

The Proposed Regulation expressly provides that working owners, such as sole proprietors and other self-employed individuals, may elect to participate in an employer group or association as both an employer and an employee. The NSBA is generally supportive of this proposal given the clear guidance provided by the Proposed Regulation and the resulting opportunities this provides to NSBA members who are for sole proprietors or other self-employed individuals.

However, the NSBA proposes that the Department alter the qualifications to meet the definition of working owner under Proposed Regulation § 2510.3-5(e)(2)(iii). This requirement imposes a burden on those working owners who seek to join with other employers to obtain coverage under an association health plan. This burden does not seem to be equivalent to the benefits, if any, that the Department seeks to ensure related, presumably, to stability within the current market. In fact, the requirement results in a marriage penalty that is not applied to owners of other employers. Furthermore, the ability of the

Department to monitor or to enforce this requirement seems quite limited. Thus, the NSBA respectfully suggests eliminating the requirement under Proposed Regulation § 2510.3-5(e)(2)(iii) entirely.

2. The final regulation should permit the use of rate bands in determining employer premiums or contributions, based on certain guidelines or parameters, in order to promote risk pool stability.

The preamble to the Proposed Regulation correctly identifies stability of an association health plan's risk pool as an important concern. 83 Fed. Reg. at 623. The preamble also notes that actuarially appropriate pricing, where premiums match risk, incentivizes people to buy an efficient amount of coverage and reduces the probability that insurance markets deteriorate into adverse selection spirals. Id. Yet, the Proposed Regulation seemingly prohibits the use of experience bands amongst employer members and calls into question the use of age bands to determine premiums or contributions for participants and beneficiaries under an association health plan.

As noted by the Department in the preamble, the issue with the current language of Prop. Reg. § 2510.3-5(d)(4) is the potential to hamper employers' ability to create flexible and affordable coverage options for their employees and to destabilize the association health plan market. If the Department is advocating for a prohibition on either experience bands or age bands, this requirement would deprive association health plans of a tool vital to risk pool stability. One of the most significant challenges facing association health plans is ensuring risk pool stability by encouraging continuous participation by employer members on a long-term basis, regardless of the fluctuation in claims of any particular employer member from year to year. New association health plans will consider and potentially use experience bands and age bands to remain an attractive option to employer members with good claims history and/or a younger workforce, which might otherwise be able to obtain more favorable premiums elsewhere.

The Proposed Regulation requires an association health plan to comply with DOL Regulation Section 2590.702(c) with respect to nondiscrimination in premiums or contributions required by any participant or beneficiary for coverage under the plan. Prop. Reg. § 2510.3-5(d)(3). It further provides that a group or association may not treat different employer members of the group or association as distinct groups of similarly-situated individuals. Prop. Reg. § 2510.3-5(d)(4). Example 4, set out in the Proposed Regulation, emphasizes that an association could not treat a single employer member as a separate group of similarly situated individuals from other employer members and, correspondingly, charge a higher premium for coverage based on the fact that the single employer member employs several individuals with chronic diseases.

DOL Regulation Section 2590.702(c), the cross-referenced provision, generally prohibits group health plans and health insurance issuers from requiring an *individual* to pay a premium greater than the premium or contribution for a similarly situated individual based on any health factor. A "health factor" means health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. DOL Reg. § 2590.702(b)(1)(ii).

Experience Bands. The NSBA is concerned that the prohibition on treating employer members as distinct groups of similarly-situated individuals in the Proposed Regulation together with the cross-reference to DOL Regulation Section 2590.702(c), will be interpreted to prevent an association from utilizing reasonable experience bands to determine an employer member's required premiums.

Notably, DOL Regulation Section 2590.702(c) generally prohibits health plans and health insurance issuers from requiring an *individual* to pay a premium greater than the premium or contribution for a similarly situated individual based on any health factor. However, a plan or issuer can take health status factors into account, for purposes of determining the amount the *employer* must pay. DOL Reg. § 2590.702(c)(2)(i). Presumably, the Department proposes to extend the individual requirement to employer members within an association, effectively treating the employer member as an individual and overriding DOL Reg. § 2590.702(c)(2)(i).

