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Definition of Employer Under Section 3(5) of ERISA-Association Health Plans

Comment On: EBSA-2018-0001-0001

Definition of Employer Under Section 3(5) of ERISA-Association Health Plans

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General Comment

Please accept these comments also filed to U. S. Bureau of Census (USBC) for their Feb. 12, 2018 deadline. The examples of health care related questions given for Census are relevant to this rulemaking at Department of Labor. I will file additional comments by March 6, 2018 regarding the ERISA policy questions. I hope that DOL is able to make changes to this definition so that small businesses may purchase health care through exchanges or larger pools that cross state lines. However I do not believe that the health care policies should fail to meet Affordable Care Act (ACA) or fail to meet requirements needed by most physicians' offices or hospitals.

Details to come.

Thank you.

Theresa Pugh

Attachments

Comments on Small Biz Census Submitted by Theresa Pugh Consulting Feb 2018 FINAL



**COMMENTS SUBMITTED BY THERESA PUGH CONSULTING, LLC
REGARDING U.S. BUREAU OF CENSUS (USBC)
AND RELEVANCE TO ERISA SECTION 3(5) SOLICITATION OF COMMENTS DUE MARCH 6, 2018
DOCKET NUMBER US BC-2017-0005
FEDERAL REGISTER NOTICE 2017-26725**

FEB. 12, 2018 (USBC)

**AND FILED AS ADDENDUM TO COMMENTS FILED TO
DEPARTMENT OF LABOR (ERISA-2018-0001)**

MARCH 6, 2018 (DOL)

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Who/what is Theresa Pugh Consulting, LLC?

Theresa Pugh Consulting, LLC is a solo operator regulatory affairs consulting firm registered in the state of Virginia. The firm began in June 2016. These comments reflect the views of the owner/operator, Theresa Pugh, and do not reflect any views of the firm's clients on other regulatory matters. To date, no clients have asked for assistance in advocating on Census matters or on health care. These comments are entirely those offered by the owner. The owner is familiar with OIRA and OMB Burden Box requirements.

The purpose of the comments, filed both before USBC for the small business census process and the Department of Labor's reconsideration of the definition of "associated" businesses for purposes of buying health care policies across state lines to reduce health care costs for millions of small businesses with <50 employees. The purpose to file on both matters is for OIRA/OMB, U. S. Census and Department of Labor to determine if there is a way to gain information that would be helpful to Department of Labor in addressing health care related issues for small businesses while not expanding the data collection in Census process to burden respondents. These comments intend for a few key questions be added to the Census for business to assist Department of Labor to determine how best to correct the flaws in the ERISA definition {specifically Section 3(5)} or confirm the regulatory solution is working. Perhaps the questions may also assist key government agencies make additional changes through notice and comment/rulemaking to assist small businesses seeking affordable health care. Health care law(s) are inherently complex and often come under multiple agency jurisdictions including DOL, HHS, and IRS.

Why Census Questions to Small Business Entities Matter More Now Than Before:

There are currently 28.8 million small businesses in America. According to U. S. Small Business Administration more than 80% of these or 23 million are solo operators with no employees. And approximately 19% of all new small businesses are family-owned so any problems these small businesses face tend to have far broader implications to the families of small business owners.

Fortunately, the number of small businesses has increased since the recession (2008-2009). Small businesses account for 63.3% of all new jobs from 1992 until 2013. This statistic is why asking small businesses the right questions in the business Census is critical.

We have seen a diminishment of larger employers adding jobs or enhancing existing jobs due to a variety of reasons—increased productivity, "Artificial Intelligence", cost of labor, trade, costs of health care, and costs of regulation. Generally speaking the cost of capital has not been a discouragement for entrepreneurs to start new businesses or expand. Understanding the biggest or second biggest challenge to small businesses is critical and carefully crafted Census questions may help address this problem.

Why Census Questions to Small Businesses on Health Care Are Relevant to Broader Economy:

As a nation we are pleased to see many individuals start small businesses—with hopes that these companies will take root and become larger employers, offering excellent salaries, benefits, and new products/services not offered by others. This is the proverbial "American way". However, increasingly it is clear that U. S. small business entrepreneurs find it very difficult to find (or keep) affordable health care insurance because many of these businesses (with <50 employees) are currently restricted from

purchasing health care across state lines. This problem goes back to an inequity that did not appear so significant in the 1970s when ERISA was first addressed by Congress¹. However, it is now clear that the access to affordable health care insurance problem is growing more acute for small businesses. A recent survey² conducted by National Association of Self-Employed (NASE)³ shows:

*“A large majority — more than eight of every ten [NASE survey] respondents — **continue to feel that small businesses are at a disadvantage compared with large businesses when it comes to access to health insurance. Close to a majority do not feel they have access to health insurance options that fit their company’s needs, again a pattern nearly identical to that seen in 2005 and 2008. As in 2005 and 2008, a plurality of respondents feel it is the employer’s responsibility to offer health insurance, and that health insurance is a necessity to remain competitive for employee recruitment. However, support for these issues has decreased over the years, and the percentage who are uncertain continues to grow**”.*

NASE’s survey also points out that

“respondents from companies with gross sales of less than \$50,000 report that their health insurance premiums account for a median of **19% of their gross sales**. Elevated rates are also seen **among the solo practitioners, who have to dedicate 8% of their gross to cover health insurance costs**. This drops to 1.5% or less among the largest-grossing companies, even though their actual dollar amount spent is much higher”.

