James Szostek
Vice President, Taxes & Retirement Security
(202) 624-2378 t (866) 953-4149 jimszostek@acli.com

Howard Bard
Vice President, Taxes & Retirement Security
(202) 624-2028 t (866) 953-4149 howardbard@acli.com

March 6, 2018

Submitted Electronically to www.regulations.gov

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

Subject: RIN 1210-AB85 – Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans

Greetings:

On behalf of the American Council of Life Insurers (ACLI)[1], we appreciate the opportunity to provide comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the Department of Labor (the Department) to clarify which persons may act as an "employer" within the meaning of section (5) of the Employee Retirement Income Security Act of 1974 (ERISA) in sponsoring a multiple employer "group health plan," as that term is defined in ERISA section 733(a)(1). The Department proposes to modify the definition of employer, in part, by creating a more flexible "commonality of interest" test for the employer members of an association that is treated as the "employer" sponsor of a multiple employer welfare plan. ACLI's comments are limited to the Department's proposed new "commonality of interest" test.

ACLI supports regulatory proposals designed to enhance coverage under the current voluntary employee benefit plan system. However, as detailed below, we are concerned that the

[1] The American Council of Life Insurers (ACLI) is a Washington, D.C.-based trade association with approximately 290 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the consumers that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 93 percent of life insurance premiums, and 98 percent of annuity considerations in the United States. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

Department's unnecessary, unfounded, and situational interpretations of who may serve indirectly in the interest of an employer, in relation to an employee benefit plan under ERISA, are having a chilling effect on the establishment and maintenance of multiple employer plans (MEPs) and increasing the cost of operating and maintaining existing plans, all to the detriment of the employees of small businesses. As discussed below, ACLI recommends that the Department issue singular guidance on open MEPs. Such guidance should provide that it is sufficient that a person (as defined in ERISA 3(9)) establish that said person is acting indirectly in the interest of an employer in relation to an employee benefit plan, regardless of whether the person is or is not a group or association, with or without some "nexus" or "commonality of interest."

I. Neither ERISA Nor the Internal Revenue Code Include a "Nexus" or "Commonality of Interest" Requirement

The Department maintains that, in distinguishing employer groups or associations that can act as an ERISA section 3(5) employer in sponsoring a multiple employer plan from those who cannot, "the touchstone has long been whether the group or association has a sufficiently close economic or representational nexus to the employers and employees that participate in the plan."[2] The Department maintains that this "commonality of interest" requirement "distinguishes bona fide groups or associations of employers who provide coverage to their employees and the families of their employees from arrangements that more closely resemble State-regulated private insurance offered to the market at large."[3]

In this regard, we note that ERISA section 3(5) defines the term employer as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."[4] ERISA section 3(5) does not require that there be a group or association of employers acting for an employer, it merely notes that such group or association is an example of a person acting indirectly in the interest of an employer. The key word in the definition is the word "*include*s." If Congress intended that only such group or association could be such person, it would not have used the word "includes." Further, ERISA section 2530.210(c)(3) makes clear that, for purposes of ERISA, a "multiple employer plan" shall mean a multiple employer plan as defined in section 413(b) and (c) of the Code. Neither section 413(c) of the Code nor Treasury Regulation section 1.413-2 require a "unique nexus" between the employers that maintain a multiple employer plan. For purposes of the Code and therefore ERISA, a multiple employer plan is simply a plan maintained by more than one employer. No "nexus" is required.

---

[2] 83 Fed. Reg. 616 (Jan. 5, 2018). *See also* DOL Advisory Opinions 94-07A, 2001-04A. Although the Department notes that several court decisions have supported this "commonality of interest" requirement, the Department also states that "…neither the Department's previous advisory opinions nor relevant court cases have ever held that the Department is foreclosed from adopting a more flexible test in a regulation or departing from the three particular factors set forth above in determining whether a group or association can be treated as acting as an 'employer' or 'indirectly in the interest of an employer,' for purposes of the statutory definition. *See* 83 Fed. Reg. at 617.

[3] *Id.*

[4] *See* ERISA Section 3(5), 29 USC 1002(5).

II. If Adopted, the Proposal Will Result in The Department's Third Unsubstantiated Situational "Commonality of Interest" Interpretation.

Interpretation 1 – Multiple Employer Plans

With respect to open MEPs, the Department has previously opined that "where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of ERISA section 3(5)."[5] Accordingly, the Department, in various advisory opinions, has applied a facts and circumstances approach to determine whether there is a sufficient common economic or representational interest or genuine organizational relationship for there to be a bona fide employer group or association capable of sponsoring an ERISA plan. The Department's analysis has focused on three broad sets of issues:

- Whether the group or association is a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits;
- Whether the employers share some commonality and genuine organizational relationship unrelated to the provision of benefits; and
- Whether the employers that participate in the benefit program, either directly or indirectly, exercise control over the program, both in form and substance.

