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July 3, 2018

The Honorable Lamar Alexander
Chairman
The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Virginia Foxx
Chairman
The Honorable Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Labor, Employee Benefits Security Administration: Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor (DOL), Employee Benefits Security Administration entitled "Definition of 'Employer' Under Section 3(5) of ERISA—Association Health Plans (RIN: 1210-AB85). We received the rule on June 21, 2018. It was published in the *Federal Register* as a final rule on June 21, 2018. 83 Fed. Reg. 28,912. The effective date of the final rule is August 20, 2018.

The final rule establishes under title I of the Employee Retirement Income Security Act (ERISA) additional criteria under ERISA section 3(5) for determining when employers may join together in a group or association of employers that will be treated as the "employer" sponsor of a single multiple-employer "employee welfare benefit plan" and "group health plan," as those terms are defined in title I of ERISA. The rule states that by establishing a more flexible commonality of interest test for the employer members than DOL had adopted in sub-regulatory interpretive rulings under ERISA section 3(5), and otherwise removing undue restrictions on the establishment and maintenance of Association Health Plans (AHPs) under ERISA, the regulation facilitates the adoption and administration of AHPs and expands access to affordable health coverage, especially for employees of small employers and certain self-employed individuals. At the same time, according to DOL, the regulation continues to distinguish employment-based plans, the focal point of title I of ERISA, from commercial insurance programs and other service provider arrangements. The final rule also sets out the criteria that would permit, solely for purposes of title I of ERISA, certain working owners of an incorporated or unincorporated trade or business, including partners in a partnership, without any common law employees, to qualify as employers for purposes of participating in a bona fide group or association of employers sponsoring an AHP and also to be treated as employees with respect to a trade, business, or partnership for purposes of being covered by the AHP. The regulation

would affect AHPs, bona fide groups or associations of employers sponsoring such plans, participants and beneficiaries with health coverage under an AHP, health insurance issuers, and purchasers of health insurance not purchased through AHPs.

Enclosed is our assessment of DOL's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the agency's submissions to us indicates that DOL complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Preston Rutledge
Assistant Secretary, Employee Benefits
Security Administration
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
ENTITLED
DEFINITION OF “EMPLOYER” UNDER SECTION 3(5)
OF ERISA—ASSOCIATION HEALTH PLANS
(RIN: 1210-AB85)

(i) Cost-benefit analysis

The Department of Labor (DOL) concluded that this rule delivers social benefits that justify any attendant social costs. It stated that the impact of this final rule on state individual and small group risk pools is highly dependent on state regulatory practices. States under this final rule retain broad authority to pursue steps to optimize the Association Health Plans (AHPs) role in their local markets. DOL believes that the provisions of this rule and states' broad authority to adjust local rules, combined with the attendant benefits of extending insurance to small businesses and working owners, strike the right balance to both limit and justify consequent adverse selection against local markets. According to DOL, this final rule is intended to facilitate the creation and maintenance of AHPs to offer more affordable health insurance to small businesses, including working owners. DOL states that millions of Americans are working owners of small businesses, employees of small businesses, or are family members of such working owners or employees. According to DOL, too many have unaffordable options for health insurance or lack health insurance altogether. DOL states that by revising the rule and promoting formation of AHPs for small businesses and working owners, this final rule will make affordable health insurance available to many of these people, including a substantial number who would otherwise be uninsured. According to DOL, many employer groups or associations have a thorough knowledge of the economic challenges that their members face, and using this knowledge and the regulatory flexibility provided by this final rule AHPs may tailor health coverage to better meet the needs of their members at lower and more actuarially fair prices than plans currently available in the small group and individual health insurance markets under the Patient Protection and Affordable Care Act (PPACA) and state laws applicable to those markets. The final rule, according to DOL, will increase the choice of affordable health coverage available to many small businesses, including working owners. And, according to DOL, small businesses may use some of the economic gains that they will reap from affordable AHP health coverage to raise pay, hire more employees, and invest in new equipment, structures, and intellectual property, all of which contributes to economic growth.

