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

**RE: RIN 1210– AB88: Definition of “Employer” Under Section 3(5) of ERISA -
Association Retirement Plans and Other Multiple-Employer Plans**

Dear Director Canary:

On behalf of Uber Technologies (Uber), thank you for the opportunity to comment on the above referenced Notice of Proposed Rulemaking (NPRM) published by the U.S. Department of Labor’s Employee Benefits Security Administration (EBSA) on October 23, 2018 (83 Fed. Reg. 53534).

Uber has been a leader in connecting independent contractors with third parties that can provide them with healthcare, retirement, coverage for medical expenses, disability payments and a survivors benefit, and other benefits. The company supports efforts by policymakers to expand access to portable, affordable and quality benefits and thanks the Department of Labor (Department) for issuing this important NPRM.

Uber’s independent work model

Uber’s mission is to ignite opportunity by setting the world in motion. We build technology designed to enable reliable transportation everywhere, for everyone. What started as a way to tap a button to get a ride has led to billions of moments of human connection as people around the world move with the help of our technology. In the space of eight years since the company started, over ten billion trips have been completed using Uber’s technology.

With Uber, people can also get work at the touch of a button. Easy access to work combined with the flexibility to set and adjust your work schedule has attracted over 900,000 drivers to partner with Uber in the United States. Indeed, in a [survey](#) of Uber driver-partners, 87% noted that they use Uber “to be [their] own boss and set [their] own schedule.” Furthermore, recent [economic research](#) by UCLA, Yale and Uber researchers

has estimated “significant benefits” arising from Uber’s real-time flexibility which enables drivers to not just set but also to adjust their work schedule.

However, the chance to be your own boss should not need to come at the expense of having access to social benefits and protections. We believe everyone should have the option to protect themselves and their loved ones when they’re injured at work, get sick, or when it’s time to retire.

Universal portable benefits systems would allow individuals to optimize their work arrangements, affording them the option of seeking new opportunities and creating new businesses without the threat of losing critical benefits for themselves or their families. Universal and workable portable benefits systems, however, must have robust worker and consumer protections and a well-functioning market design and regulatory framework. That is why Uber is committed to working in a collaborative process that involves all stakeholders and seeks to understand and account for these challenges through data, evidence, and an open process.

Comments

Uber shares the Department’s goal of increasing access to Employee Retirement Income Security Act (ERISA) retirement plans for small businesses and the self-employed, and believes the NPRM will do both. We are particularly pleased to see the inclusion of the self-employed in the NPRM as studies show the vast majority of self-employed individuals are not regularly contributing to individual retirement accounts.¹ As the Department notes, “Gig economy workers, in particular... might find it difficult and expensive to navigate” the tax-advantaged vehicles available to them, and “[Multiple Employer Plans (MEPs)] could help raise awareness and ease entry to retirement coverage for broad classes of gig workers such as on-demand drivers or workers in cities where gig work is common” (83 Fed. Reg. at 53547 and 53548, respectively).

Uber also agrees with the Department that ERISA plans provide greater protections and other advantages over Individual Retirement Accounts, including reduced fees, increased portability, automatic enrollment, a well-established regulatory structure with consumer protections, and stronger protections from creditors (83 Fed. Reg. at 53535 and 53553).

Additionally, Uber appreciates the Department noting in the NPRM’s preamble that, “The proposal also should not be read to indicate that a business that contracts with individuals as independent contractors becomes the employer of the independent contractor merely by participating in the MEP with those independent contractors, who would participate as worker owners, if applicable, or promoting participation in a MEP to those independent contractors, as working owners” (83 Fed. Reg. at 53537). While such

¹ See e.g., the NPRM at 83 Fed. Reg. at 53534, note 6 (referencing a study finding only 13% of workers that do not have access to workplace retirement contribute to retirement accounts) and 53547, note 76 (referencing a study finding only 6% of self-employed individuals participate in retirement plans).

language is helpful, we suggest the Department take the following additional steps to facilitate and encourage participation in MEPs by bringing clarity on this important issue:

1. Include the above-referenced or similar language in the text of the rule, rather than just in the preamble;
2. Provide parallel guidance under the Fair Labor Standards Act and other applicable laws the Department enforces where classification of independent contractors is relevant to enforcement; and
3. Clarify that participating in an MEP or encouraging participation in an MEP cannot be used as evidence of employee status for purposes of evaluating in any proceeding whether an individual is providing services as an independent contractor or employee.

The Department notes in the NPRM that it plans to interpret “trade, industry, line of business, or profession” broadly (83 Fed. Reg. at 53540). While such phrasing is helpful, we encourage the Department to take this a step further in the final rule by providing illustrative examples.

Uber encourages the Department to give sponsors of Association Retirement Plans the ability to delegate/outsome some or all its administrative, operational and regulatory compliance duties to qualified third parties (e.g. third-party administrator or Independent Fiduciary). In our view, such a change would be consistent with the public policy purpose of the NPRM.

Uber also proposes that the Department work closely with Treasury to eliminate the unified plan rule, also known as the “one bad apple” rule. The “one bad apple” rule currently serves as a deterrent to joining a MEP because one non-compliant participating employer could put all the other employers in the plan at risk. Uber also supports limiting the liability of the MEP and MEP assets for compliance issues that occur prior to a participating employer’s entry in to the MEP since many of those issues may not be known at the time of the merger. In addition, Uber strongly supports clear language and best practices related to a forced spin-off and termination if a participating employer fails to comply with the plan document or fiduciary best practices.

We would also encourage the Department to provide clear guidance on how to handle a MEP adopting employer who decides to discontinue its association membership when the plan criteria is based on such membership. Clarification by the Department will help to alleviate confusion about required next steps and assist administrators in complying with all applicable laws and regulations.

Additionally, further clarification on how the Department would expect auto enrollment to work for independent contractors would be helpful.

Lastly, while we understand the Department’s desire to set thresholds for participation in MEPs, we believe these thresholds should be very low in general but also to meet the needs of those that are choosing to work flexibly and independently through apps like Uber. Access to retirement accounts should be universal, and we do not want any independent workers deprived of the opportunity to participate in a MEP. As the Department notes, a wide range of gig workers could benefit from the NPRM, with one survey finding that “many traditional workers who pursue gig work on the side do so at least partly to help them save for retirement,” but “[on] the other hand, most of those for whom gig work is their main job have less than \$1,000 set aside for retirement” (83 Fed. Reg. at 53548). The minimum income should not be tied to participation in an Association Health Plan as workers might not be offered or participate in such plans.

The reality of the on-demand economy is that driver-partners have multiple options to generate income. In the US more than half of Uber’s driver-partners drive less than 10 hours a week, and to Uber’s estimation, a majority of driver-partners work in other capacities that provide additional sources of income. Therefore, it is important the Department clarify how the 20-hour/80-hour thresholds would be calculated for workers who supplement their income through a range of activities.

Thank you for the opportunity to submit these comments. Uber looks forward to working with you on this and other issues.

Sincerely,

/s/ Danielle Burr

Head of Federal Affairs
Uber Technologies, Inc.