The Department indicates one of the bases for the nondiscrimination requirements is its concern that association health plans that discriminate *among* employer members in ways that would violate the proposed nondiscrimination provision may not reflect the common employer interests that characterize an employee benefit plan. The Department further explains that treatment as a single “employer” under ERISA § 3(5) is undermined by treating different employer members as different groups based on the health factors of individuals within that employer member.

For several reasons, the NSBA respectfully disagrees that experience bands automatically defeat the commonality of interest intrinsic to an employee benefit plan.

First, current guidance requires the association to reflect an organizational relationship beyond providing group health coverage. Thus, for example, the group or association of employers must not only be engaged in the same industry, but also, all participating employers must be members of a separate association that collaborates on a variety of other issues central to that industry for an extended period of time, in some cases, for decades. The history of organized cooperation amongst the employer members supports and fulfills the necessary requirement for a protective nexus between the association and the individuals who benefit from the plan. See, e.g., Advisory Opinion 94-07A; Advisory Opinion 2001-04A.

A new group or association of employers could elect to utilize the existing guidance and ensure that participating employers in the group or association must be members of a separate association that collaborates on a variety of other issues central to that industry for an extended period of time. Thus, the appropriate nexus and cohesion amongst employer members will exist and, thus, the perceived necessity of the nondiscrimination requirements is eliminated.

Second, experience bands could certainly lead to higher premiums for a particular employer member. Significantly, however, one of the primary benefits of the association and the association health plan for its membership is the mitigation of risk tied to poor experience. As part of the association, an employer member enjoys a greater reduction in risk than is possible if the employer member was seeking insured coverage on its own.

For example, an employer seeking coverage on the open market for its employees is subject to underwriting by insurance companies (and related premium rates) based on the employer’s experience and medical risk alone. The use of rate bands within the association does not change the current, intrinsic nature of discrimination in premiums tied to experience amongst employer members. Instead, within an

association health plan, rate bands may be structured so that the fluctuation or movement between the rate bands is limited in degree (e.g., employer member can only be moved up or down one or two bands on an annual basis). So long as a group or association health plan applies rate bands uniformly among its employer members, and discloses the fact that it does so, the NSBA respectfully submits that employer members are in the best position to determine whether the practice serves their interests. In addition, under this structure, the association balances maintaining the attractiveness of the coverage for employer members with good claims history and/or a younger workforce, with the interests of maintaining a stable risk pool for all members.

Age Bands. The NSBA is also concerned that the prohibition on treating employer members as a distinct group of similarly-situated individuals in the Proposed Regulation together with the cross-reference to DOL Regulation Section 2590.702(c), will be interpreted to prevent an association from determining an employer member's required premiums or other contributions using age bands.

As noted above, DOL Regulation Section 2590.702(c), the cross-referenced provision, generally prohibits group health plans and health insurance issuers from requiring an *individual* to pay a premium greater than the premium or contribution for a similarly situated individual based on any health factor. A "health factor" means health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. DOL Reg. § 2590.702(b)(1)(ii). Although the list of health factors in DOL Regulation Section 2590.702(c) does not expressly include age, other portions of the regulation suggest bona fide-employment based classifications (for example, full-time or part-time status) constitute the only permissible basis for distinguishing between employees. DOL Reg. § 2590.702(d)(1). With respect to beneficiaries, the regulation lists age as a permissible basis for distinction only with respect to a participant's children. DOL Reg. § 2590.702(d)(2)(i).

Again, if the Department's intent is to preclude the use of age bands, this prohibition would deprive association health plans of a tool vital to risk pool stability. New association health plans will consider and potentially use age-banded rating systems to remain an attractive option to employers with younger workforces, which might otherwise be able to obtain more favorable premiums elsewhere. The Affordable Care Act uses the same mechanism in the small group and individual markets. 42 U.S.C. § 300gg.