While the NASE survey response are helpful, perhaps in addition to other business society surveys the U. S. business Census should inquire a short set of questions that will assist key agencies including Department of Labor, Health & Human Services, U. S. Department of Commerce, and U. S. Small Business Administration understand the impact of this issue to the small business community and find solutions. Further, as NASE’s survey indicates, many small business owners have more than one family member obtaining health insurance through the small business. Thus, availability and affordability of health care for small businesses may affect the families of those employers and employees.

Personal experience:

It is shocking how few PPO health insurance policies are available to LLC businesses for health care insurance with broad physician and hospital participation or acceptance. For example, in Northern Virginia, where my business is located, only entities in five zip codes between Richmond, VA and the Virginia/DC/Maryland border actually offer a PPO insurance where all major hospitals⁴ and most medical offices recognize. As I understand, by contrast, small businesses in Washington, D. C. offer 17 health care policies to select from within its exchange and more than three are PPOs. The same insurance company that I obtain health insurance from is available at half the cost because the DC exchange or

¹ According to Entrepreneur, in 1970 there were only 14.7 small businesses. See

<https://www.google.com/amp/s/www.entrepreneur.com/amphtml/177302>

² NASE survey on health care costs, availability, ability to offer to employees, and lack of insurance for employees found at https://www.nase.org/sf-docs/default-source/research-results/2012_NASE_Health_Care_Survey.pdf?sfvrsn=56b8c7a5_0

³ Theresa Pugh Consulting, LLC is a member of NASE, U. S. Chamber of Commerce, and American Public Power Association.

⁴ >300 bed hospitals with Emergency Room service

“pool” is far wider. Yet the population of 681,170 in Washington, D. C. is far smaller than the 8.4 million population in Virginia. (Approximately 2.4 million of the 8.4 million live in Northern Virginia).

While these comments are intended to respond to the solicitation on Census questions and whether other topics should be included, I offer this background on healthcare questions/survey response within Census to identify practical and helpful ideas. While I am not an expert on ERISA (where changes must be made by law or regulation to expand Associated Health Plans -AHPs), I recognize that DOL might have an easier task if DOL and OMB/OIRA had gathered information through the Census. This information could address availability, how much time small businesses take to seek health insurance, negotiate health insurance, or how many employees declined employment/left employment because of lack of health insurance offered. So, my recommendations would be to add to the Census the following questions, in order to help DOL and other agencies address how to help small businesses thrive.

I recognize that Census may want to sunset or revisit health care-related questions after two Census cycles to reduce burden.

Suggested questions to Census:

- 1) Does your small business offer health insurance to you or to your employees? (Yes or No)
- 2) If no, is this because you have health insurance through another means (retirement, spouse, military coverage, Medicare Part A/B etc.)
- 3) If you have health insurance, has your coverage been a positive in offering employment or expansion of employee benefits? Yes, No, Not Applicable
- 4) Have prospective and desirable prospective employees rejected employment because of your health care coverage (or lack of coverage)? Yes, No, Not sure
- 5) Have your health care insurance costs increased or decreased over the last five years?
- 6) If costs increased, has the cost of your health care insurance increased by more than 20%?
- 7) Did you find more than one health care insurance provider to select from for you or your employees? Yes or No.
- 8) Were you or your employees categorized by health care insurance providers as “high risk” even if those employees worked >49 weeks of the year with less than 3 days of absenteeism and no known hospitalization of more than 2 days?
- 9) Would your company be interested in participating in Associated Health Plan (AHP) of a much larger pool of participants if this reduced cost without decreasing quality if allowed under ERISA tax law?

It may also be useful for the Census to include businesses in Washington state because a business organization offers a broad exchange or AHP that appears to have reduced health care costs. DOL and other agencies seeing “private sector solutions” to problems may help Federal Agencies see other solutions in Census survey responses.

Even if OIRA/OMB believe that adding nine questions is too large of a number, I encourage an attempt to learn more about health care as this issue is of far more consequence than the ability to obtain small business loans and financing under current economic conditions. For many businesses, like mine, health care costs are the most challenging problem. In 19 months, my health care costs have increased by 52% simply because I am not allowed, under ERISA definitions, to purchase with others and negotiate across

state lines. While I cringe at the increase in health care costs, I realize that I am fortunate to live in one of the five zip codes in Virginia that even offers PPO policies that are well recognized by many hundreds of physicians and major hospitals. What better way for the U. S. government to allow for regulatory changes, freeing the private sector, to correct the problem than through a small statistical survey in the Census for business?

Separate comments will be submitted to DOL on March 6, 2018 regarding their call for comments on ERISA Section 3(5) revisions that might allow AHPs to be open to the many small businesses across America that currently are disadvantaged in purchasing health insurance only within their own state.

Miscellaneous:

Many small business owners like mine are reluctant to respond to phone survey out of fear that it is not legitimate or a nuisance. Given the frequency of SPAM e mail and bogus phone calls offering warranty extensions and other undesirable products (perhaps even fraudulent), it is not terribly likely that a small business would respond to phone surveys from Census takers. Perhaps the Census survey should give an imprimatur of legitimacy through a notice from U. S. Census Department and IRS by mail to the Owner/CEO. Also, many small business owners, like myself, are wary of surveys given identity theft. Some small businesses have policies to not respond to surveys that might appear legitimate after the fake IRS phone calls and e mails over the last five years.

Thank you for considering these comments. I am available if I may be answer any questions.

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