



## CC Law & Policy

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*Submitted Electronically via:* [www.regulations.gov](http://www.regulations.gov)

Office of Regulations and Interpretations, Employee Benefits Security Administration  
Attn: RIN 1210-AB85  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

RE: Comments on Proposed Regulations to Facilitate the Formation of Small Business Health Plans

To Whom It May Concern:

On behalf of interested stakeholders, I respectfully submit the following comments in response to the Notice of Proposed Rulemaking (“NPRM”), clarifying the definition of “employer” under Section 3(5) of the Employee Retirement Income Security Act (“ERISA”) for purposes of establishing a “Small Business Health Plan” (“SBHP”).

### **I. General Support for the NPRM, But Concerns About Its Limited Impact**

There are a number of stakeholders that are supportive of the flexibility the Department is seeking to provide small employers and self-employed individuals with no employees (referred to as “working owners”) to make it easier for them to establish a fully-insured “large group” or self-insured SBHP. However, there are other stakeholders that suggest that the NPRM will have a limited impact, especially as it relates to self-insured SBHPs. This is largely driven by current State regulation of self-insured “multiple employer welfare arrangements” (“MEWAs”).

### **II. Currently, Self-Insured MEWAs Must Comply With a “Patchwork” Set of Legal Requirements and Licensing Practices**

As the Department knows, an SBHP is by definition a MEWA. As the Department also knows, ERISA gives States the exclusive authority to impose any State insurance law requirement on a self-insured MEWA. Over the years, States have enacted their own State MEWA laws with varying degrees of regulation – ranging from restrictive to permissive. This has created a “patchwork” set of rules and requirements that self-insured MEWAs must meet if an employer-run organization sponsoring this type of arrangement wants to offer health coverage to employees located in multiple States.

In the case of the formation of a self-insured SBHP, stakeholders are convinced that the cost and time associated with complying with this “patchwork” set of regulations and licensing rules will be prohibitive. In other words, many believe that the formation of self-insured SBHPs will be limited due to the fact that employer and/or working owner groups will have to comply with each State MEWA law in each State in which the SBHP coverage may be offered.

### **III. A “Class Exemption” Would Provide Some “Uniformity” In the Law, But Limitations Remain**

In response to the above stated concerns, stakeholders have encouraged the Department to develop a “class exemption” that would exempt a self-insured SBHP from the non-solvency requirements of State MEWA laws. Most stakeholders believe the development of a “class exemption” is advisable because – consistent with the purpose of ERISA – a “class exemption” would provide a level of “uniformity” that would allow self-insured SBHPs to offer health coverage in multiple States free from the burden of complying with a set of regulations that differ State-by-State.

However, even if a “class exemption” from the non-solvency requirements of State MEWA laws is developed, ERISA requires that State reserve and contribution levels continue to apply to a self-insured MEWA (i.e., a self-insured SBHP). Stakeholders believe that the continued application of these requirements could be detrimental to the formation of self-insured SBHPs. For example, States adverse to self-insured SBHP health coverage may seek to enact reserve requirements that are so high that the requirement is prohibitive. While such State actions are arguably inconsistent with ERISA, it appears that the Department may be limited in its ability to stop States from setting up barriers to the formation of self-insured SBHPs.

### **IV. An Alternative Option: Allowing Working Owners to Establish Their Own Self-Insured “Group Health Plan”**

In light of these limitations, there is another option that the Department may consider to promote consumer choice and competition across the United States, and ensure that working owners have access to affordable health coverage on a nationwide basis: Allowing working owners to establish their own self-insured “group health plan,” subject to Federal solvency requirements, along with the existing consumer protections applicable to a group health plan under ERISA and the Affordable Care Act (“ACA”).

#### **A. The Department Allows “Dual Status” for Working Owners for Participation In Group Health Plan Coverage Through an SBHP**

The Department points out that “the touchstone of ERISA is the provision of benefits *through the employment relationship*.” The Department further points out that a “participant” in an ERISA-covered group health plan “is an employee of an employer who may receive benefits from that employer’s own benefit plan.” And, that “individuals” who are *not* participants (i.e., individuals who are not employees or former employees of an employer sponsoring a particular plan) “are ineligible to be covered by an ERISA plan.” However, the Department has opted to modify its current regulations to allow an individual who is (1) self-employed and (2) with no common law employees (i.e., a working owner) to elect (a) to act as an “employer” for purposes of participating in an employer group or association and also (b) to be treated as an “employee” of their business for purposes of being covered by an SBHP.