So long as a group or association health plan applies age banding uniformly among its employer members, and discloses the fact that it does so, the NSBA respectfully submits that employer members are in the best position to determine whether the practice serves their interests. In addition, the risk pool stability promoted by age banding outweighs the risk that age banding would be used as a pretext for discrimination based on health status. In this regard, the NSBA notes that the cross-referenced HIPAA regulations prohibit using health factors to determine an *individual's* required premiums or contributions. However, a plan or issuer can take health status factors into account for purposes of determining the amount the *employer* must pay. DOL Reg. § 2590.702(c)(2)(i). Thus, as drafted, the Proposed Regulation could be construed to prohibit the employer-by-employer assessments that HIPAA *expressly* allows. Consistent with existing HIPAA regulations, the NSBA respectfully submits that, when uniformly applied to determine employer contributions, age banding is unlikely to serve as a pretext for discrimination against individuals based on health status.

In order to encourage the formation and use of association health plans and to promote stability within an association plan risk pool, the associations must have some flexibility in ensuring that the cost associated with the coverage remains competitive. Correspondingly, the Proposed Regulation should clarify that using rate bands, such as experience or age bands, which are disclosed in writing, to determine employer members' required premiums does not constitute a prohibited employer member distinction under Proposed Regulation Section 2510.3-5(d)(4).

The NSBA suggests the revision italicized below:

(4) In applying the nondiscrimination provisions of paragraphs (d)(2) and (3) of this section, the group or association may not treat different employer members of a group or association as distinct groups of similarly-situated individuals; *provided that a group or association may determine an employer member's total required premium or contribution by reference to a uniformly applied, written schedule setting forth contributions for each employer member based on two or more rate bands, which written schedule is disclosed to employer members in advance.*

3. The final regulation should permit an association health plan to use reasonable contractual limitations to promote stability.

The preamble to the Proposed Regulation correctly identifies association health plan stability as an important concern. However, the preamble's discussion could be read to prohibit certain contractual limitations that associations commonly use to ensure stability. For the reasons that follow, the Department should ensure that the final regulation permits association health plans to impose reasonable contractual limitations on terminating and resuming coverage.

The Proposed Regulation prohibits a group or association from conditioning employer membership based on any health factor of an employee or employees, former employee or former employees, or their respective family members or other beneficiaries. Prop. Reg. § 2510.3-5(d)(3). In addition, the preamble contains the following statement:

Coupled with the control requirement, also requiring AHPs to accept all employers who fit their geographic, industry, or any other non-health-based selection criteria that each AHP chooses, the nondiscrimination provisions ensure a level of cohesion and commonality among entities acting on behalf of common law employers . . .

83 Fed. Reg. at 624 (col. 3). The quoted statement could be read to mean that, in addition to nondiscrimination based on health factors, a group or association could not impose reasonable contractual limitations on membership (and, thus, eligibility for coverage) for employer members who drop and resume coverage. This seems at odds with the HIPAA regulation cross-referenced in Proposed Regulation Section 2510.3-5(d), which provides that the election of prior coverage is not, itself, within the scope of any health factor. DOL Reg. § 2590.702(a)(3).

New association health plans will consider and potentially impose contractual limitations on a member's ability to discontinue and resume coverage in order to incentivize long-term membership. This, in turn, promotes a stable risk pool. As an example, an association might impose a waiting period of two years, during which a member who drops association coverage cannot resume coverage under the association plan.

These contractual tools address a market reality: insurers and other coverage providers recruit the healthier members of associations, and sometimes offer artificially low premium or contribution rates for the first year of coverage, knowing that the employer's existing plan will cover "tail claims" for services performed but not yet billed before the change in coverage, leading to favorable claims experience in the first year. The same employer will likely find that rates increase in a subsequent year, and may seek to rejoin the association plan to avoid the increase. Such changes in a risk pool can destabilize an association plan. To promote stability, associations currently use contractual limitations to make short-term changes in coverage (and membership) less appealing.

The NSBA respectfully submits that so long as an association health plan discloses any contractual limitations on reentry clearly and in advance, they do not present a policy or enforcement concern. Applied uniformly over all members, such limitations do not present a risk of discrimination based on health factors. The Department should therefore revise the statement in the preamble, relating to the purported requirement to accept all employers meeting non-health-based criteria, to clarify that a group or association may use reasonable contractual limitations on discontinuing and recommencing group or association membership.

