



March 6, 2018

Office of Regulations and Interpretations  
Employee Benefit Security Administration  
Room N-5655  
US Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

**Attention: Definition of Employer – Small Business Health Plans – RIN 1210-AB85**

Ladies and Gentlemen:

Lockton Companies (“Lockton”) appreciates this opportunity to comment on the Department of Labor’s (DOL) proposed rule that would modify the interpretation of the term “employer” in section 3(5) of ERISA to facilitate the ability of unrelated employers, particularly small employers, to band together for group health insurance coverage.

Lockton is the world’s largest privately-owned insurance brokerage and consulting firm, with over 100 offices around the world. We provide sophisticated brokerage and consulting services, including employee benefits brokerage and consulting, to more than 5,000 domestic employers who provide fringe benefits, including health insurance, to more than 10 million employees.

Lockton Benefit Group is the employee benefits brokerage and consulting arm of Lockton Companies. Our clients look to us to help them provide cost effective health insurance solutions to protect their employees and the employees’ families, solutions their employees will value and appreciate. Among our clients are small businesses struggling to provide health insurance purchased in the Affordable Care Act (ACA) community-rated pools, and associations desirous of supplying their employer members with more effective health insurance solutions for the members’ employees.

Our clients also include:

- Private equity funds struggling to provide cost-effective health insurance solutions to their portfolio companies, some of which are classified as “small group” employers in their state insurance markets, that are not in the same controlled group of trades and businesses.
- Joint venture partners seeking more cost-effective, consolidated health insurance coverage for the employees of the joint venture partners, particularly joint venture partners that are small-group employers.
- Employers who struggle to provide health insurance solutions to significant numbers of independent contractors (e.g., truck drivers, commissioned sale people, etc.).

## Comments on the Proposed Rule

We applaud the Department for its efforts to make group health insurance more affordable and readily available to employers, particularly small employers. In this regard we offer the following observations, suggestions and recommendations with respect to the Department's notice of proposed rulemaking.

1. **Subsection 2510.3-5(e) is a welcome clarification to existing guidance to make clear that even, for example, independent contractors performing services for another employer may be considered "working owners."**

We presume that the Department's expansive definition of "working owners" is intended to be broad enough to encompass independent contractors who are treated as self-employed individuals for tax purposes *but are performing services on a substantially full-time and exclusive basis for another employer.*

While subsection (e) refers to "any individual [with] an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including partners and other self-employed individuals," some have questioned whether this definition of a working owner includes self-employed individuals performing services as independent contractors exclusively for another employer.

Many employers engage large numbers of independent contractors, such as transportation firms who engage large numbers of independent contractor drivers, or professional service firms who engage large numbers of independent contractor sales personnel. Currently it's problematic to insure these individuals under a single large-group health insurance program for all the reasons the Department describes in the preamble to its proposed rule on AHPs.

We think the Department's expanded treatment of the term "working owner" is certainly broad enough to include independent contractors performing services exclusively for another employer. While we are not convinced further clarification on this point is necessary, perhaps an example could be added to the discussion of "working owner" reflecting that such independent contractors may be considered "working owners" and may participate in an AHP established, for example, by the company on whose behalf the contractors supply services, and solely to provide group health insurance to such contractors under a single large group health insurance policy.

2. **Subsection 2510.3-5(c)(1) should be clarified to further define what is meant by "same trade, industry, line of business or profession."** For example, the regulation could include in the "same trade, industry, line of business or profession" any business included in the same Standard Industrial Classification (SIC) *division*.

If the phrase "same trade, industry, line of business or profession" is not clarified in the regulation, there will be considerable confusion regarding which employers are embraced by that phrase and which are not. While the Department could, of course, endeavor to clarify the phrase via subregulatory guidance, we suggest it would be better – and allow for more rapid

implementation of AHPs upon finalization of the rule – if the Department would more precisely clarify that phrase in the final rule.

3. **Subsection 2510.3-5(c)(1) should be further clarified to include with the “same trade, industry, line of business or profession” a business (“the first business”) in a given trade, industry, line or business or profession and any other business (“the second business”) in the supply chain of such first business.**

Many larger employers are desirous of creating an association to provide health insurance to their suppliers, many of which are small businesses presently limited to purchasing insurance in the ACA’s community-rated pools. Some suppliers (such as firms creating parts, user manuals or promotional materials for the larger firm’s products) might reasonably be said to not be included in the larger firm’s industry, line of business or profession. Often these smaller businesses in the supply chain are not located within the same state or multi-state metropolitan area as the larger firm.

