



VIA ELECTRONIC SUBMISSION

March 6, 2018

Jeanne Klinefelter Wilson
Deputy Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans; RIN 1210-AB85

Dear Deputy Assistant Secretary Wilson:

Associated Builders and Contractors Inc. (ABC) hereby submits the following comments to the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) in response to the above-referenced proposed rule, published in the *Federal Register* on Jan. 5, 2018, at 83 Fed. Reg. 614.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association established in 1950 that represents more than 21,000 members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC’s membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses.

Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Background

On Oct. 12, 2017, President Trump issued Executive Order (E.O.) 13813, Promoting Healthcare Choice and Competition Across the United States, which seeks to expand access to more affordable health care options for millions of Americans.¹ The E.O. directs the Secretary of Labor to consider proposing

¹ 82 Fed. Reg. 48385

regulations or revising guidance, consistent with law, to expand access to health coverage by allowing more employers to form association health plans (AHPs).²

On Jan. 5, 2018, the DOL’s EBSA issued a proposed rule, Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans,³ that would amend the regulations under Title I of the Employee Retirement Income Security Act (ERISA) to make it easier for employers to band together and be treated as an “employer” sponsor of a single multiple-employer “employee welfare benefit plan” and “group health plan” under ERISA.

ABC’s Comments in Response to the Department’s Proposed Rule

ABC writes in support of the DOL’s proposal, which will help expand access to affordable health coverage by allowing more employers to form AHPs. AHPs are a common-sense solution to lowering the cost of health care by allowing small businesses to band together and purchase health insurance for millions of Americans who have been harmed by the Affordable Care Act (ACA).

Providing quality health care benefits is a top priority for ABC and its member companies. However, since the implementation of the ACA, ABC members no longer have the choice or flexibility to structure health care coverage options that meet the needs of their fluctuating workforce. The resulting increased costs jeopardize the ability of ABC member companies—and small business owners in particular—to maintain affordable coverage options for their employees, and have forced some to drop coverage altogether.

For more than 40 years, ABC offered its members comprehensive and affordable health care coverage through an AHP. The plans were administered by the ABC Insurance Trust, which was established in 1957 by five contractors that could not afford to buy insurance coverage because they were too small. The program was overseen by a group of trustees who were all contractor members and whose families and employees were insured by the plan. The trust offered ABC members the choice of more than 14 different fully insured medical plans that were comprehensive in that they covered all licensed providers across the country. Additionally, they included all the required mandates in the state of Virginia, where ABC was headquartered at the time, and provided the same types of plans in other states, even if they had lesser benefit requirements.

ABC had a strong and viable program that offered access to affordable health care options as a benefit to its membership. Unfortunately, the ABC Insurance Trust was forced to discontinue its health insurance portion of AHPs in 1999 due to incompatible and inconsistent state laws, making it too expensive to provide coverage.

In competing with large employers for their workforce, it is essential that our small contractor members have the ability to offer the same, high-quality, comprehensive benefits that large employers can afford to offer their employees. By banding together nationwide, AHPs will provide small businesses with the opportunity to reduce health insurance costs and obtain the same economies of scale, bargaining clout and administrative efficiencies now available to employees in large employer and union plans.

² 82 Fed. Reg. 48386

³ 83 Fed. Reg. 614

While ABC supports the DOL's efforts to allow more employers to form AHPs, we urge the Department to address our concerns regarding the following specific provisions of the proposed rule.

- As many larger, bona fide associations require staff to assist their members, ABC believes it is critical that association staff are able to receive health care coverage under AHPs. A bona fide association that exists for a purpose other than providing group health coverage should be considered an employer member of the AHP for the purposes of providing its staff access to the affordable quality health insurance available to its other employer members. An association that provides services to its members related to the association's purpose must have staff to provide those services. Those employees are critical to the mission and purpose of the association. If a bona fide association is able to establish an AHP, it follows that the employees who serve that AHP should be eligible to participate.
- With concerns facing many employers regarding liability under AHPs for labor and employment violations of their partner businesses, it is critical that the final rule include safe harbor language to protect those acting in good faith. The legal standards for determining joint employer liability were greatly expanded under the Obama administration to the point that even tenuous business relationships can give rise to joint employer liability. AHPs will be considered "employers" under Section 3(5) of ERISA. This raises the risk of joint employer liability for the association member. This risk will impede the establishment of AHPs unless the final rule includes protection against joint employer liability. In order to maximize the benefits of health insurance delivery for small employers, the DOL's final rule should include language that ensures small businesses are not at risk of joint employment liability based on the offering of an AHP. With the inclusion of this language, the final rule will maximize effectiveness and increase access to affordable, quality coverage.
- ABC supports the expansion of the definition of "employer" under Section 3(5) of ERISA to include AHPs. ABC requests that the DOL clarify that AHPs will not be considered multiple employer welfare arrangements (MEWAs), but will be treated as single employer plans sponsored by the associations. Alternatively, ABC requests that the DOL use its authority under Section 514(b)(6)(B) of ERISA to provide a uniform, consistent framework of regulations for AHP operation and thereby preempt AHPs from state MEWA regulations.

Conclusion

ABC appreciates the actions being taken by this administration to address the harmful effects that the ACA has had on health care costs for millions of Americans. Expanding AHPs is a key step toward providing more affordable health care options and flexibility to our national small businesses and their employees. ABC looks forward to continuing to work with the administration to promote AHPs and lower health care costs for our members throughout the country.

Respectfully Submitted,



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