The Department justifies this modification to current law, explaining that “this approach is consistent with advisory opinions in which the Department has concluded that working owners may be ‘participants’ in ERISA plans. For example, Advisory Opinion 99-04A reviews various provisions of ERISA and the Code that specifically address working owner issues in ERISA plans, and concludes that, taken as a whole, they reveal a clear Congressional design to include working owners within the definition of participant for purposes of Title I of ERISA.”

The Department also acknowledges that the U.S. Supreme Court in *Yates v. Hendon*,<sup>1</sup> concluded that “under ERISA, a working owner may have dual status (i.e., he can be an employee entitled to participate in a plan, and, at the same time, the employer (or owner or member of the employer) who established the plan).” And, the Department notes that section 401(c) of the Internal Revenue Code (“Code”) “generally treats a sole proprietor as both an employer and an employee.”

Based on this analysis and interpretation of ERISA, the Code, and court decisions, the Department proposes to allow working owners to participate in group health plan coverage through an SBHP (sponsored by groups of employers and/or groups of working owners). The Department explains that it has the authority to supersede its previous interpretations as articulated in non-binding Advisory Opinions – as well as supersede a prior interpretation by a Federal court – to address marketplace developments and new policy and regulatory issues.<sup>2</sup> Based on this precedent, many stakeholders believe that the Department does indeed have the requisite authority to re-interpret its own rules to address new issues presented in an ever-evolving economic environment.

#### **B. There Is No Statutory or Regulatory Basis for Failing to Allow “Dual Status” for Working Owners for Purposes of Establishing Their Own Group Health Plan**

Based on this same analysis and interpretation as it relates to working owners participating in group health plan coverage through an SBHP, there does *not* appear to be any reason why the Department is unable to allow a working owner to be considered (1) an “employer” for purposes of sponsoring their own group health plan and (2) an “employee” for purposes of participating in that group health plan. In other words, if the Department is now allowing working owners to have “dual status” for purposes of participating in an SBHP, there is no statutory or regulatory basis for failing to recognize this same “dual status” for working owners wanting to establish their own self-insured group health plan.

Again, the fact that the Department has the authority to re-interpret its own rules – and the fact that there is parallel precedent under Code section 401(c), judicial precedent at the Supreme Court level, but more importantly, precedent under the Department’s own Advisory Opinions (finding that Congress clearly intended to include working owners within the definition of “participant” under ERISA) – all give the Department the ability to allow working owners to establish their own self-insured group health plan. In this case, the Department would no longer consider a self-insured group health plan established by a working owner as “a plan without employees” (because a working owner will now have the requisite “dual status” as (1) employer for purposes of sponsoring the plan and (2) employee for purposes of being considered a “participant” in that plan).

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<sup>1</sup> 541 U.S. 1 (2004).

<sup>2</sup> See *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015); see also, *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).



### **C. Working Owners Establishing Their Own Self-Insured Group Health Plan Will Satisfy ERISA's Prudence and Loyalty Standards**

In the NPRM, the Department tries to distinguish the ability of a working owner to consider themselves an employer and an employee for purposes of (1) participating in group health plan coverage through an SBHP from (2) a working owner sponsoring and administering their own benefit arrangement. In this case, the Department suggests that "SBHPs are a far cry from such individual arrangements administered by a single individual on behalf of himself or herself and a spouse. Instead, the association as the SBHP are responsible for the provision or employment-based benefits payable to numerous workers employed by multiple employers."

On the one hand, the Department's current position is a reasonable one. That is, an argument can be made that if a working owner is a participant in a group health plan that is sponsored by a group of employers and/or working owners – where the employer and/or working owner members "control" the operation and administration of the plan – this working owner will not be directly involved in the administration of benefits, but they will still benefit from the requirement that the persons operating/administering the plan "act in the best interest" of plan participants. However, there is no reason why an individual who runs his or her own business would not similarly operate and administer their own plan with their own best interest in mind. Stated differently, if a working owner is operating and administering their own plan, a strong argument can be made that the working owner is by definition "acting in the best interest" of plan participants (because as the only participant, they are going to act with their own best interest in mind).

