Coalition to Promote
Independent Entrepreneurs
ICCoalition.org · (202) 659-0878

March 6, 2018

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

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

Dear Sir or Madam:

The Coalition to Promote Independent Entrepreneurs[1] (the "Coalition") appreciates the opportunity to submit comments concerning the above-referenced proposed rule that would affect section 3(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The U.S. Department of Labor (the "DOL") published the proposed rule on January 5, 2018.

The Coalition supports and endorses the proposed rule, as it would create a new health plan option for independent contractors that is very much needed. As the proposed rule observes, self-employed individuals are denied access to large group health plans, which exposes them to higher health-care costs than those who have access to such plans. This creates a disincentive against individuals pursuing their entrepreneurial desires. An economic study on the use of independent contractors found that a government policy that curtails the legitimate use of independent contractors tends to reduce job creation and small business formation, reduce competition, increase prices, and produce a less flexible and dynamic workforce.[2] The proposed expansion of association health plans would operate to reduce this disincentive and thereby encourage entrepreneurship and benefit the nation's economy.

I. Comments Concerning the Criteria to Qualify as a "Working Owner"

DOL requested comments concerning the proposed criteria to qualify as a "working owner." The current proposal would define the term "working owner" to mean any individual:

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[1] The Coalition to Promote Independent Entrepreneurs, http://iecoalition.org/, is an organization dedicated to informing the public and elected representatives about the importance of an individual's right to work as a self-employed individual, and to defend an individual's right to contract in this capacity.

[2] *See, e.g.*, Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, at 33 - 35 (Dec. 2010), *available at* http://www.iecoalition.org/wp-content/uploads/2014/07/Role-of-Independent-Contractors-December-2010-Final.pdf.

(i) Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including partners and other self-employed individuals;

(ii) Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business;

(iii) Who is not eligible to participate in any subsidized group health plan maintained by any other employer of the individual or of the spouse of the individual; and

(iv) Who either:

(A) Works at least 30 hours per week or at least 120 hours per month providing personal services to the trade or business, or

(B) Has earned income from such trade or business that at least equals the working owner's cost of coverage for participation by the working owner and any covered beneficiaries in the group health plan sponsored by the group or association in which the individual is participating.[3]

The proposed rule states that the purpose of these criteria is to distinguish between individuals involved in a legitimate trade or business from those who are not or who are engaged in only *de minimis* commercial activities. While the Coalition supports this objective, it respectfully recommends that criteria (iv)(A) be replaced with the following:

(A) Operates the trade or business under an Employer Identification Number ("EIN"), rather than a Social Security Number, and reported the earnings and expenses for the trade or business for the prior tax year on a Schedule C to the individual's Internal Revenue Service ("IRS") Form 1040, or, if applicable, on the tax form appropriate for the type of entity out of which the trade or business is operated.

II. Rationale for the Recommendation

The current criteria in section (iv)(A) are similar to the standards used to determine whether an employee is a "full-time employee" for purposes of the Affordable Care Act.[4] In order to maintain clear distinctions between employees and independent contractors, the Coalition believes it is preferable that the criteria used to determine a self-employed individual's involvement in a legitimate trade or business not be derived from the criteria used for employees.

Tracking hours is not an appropriate standard for measuring a self-employed individual's dedication to the business. Unlike employees, independent contractors often work on projects for

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[3] The proposed definition would be codified at 29 C.F.R. § 2510.3-5(e)(2).
[4] See 26 C.F.R. § 54.4980H-1(a)(21).

which they are paid on a project-fee basis or a commissioned basis, rather than based on the number of hours worked. Consequently, many self-employed individuals do not maintain the types of records necessary to be able to demonstrate the number of hours worked in any specific period of time.

The Coalition submits that the criteria it proposes are more consistent with an individual's independent-contractor status. Operating under an EIN represents an unequivocal statement by an individual that the activities undertaken under the EIN are intended to be business related. While independent contractors are not required to operate under an EIN, and not all independent contractors currently do so, the Coalition believes such a requirement would be an appropriate alternative indicator of an individual actually being engaged in a legitimate trade or business.

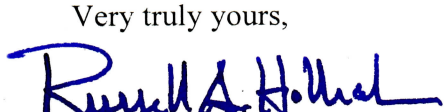
Likewise, reporting earnings and expenses attributable to a trade or business on a Schedule C represents an individual's representation to the IRS that the individual operates a trade or business. An independent contractor is currently required to report earnings relating to the individual's trade or business on a Schedule C. It follows that this would be another reliable alternative indicator of an individual actually being engaged in a legitimate trade or business.

III. Conclusion

The Coalition supports and endorses the proposed rule. The Coalition also believes it critically important that fundamental distinctions between employees and independent contractors be reinforced in all contexts, and that the criteria used to measure full-time commitment to a business endeavor by employees and by independent contractors reflect these differences.

Thank you very much for your consideration. If you have any questions concerning these comments, please let us know.

Very truly yours,



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