4. To ensure that a group or association acts in the interests of its employer members and those members' employees and dependents, the final regulation should require the employer members of an association have a genuine organizational relationship unrelated to the provision of benefits.

To qualify as a bona fide group or association of employers under the Proposed Regulation Section 2510.3-5(b), a group or association must only "(exist) for the purpose, in whole or in part, of sponsoring a group health plan that it offers its employer members." With this language, the Department proposes to remove the condition that is in effect under current DOL sub-regulatory guidance, requiring an employer association have a purpose other than offering health coverage. 83 Fed. Reg. at 619. The impetus for this change is to allow for expanded opportunities for employers to band together to provide group health coverage. Id.

The NSBA expresses some trepidation against a standard that completely rejects the current guidance for several reasons. First, current Department guidance does not preclude formation of a bona fide group or association of employers as is evidenced by existing association health plans. In addition, in reviewing requests for advisory opinions on this issue, the Department has indicated that a sub-group of employer members of a trade or industry association may constitute a bona fide group or association of employers acting as an "employer" within the meaning of ERISA § 3(5). See, e.g., Advisory Opinions 2017-02A, 2003-13A, 2005-25A, 2005-24A.¹ Thus, the condition that a group or association of employers has a purpose other than offering health coverage does not preclude new bona fide associations from forming, but requires that the employer members have some type of pre-existing

¹ In its advisory opinions, the Department emphasizes that the pre-existing relationships between the employers – membership in a trade or industry association – satisfies the requirement that the sub-group of employers have a genuine organizational relationship unrelated to the provision of benefits. Advisory Opinions 2017-02A, 2003-13A, 2005-25A, 2005-24A.

organizational relationship. As this letter discusses, these pre-existing organizational relationships provide numerous benefits to association health plans.

Second, the NSBA asserts that the condition of a genuine organizational relationship unrelated to the provision of benefits provides the better method of achieving the common employer interests that characterize an employee benefit plan than the proposed nondiscrimination provisions in the Proposed Regulations. The value of this type of preexisting relationship amongst employers is tied directly to the common economic and representational interest that the Department and the courts have found vital in creating the protective nexus employees rely on to represent their interests relating to the provision of benefits. The existing relationships and networks born out of a prior organizational connection provide for a significant degree of accountability as well as assisting with the development and longevity of the association health plan. For example, a legitimate membership organization, like the NSBA, will not risk its goodwill and reputation with its members by associating with a substandard association health plan. The NSBA expresses its concern that eliminating this condition may in fact lead to a proliferation of association health plans that do not have the requisite cohesion and protective nexus integral to the success of the association and the protection of employees.

Third, and practically, requiring new bona fide groups or associations of employers to abide by the condition of a genuine organizational relationship unrelated to the provision of benefits will facilitate the development of successful, new association health plans. Association health plans whose employer member have access to the communication systems, networks, and history of cooperative ventures of an existing association will have a significant advantage as to the formation, development, and communication of a plan.

Based on the foregoing reasoning, the NSBA recommends that the Department consider revising Proposed Regulation Section 2510.3-5(b)(1) to include the revision italicized below:

(1) The group or association exists for the purpose, in whole or in part, of sponsoring a group health plan that it offers to its employer members; *provided that the employer members share some business or organizational purposes and functions unrelated to the provision of benefits;*

Alternatively, the Department could exempt associations and association health plans that establish a membership nexus to an existing association from all or a portion of the nondiscrimination requirements in Proposed Regulation Section 2510.3-5(d).

Conclusion

The NSBA welcomes the Department's proposals seeking to enable more associations to offer group health plan coverage. The NSBA respectfully submits that the clarifications and revisions described above further that purpose and the policies the Department identified in the preamble to the Proposed Regulation and urges the Department to include the clarifications and revisions proffered in this letter in the final rule.

If you have questions, please contact me at 402-475-7091 or via email at lneeley@nebar.com

Best regards,

A handwritten signature in black ink that reads "Elizabeth Neeley". The signature is written in a cursive, flowing style.

Elizabeth Neeley
Executive Director
Nebraska State Bar Association