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LAW FIRM

February 26, 2018

VIA PRIORITY MAIL

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

Attn: Definition of Employer - RIN 1210-AB85

Re: Comments to Proposed Regulations Regarding Definition of "Employer"

Dear Sir or Madam:

This firm represents a self-insured multiple employer welfare arrangement ("MEWA") that is a tax-exempt Voluntary Employees' Beneficiary Association ("VEBA") under § 501(c)(9) of the Internal Revenue Code of 1986, as amended. This entity provides health and other permissible benefits to qualified participants and maintains stop-loss insurance coverage to safeguard against catastrophic claims. On behalf of this client, we would like to comment on the proposed regulations relating to the definition of "employer" set forth in 29 CFR § 2510.3-5.

As described in the following paragraphs, a number of the proposed regulations are in conflict with Internal Revenue Code § 501(c)(9) and the regulations thereunder, and we respectfully suggest that the proposed rules provide an exemption for those entities that are recognized as VEBAs by the Internal Revenue Service. Alternatively, we suggest that those entities that are recognized as VEBAs on or before the effective date of the proposed rules be grandfathered from their application, although discrepancies between the proposed rules and § 501(c)(9) would still require resolution. Finally, we also believe that the application of the proposed regulations would make our client and other VEBAs offering health benefits less affordable in the marketplace and would not serve the stated principal objective of expanding employer and employee access to more affordable health coverage.

As an initial matter, we would like clarity on whether the proposed Association Health Plan ("AHP") regulations are applicable to all qualifying organizations on a mandatory basis, or if an organization may elect to be treated as a qualifying AHP. If the latter is correct, entities such as our client could simply elect to not be treated as an AHP. Again, the stated purpose of the proposed regulations, as set forth in the Department of Labor's Announcement of the

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proposed regulations, is to provide, "an *additional* alternative through Small Business Health Plans (Association Health Plans)" and to "*allow* employers to join together as a single group to purchase insurance in the large group market". Our client, and other VEBAs, have already accomplished these purposes and abide by both federal and state laws governing their operations and continued tax-exempt status. Our client is registered with the Iowa Insurance Division as a certified MEWA, and must comply with all state laws applicable to such MEWAs. It must also comply with all requirements under Internal Revenue Code § 501(c)(9) and the regulations thereunder to maintain its tax-exempt status.

A number of the provisions of the proposed regulations conflict with existing laws governing Internal Revenue Code § 501(c)(9) VEBAs. Proposed regulation § 2510.3-5(b)(5) defines a "bona fide group or association of employers" to require that the employer members have a "commonality of interest" as described in § 2510.3-5(c). Subsection (c) provides that this commonality of interest will be determined based on relevant facts and circumstances, and may be established by: (i) employers being in the same trade, industry, line of business or professions; or (ii) employers having a principal place of business in a region that does not exceed the boundaries of the same state or the same metropolitan area. Eligibility for membership in a VEBA under § 501(c)(9), however, is based upon individuals having an "employment-related common bond" among themselves, which can be established through specialized ownership attribution and other rules that allow inclusion of members that are not in the same trade, industry, line of business or profession.

In addition, proposed subsection 2510.3-5(c)(1) would allow nationwide membership of an AHP having the requisite commonality of interest based upon the component employers being engaged in the same trade, industry, line of business or profession. In contrast, Treasury Regulation § 1.501(c)(9)-2(a)(1) imposes a requirement that employers be located in the "same geographic locale" to satisfy the employment-related common bond requirement. Proposed Treasury Regulation § 1.501(c)(9)-2(d)(1) generally limits the geographical limitations of a VEBA to three contiguous states, with Alaska and Hawaii deemed contiguous with each other and with Washington, Oregon and California.

Proposed subsection 2510.3-5(b)(6) provides that an AHP cannot make health coverage available other than to employees and former employees of employer members and family members or other beneficiaries of those employees and former employees. Treasury Regulation § 1.501(c)(9)-2(a)(1), however, provides that a VEBA's membership is not required to be comprised exclusively of employees of the participating employer members, and can have up to 10% of its membership comprised of individuals who are not considered "employees", although even this 10% non-employee group must still share an employment-related common bond with the other members. Treasury Regulation § 1.501(c)(9)-2(b) defines the term "employee" as including the spouse and dependents of an employee; an individual who is considered an employee for Employment Tax purposes under the Internal Revenue Code; former and retired employees; and those considered employees under the Labor Management Relations Act of 1947.

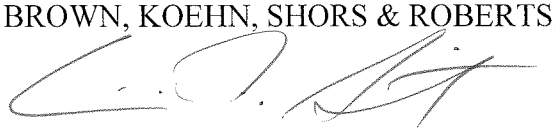
Next, proposed § 2510.3-5(d) contains non-discrimination rules relating to an AHP's membership, eligibility for benefits, and premiums or contributions required. Subsection 2510.3-5(d)(2) provides that an AHP must comply with the rules of § 2590.702(b) with respect to nondiscrimination in rules for eligibility for benefits. That regulation prohibits the establishment of any rule for eligibility (including continued eligibility) of any individual to enroll for benefits that discriminates based on any health factor that relates to that individual or a dependent of that individual. Under Treasury Regulations to Internal Revenue Code § 501(c)(9), however, eligibility for benefits from a VEBA may be restricted based upon "objective conditions relating to the type or amount of benefits offered". Treasury Regulation § 1.501(c)(9)-2(a)(2)(ii)(E) provides that a VEBA may require that a member (or a member's dependents) meet a "reasonable health standard" related to eligibility for a particular benefit offered by the VEBA. In its EO CPE Text, the Internal Revenue Service provides examples of a "reasonable health standard" to include, for medical insurance purposes, "the absence of disease" and "reasonably good health plus passage of a medical examination". Clearly, the examples of "reasonable health standards" cited by the Internal Revenue Service constitute prohibited "health factors" within the meaning of § 2590.702(a)(1).

In summary, many of the proposed regulations directly conflict with Internal Revenue Code § 501(c)(9) and its regulations. As a result, those AHPs that are simultaneously recognized as VEBAs would be subject to inconsistent bodies of Federal law. If classification as an AHP is permissive rather than mandatory, however, a VEBA could simply decline to elect AHP status, thereby eliminating the problems associated with the discrepancies in the laws.

Thank you for the opportunity to comment on these important issues. If we can be of any further assistance, please do not hesitate to contact us.

Very truly yours,

DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.



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