



March 6, 2018

Submitted electronically via regulations.gov

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

Re: Docket No. EBSA—2018—0001, “Definition of Employer Under Section 3(5) of ERISA-Association Health Plans,” RIN 1210-AB85

Dear Sir or Madam:

The Independent Bakers Association (“IBA”) appreciates the opportunity to submit comments on the Department of Labor (“DOL”)’s proposed rule concerning the definition of “employer” under Section 3(5) of the Employee Retirement Income Security Act (“ERISA”). IBA is a Washington, D.C.-based national trade association of more than 250 family-owned wholesale bakeries and allied businesses. The Association was founded in 1968 to protect the interests of independent wholesale bakers. IBA commends the Secretary’s pursuit of actions to increase competition and decrease the cost of healthcare as directed by Executive Order 13813, and the decision to involve the public in this effort.

IBA is an active member of the Coalition to Promote Independent Entrepreneurs, which advocates for preserving an individual’s right to work as an independent contractor and a company’s right to do business with a self-employed individual. Many IBA members utilize independent contractors in connection with the sale and delivery of their baked goods. This model allows the contractors to have more freedom and control over their activities and, because they buy and resell the products to retailers, gives the contractors an opportunity to generate more income through independent entrepreneurial activities and decisions.

In coordination with the comments submitted by the Coalition, IBA supports and endorses the proposed rule, as it would create a new health plan option for independent contractors that is very much needed. As the proposed rule observes, self-employed individuals are denied access to large group health plans, which exposes them to higher health-care costs than those who have access to such plans. This operates as a disincentive against individuals pursuing their entrepreneurial desires. The proposed expansion of

association health plans would represent a significant action to remove this disincentive and thereby benefit the nation's economy.

I. Comments Concerning the Criteria to Qualify as a “Working Owner”

DOL requests comments concerning the criteria to qualify as a “working owner.” The current proposal would define the term “working owner” to mean any individual:

- (i) Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including partners and other self-employed individuals;
- (ii) Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business;
- (iii) Who is not eligible to participate in any subsidized group health plan maintained by any other employer of the individual or of the spouse of the individual; and
- (iv) Who either:
 - a. Works at least 30 hours per week or at least 120 hours per month providing personal services to the trade or business, or
 - b. Has earned income from such trade or business that at least equals the working owner's cost of coverage for participation by the working owner and any covered beneficiaries in the group health plan sponsored by the group or association in which the individual is participating.¹

The proposed rule states that the purpose of these two alternative criteria is to distinguish between individuals engaged in a legitimate trade or business from those who are not or who are engaged in only *de minimis* commercial activities. While IBA supports this objective, it respectfully recommends that criteria (iv)(a) be replaced with the following:

- a. Operates the trade or business under an Employer Identification Number (“EIN”), rather than a Social Security Number; and reported the earnings and expenses for the trade or business for the prior tax year on a Schedule C to the individual’s Internal Revenue Service (“IRS”) Form 1040, or, if applicable, on the tax form appropriate for the type of entity out of which the trade or business operates; or

II. Rationale for the Recommendation

The current criteria in section (iv)(a) are similar to the standards used to determine whether an employee is a “full-time employee” for purposes of the Affordable Care Act.² In order to maintain clear distinctions between employees and independent contractors, we believe it is preferable that the criteria used to determine a self-employed individual’s involvement in a legitimate trade or business not be derived from the criteria used for employees.

¹ The proposed definition would be codified at 29 C.F.R. § 2510.3-5(e)(2).

² See 26 C.F.R. § 54.4980H-1(a)(21).

Tracking hours is not an appropriate standard for measuring a self-employed individual's dedication to the business. Unlike employees, independent contractors often do not track their hours worked, as many of their projects are paid on a project-fee basis or a commissioned basis, rather than based on the number of hours worked. Consequently, many self-employed individuals do not maintain the types of records necessary to be able to demonstrate the number of hours worked in any specific period of time.

IBA asserts that the criteria it proposes are more consistent with an individual's independent-contractor status. Operating under an EIN represents an unequivocal statement by an individual that the activities undertaken under an EIN are intended to be business related. While independent contractors are not required to operate under an EIN, and not all independent contractors currently do so, we believe such a requirement would be an appropriate alternative indicator of an individual actually being engaged in a legitimate trade or business.

Likewise, reporting earnings and expenses attributable to a trade or business on a Schedule C represents an individual's representation to the IRS that the individual operates a trade or business. An independent contractor is currently required to report earnings relating to the individual's trade or business on a Schedule C. It follows that this would be another reliable alternative indicator of an individual actually being engaged in a legitimate trade or business.

III. Conclusion

IBA supports and endorses the proposed rule. We believe it is critically important that fundamental distinctions between employees and independent contractors be reinforced in all contexts, and that criteria used to measure commitment to a business endeavor by employees and by independent contractors reflect the differences between these two different categories of workers.

Thank you for your consideration of this request. Please contact me with any questions.

Respectfully submitted,

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