We encourage an expansion of the scope of the “commonality of interest” principle to include supply chain members. The regulation could include an illustration reflecting, for example, that (i) a manufacturer of widgets, (ii) the businesses supplying widget components or raw materials used in the fabrication of widgets, and (iii) businesses creating user manuals for the widgets manufactured by the widget maker, would all be considered in the “same trade, industry, line of business or profession.”

4. **Subsection 2510.3-5(b) should be modified to make clear that the “control” test is satisfied if the employer-members of an association participating in the association health plan directly or indirectly control the association *health plan* (for example, by directly or indirectly controlling a board of trustees that has direct control over the design and administration of the health plan) even if the employer-members do not necessarily control the association itself.**

The proposed rule’s “control test” requires that employer-members of the association directly or indirectly control not only the AHP but the plan sponsor (the association) as well.

Because ERISA may require an AHP to utilize a trust to collect and hold contributions from employers and their employees before sweeping those contributions to the AHP’s insurance carrier, it should be adequate to satisfy the control test if the association’s member-employers participating in the AHP directly or indirectly control the AHP’s board of trustees, without regard to the employer-member’s level of control over the association itself, provided the board of trustees has the right, under the trust agreement, to adequately control the AHP (apart from settlor functions).

**5. The nondiscrimination provisions in subsection (d)(4) should be clarified, amended or eliminated and replaced with other rules providing adequate safeguards to accomplish the nondiscrimination rule's intended aims.**

As proposed, the nondiscrimination provisions actually will undermine the AHPs that are formed. Nondiscrimination rules have been cited as a reason for the large rate hikes and low participation in the ACA exchange markets. In addition, MEWAs historically have tended to be unstable for similar reasons.

Therefore, for the proposed AHP rule to achieve its broader goal (i.e., to allow employers to band together for more cost-efficient health insurance for the benefit of their employees), an association health plan must be able to effectively manage the risk posed by the various employer-members participating in the association health plan, and ensure an adequate level of stability with respect to the association health plan's risk pool.

The final rule should allow for an association plan to protect itself and the viability of its insurance program by allowing the association to:

- a. Charge a similarly situated employer-member of the plan more for coverage supplied to the member's employees if that employer's employees (in the aggregate) pose a greater health risk to the plan.
- b. Charge a similarly situated employer-member of the plan *less* for coverage supplied to the member's employees if the employer participates in a wellness program offered by the association health plan to improve the health and risk profile of the employer's employee population.
- c. Refuse to permit an employer-member of the association to participate in the plan if the employer-member has engaged in frequent rate shopping (e.g., has been insured through at least two different insurers in the previous five years). To guard against adverse selection the AHP must have the ability to ensure adequate stability in its risk pool by declining participation in the plan to an employer-member of the association who frequently jumps from insurance program to insurance program.

**6. AHPs should be allowed to self-insure, with the program insulated from the application of state law through regulations issued pursuant to ERISA section 514(b)(6)(B).**

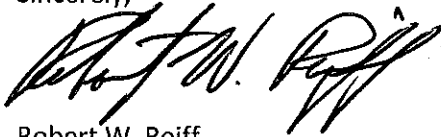
In the preamble to the proposed rule the Department wrote that it is interested in receiving input from the public about the relative merits of an exemption from state regulation issued to self-insured MEWAs pursuant to ERISA section 514(b)(6). We think such an exemption could be appropriate, subject to adequate federally-imposed safeguard related to ensuring adequate solvency of self-insured MEWAs.

Comment letter by the Lockton Companies, LLC  
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We anticipate that what the Department intends to accomplish via its proposed AHP rule will be frustrated in some states through state-imposed rules (applicable to the AHP pursuant to ERISA section 514(b)(6)(A)(i)(I) and (ii)).

While we support the notion of a viable community-rated health insurance market in the states, we think there is room for a viable community-rated market to coexist with self-insured MEWAs formed as legitimate AHPs and governed by federal rules designed to ensure the integrity and solvency of the self-insured MEWA. We encourage the Department to continue consideration of regulatory relief under ERISA section 514(b)(6)(B), with input from relevant stakeholders including the states, associations, reinsurers and other relevant parties.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert W. Reiff". The signature is stylized and cursive.

Robert W. Reiff  
President, Lockton Benefit Group