The final rule states that AHPs will pursue economies of scale by encouraging more small businesses and working owners to band together to (1) make health coverage design and purchasing decisions and (2) provide administrative functions. Like large health insurance issuers, AHPs with large shares in local healthcare markets may exercise bargaining power with local healthcare providers and achieve economies of scale in purchasing healthcare services. AHPs sponsored by geographically-based, multi-industry organizations, which the final rule authorizes, are more likely than AHPs sponsored by industry-based organizations with widely scattered memberships, which DOL's current pre-rule guidance allows (and this new regulation will continue to permit), to garner sufficient numbers of insured in local healthcare markets to

achieve such economies of scale. DOL noted that it lacks data to quantify the effect of the final rule on the uninsured population.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

DOL determined that this final rule, which would broaden the criteria for determining when employers may join together in a group or association to sponsor a group health plan under Employee Retirement Income Security Act (ERISA), is likely to have a significant impact on a substantial number of small entities. Therefore, DOL provided its final regulatory flexibility analysis in the rule which addressed the need for and objectives of the rule; an estimate of affected small entities; the impact of the rule; and any duplication, overlap, and conflict with other rules and regulations.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

DOL states that this rule does not include any federal mandate that it expects would result in expenditures of \$100 million or more (adjusted annually for inflation with the base year 1995) by state, local, or tribal governments, or the private sector. DOL states that the rule merely broadens the conditions under which AHPs will be treated as large group health benefit plans under ERISA, PPACA, and state law.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551*et seq.*

On January 5, 2018, DOL published a proposed rule. 83 Fed. Reg. 614. DOL received over 900 comments in response to the proposed rule from a wide range of stakeholders, including group health plan participants, consumer groups, employer groups, individual employers (including sole-proprietors), employer associations and other business groups, individual health insurance issuers, trade groups representing health insurance issuers, state regulators, and existing AHPs, and responded to comments in the final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

DOL states that the final rule is not subject to the requirements of PRA because it does not contain a collection of information as defined by PRA.

Statutory authorization for the rule

DOL promulgated this final rule under the authority of 29 U.S.C. 1002(2), 1002(5), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135.

Executive Order No. 12,866 (Regulatory Planning and Review)

DOL determined that this final rule is economically significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, OMB has reviewed the rule pursuant to the Executive Order.

Executive Order No. 13,132 (Federalism)

DOL states that the final rule would have federalism implications because it would have direct effects on the states, the relationship between the national government and the states, and on the distribution of power and responsibilities among various levels of government. DOL believes these effects are limited, insofar as the final rule would not change AHPs' status as large group plans and multiple employer welfare arrangements (MEWAs), under ERISA, PPACA, and state law. Because ERISA classifies AHPs as MEWAs, they generally are subject to state insurance regulation. Specifically, if an AHP is not fully insured, then under ERISA section 514(b)(6)(A)(ii) any state insurance law that regulates insurance may apply to the AHP to the extent that such state law is not inconsistent with ERISA. If, on the other hand, an AHP is fully insured, ERISA section 514(b)(6)(A)(i) provides that only those state insurance laws that regulate the maintenance of specified contribution and reserve levels may apply to the AHP, although the states retain regulatory authority over the insurance company itself and any policies it issues. DOL notes that state rules vary widely in practice, and many states regulate AHPs less stringently than individual or small group insurance. In the course of developing the final rule, DOL states that it consulted directly with a number of state officials, including state insurance department representatives and state-based Exchange representatives, as well as with the National Association of Insurance Commissioners.

DOL states that the final rule does not modify existing state authority. ERISA section 514(b)(6) gives the Department and state insurance regulators joint authority over MEWAs, including AHPs (which are a type of MEWA), to ensure appropriate regulatory and consumer protections for employers and employees relying on an AHP for healthcare coverage. DOL therefore states in this final rule that nothing in the rule changes this joint structure, or is meant to reduce the historically broad role of the states when it comes to regulating MEWAs, including AHPs.

DOL states that under this framework, if an AHP established pursuant to this final rule is not fully insured, any state law that regulates insurance may apply to MEWA to the extent that such state law is "not inconsistent" with ERISA. If an AHP is fully insured, state laws that regulate the maintenance of specified contribution and reserve levels (and that enforce those standards) may apply to MEWA, and state insurance laws are generally saved from preemption when applied to insurance companies that sell policies to AHPs and to insurance policies that AHPs purchase to provide benefits. In addition, with respect to fully-insured AHPs, DOL's view is that ERISA section 514(b)(6) clearly enables states to subject such AHPs to licensing, registration, certification, financial reporting, examination, audit and any other requirement of state insurance law necessary to ensure compliance with the state insurance reserves, contributions, and funding requirements.