It is important to emphasize that it is in the working owner's best economic interest and well-being to find a health plan that is not only affordable, but one that provides a level of coverage that is appropriate for their own health status and financial situation. For example, if a working owner is personally comfortable with paying lower-than-average premiums for a health plan that has relatively high cost-sharing (because this individual knows that if they experience a health-event they have the financial means to cover the cost-sharing), this working owner will likely purchase a lower-costing high deductible health plan. In this case, this working owner – with their own best financial and health interests in mind – is seeking to pay a lower amount for health coverage while taking the risk of financial responsibility if they get sick. There is nothing in ERISA that prohibits this behavior. In reality, the informed approach to obtaining the type and level of health coverage that best fits the needs of this working owner by definition meets ERISA's prudence and loyalty standards.

Here is another illustration: A working owner who has an existing health condition that requires routine medical services may be willing to pay a higher-than-average premium for a health plan that provides a comprehensive level of coverage (with respect to the types of benefits covered and the cost-sharing associated with that coverage). In this case, this working owner is acting in their own best interest if they find a health plan that covers the benefits and services necessary for the continued treatment of their health condition, even if the coverage carries with it higher up-front costs (in the form of premiums). There is nothing in ERISA that prohibits this behavior. Again, the informed approach to the type and level of health coverage that best fits the needs of this working owner meets ERISA's prudence and loyalty standards.



**D. A Self-Insured Group Health Plan Established By a Working Owner Would Be an “Employment-Based Arrangement”**

As stated above, the Department places great weight on the presence of an “employment-based arrangement.” In other words, if there is no employment-based relationship, there can be no ERISA-covered plan. This is a reasonable position for the Department to hold. After all, the touchstone of ERISA is the provision of benefits *through the employment relationship*.

Because a working owner – who, pursuant to the NPRM, has “dual status” as (1) an employer and (2) an employee – is establishing their own self-insured group health plan, this arrangement will by definition be considered an “employment-based arrangement.” In other words, a working owner operating a “trade or business” is – according to the Department – an “employer.” In addition, a working owner providing personal services to the trade or business is – according to the Department – an “employee.” Thus it follows that this “dual status” leads to a scenario where a self-insured group health plan established by the working owner for him- or herself cannot be considered anything other than an “employment-based arrangement.”

Add in the fact that this working owner will be acting in their best economic interest and well-being and there is no reason to distinguish (1) group health plan coverage through an SBHP from (2) group health plan coverage through a self-insured arrangement established by the working owner. Rather, each of these scenarios are analogous. And if each of these scenarios are analogous, the same change the Department proposes to make to DOL Reg. Section 2510.3-3 to allow working owners to participate in an SBHP could and should be made to allow a working owner to establish their own self-insured group health plan.

**E. Reasonable Questions Remain About the Application of ERISA and Corresponding Federal Laws, But That Is No Reason to Reject Allowing Working Owners to Establish Their Own Self-Insured Group Health Plan**

It is reasonable to suggest that there are open questions relating to how other requirements under ERISA, HIPAA, COBRA, and the ACA apply to a self-insured group health plan established by a working owner. Providing answers to many of these questions, however, is beyond the scope of this comment letter. But, the fact that there are open questions does not give reason to prohibiting a working owner from establishing their own self-insured group health plan. There are ample opportunities to work through any technical and policy challenges this proposal might present. And, there are interested stakeholders who welcome the opportunity to participate in a rule-making exercise to effectuate this proposed change.

As discussed above, for the same reasons the Department has concluded that working owners can participate in an SBHP (which prompted the Department to modify DOL Reg. section 2510.3-3), the Department could and should modify DOL Reg. section 2510.3-3 further to allow a working owner to establish their own self-insured plan. As noted, this modification to 2510.3-3 can be accomplished through the public rule-making process. Alternatively, the Department may choose to make this modification in the form of an Interim Final Regulation, which can later be modified appropriately through notice and comment rule-making that would ensure all interested stakeholders will have an opportunity to present their views on the implications and significance of the proposed change.

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Thank you in advance for considering these comments. Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in black ink, consisting of a stylized 'C' followed by a period and a large, sweeping flourish that extends to the right.

Christopher E. Condeluci