If an entity meets each of these requirements, the Department has concluded that it is appropriate to treat it as an "employer" within the meaning of ERISA § 3(5).

Interpretation 2 – State-Sponsored Retirement Plans for Private Sector Employees

In November 2015, the Department issued its second situational interpretation of the term "employer" for purposes of sponsoring a multiple employer plan. In Interpretive Bulletin 2015-02,[6] the Department set forth its views concerning the application of ERISA to state-sponsored retirement plans for private-sector employees and the options available to states under ERISA. One approach discussed by DOL is the use of an open MEP. In Interpretive Bulletin 2015-02, the Department concluded that a state has a "unique representational interest" in the health and welfare of its citizens that connects it to the in-state employers that choose to participate in the state-sponsored MEP, and accordingly, a state is considered to be "acting indirectly in the interest" of participating employers – whether or not such employers meet the Department's existing "nexus" or "commonality of interest" requirement.

Accordingly, Interpretive Bulletin 2015-02 holds that states can establish and sponsor an MEP for more than one unrelated employer. Conversely, under the Department's second

[5] *See* Advisory Opinion 94-07A, March 14, 1994.
[6] *See* Interpretive Bulletin Relating to State Savings Programs That Sponsor or Facilitate Plans Covered by the Employee Retirement Income Security Act of 1974, 80 Fed. Reg. 71936 (Nov. 18, 2015).

interpretation of the law, a person that is not a state may act "indirectly in the interest of an employer, in relation to an employee benefit plan" only if the person does so as "a group or association of employers acting for an employer" and only when the group or association of employers satisfies the Department's "nexus" and "commonality of interest" requirements.

Interpretation 3 – Association Health Plans

The NPRM proposes to implement a third situational interpretation of the term "employer" - albeit this interpretation is limited to Association Health Plans. The Department has now concluded that, with respect to an AHP and a bona fide group or association of employers capable of establishing a group health plan, the commonality of interest test may be met if the employer members of the group or association are –

- In the same trade, industry, line of business or profession, or
- Located in a region that does not exceed the boundaries of the same state or same metropolitan area, even if the metropolitan area includes more than one state.

III. The Department's Various Positions and Interpretations are Inconsistent with Law

The Department's prior positions regarding who may act "indirectly in the interest of an employer" in establishing an employee benefit plan, as well as its various employer "commonality of interest" requirements are at odds with the law. As noted above, ERISA section 3(5) does not require that there be a group or association of employers acting for an employer, it merely states that such group or association *is an example* of a person acting indirectly in the interest of an employer. Indeed, the Department itself acknowledges that, with respect to the terms "employer" and "indirectly in the interest of an employer," "these definitional terms are ambiguous as applied to a group or association in the context of ERISA section 3(5), and the statute does not specifically refer to or impose the particular historical elements of the commonality test on the determination of whether a group or association acts as the employer sponsor of an ERISA-covered plan within the scope of ERISA section 3(5)."[7] We agree.

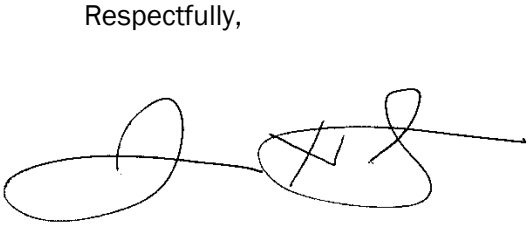
The Department's changing and inconsistent views with respect to the employer "commonality of interest" requirement demonstrates the Department's view is not rooted in law but is arbitrary. ACLI recommends that the Department issue consistent guidance on MEPs to comport with the law. Such guidance should provide that it is sufficient that a person (as defined in ERISA 3(9)) establish that said person is acting indirectly in the interest of an employer in relation to an employee benefit plan, regardless of whether the person is or is not a group or association, with or without some "nexus" or "commonality of interest."

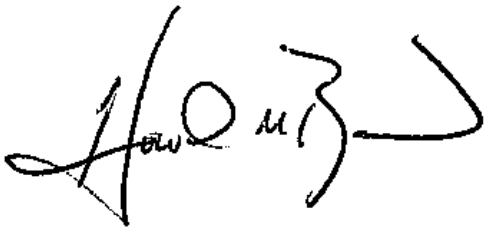
[7] 83 Fed. Reg. 617.

****

On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department.

Respectfully,





James H. Szostek

Howard M. Bard