



March 6, 2018

(Submitted electronically at <http://regulations.gov>)

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20010

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

Women Impacting Public Policy (WIPP), a national, nonpartisan organization advocating on behalf of women entrepreneurs, submits the following comments in response to the Employee Benefits Security Administration's, U.S. Department of Labor, proposed rule amending the definition of employer under section 3(5) of ERISA – Association Health Plans. Since its inception, WIPP has supported the implementation of Association Health Plans (AHPs) as an effective mechanism for small businesses to pool together to obtain affordable health insurance.

Women-owned businesses are critical to the nation's job creation and economic growth. Today there are more than 10 million women business owners, making up more than a third of all U.S. businesses, who generate more than \$1.6 trillion in revenues and employ 8.4 million people.¹ Over 36% of businesses are women-owned – a segment growing at four times the rate of men-owned businesses.² Of these women-owned businesses, 90% are small businesses.³ In order for these essential job creators to remain competitive, WIPP has long advocated for health insurance reform that benefits small employers.

In 2009, WIPP testified before the Senate Committee on Small Business and Entrepreneurship at a hearing entitled, "Reform Done Right: Sensible Health Care Solutions for America's Small

¹ 10 Million Strong: The Tipping point for Women Entrepreneurs. National Women's Business Council (2016).

² *Id.*

³ Women-Owned Businesses: Carving A New American Business Landscape, U.S. Chamber of Commerce Foundation Center for Women in Business at 6 (2014).



Businesses.”⁴ Despite many changes to the American health care system since, our message from 2009 remains similar nearly a decade later. WIPP believes that a successful healthcare market should encompass three core principles: an effective pooling mechanism, a wide array of health plan options, and a protection in place for those with pre-existing conditions. Although the Affordable Care Act envisioned state exchanges rather than AHPs, WIPP believes there is room for both. Through these exchanges the ACA gave small businesses more coverage options; however, many plans have dropped coverage, leaving the small business market with fewer coverage options. WIPP believes the expansion of affordable healthcare through AHPs will provide more coverage options for small businesses and the self-employed while maintaining protections for pre-existing conditions. Our concerns and DOL’s questions regarding these concerns are outlined below.

I. Bases for Commonality of Interest

The proposed rule would allow employers to band together for the express purpose of offering health insurance if they are (1) in the same trade, industry, line of business, or profession, or (2) have a principal place of business within a region that does not exceed the boundaries of the same state or metropolitan area, even if that metro area includes more than one state . DOL asks, should the final rule contain other bases for commonality of interest?⁵

WIPP believes the final rule should contain other bases for commonality of interest and does not go far enough. WIPP is a national organization made up of women entrepreneurs in varying industries, located all across the nation. The commonality is businesses owned by women. Under the current proposed rule as written, WIPP and other business organizations whose commonality centers around ownership of the business, such as women, minorities or veterans, for example, would not be able to participate as an AHP provider.

WIPP recommends adding an additional base for commonality of interest to allow employers to band together for the purpose of offering insurance through a membership organization or association that is comprised of members regardless of whether they are in the same trade, industry, line of business or profession, and regardless of whether they are located in the same area.

⁴ *Reform Done Right: Sensible Health Care Solutions for America’s Small Businesses* Before the S. Committee on Small Business and Entrepreneurship. 111th Congress (2009) (statement of Ann Sullivan, Women Impacting Public Policy).

⁵ Definition of Employer Under § 3(5) of ERISA – Association Health Plans, 83 Fed. Reg. 4 (proposed Jan. 5, 2018) (to be codified at 29 C.F.R. pt. 2510).



II. Eligibility for Other Subsidized Group Plan

The proposed rule contains an express provision that would allow the group or association sponsoring the AHP to rely (absent contrary knowledge) on written representations from the individual seeking to participate as a working owner. Should there be a requirement that a qualifying individual not be eligible for any other subsidized group health plan coverage under another employer or spouse's employer?⁶

WIPP understands the need for proof of employment; however, an individual should not be disqualified merely because they are eligible for health coverage through a spouse or domestic partner. For example, if an owner is covered by a spouse's insurance, but the premium under that plan for a family versus an individual is significantly higher, the owner should be able to take advantage of another health insurance option through an AHP. Denying eligibility for individuals who qualify for other health plans could lead to the unintended consequence of removal of choice for individuals in the health care market.

III. Criteria for Legitimate Trade or Business

The proposed rule contains proposed working owner criteria to ensure a legitimate trade or business exists (i.e., the individual is earning income for providing personal services to the business, either provides on average 30 hours of service per week/120 hours per month, or has derived income that equals cost of coverage under the plan; and must not be eligible for other subsidized insurance). Would other criteria be more appropriate to ensure that working owners who join an AHP are genuinely engaged in a trade or business and are performing services in the nature of an employment relationship?⁷

The proposed rule should include additional criteria to determine whether a working owner is genuinely engaged in a trader or business, such as certification or licensure in a specific area or industry by a third party at the state, national, or local level. For example, a person who owns a small, disadvantaged business and is certified by the Small Business Administration (SBA) 8(a) Program or the Women Owned Small Business Procurement program should be able to qualify as a working owner under this provision.

⁶ *Id.*

⁷ *Id.*



We appreciate the opportunity to comment. We applaud the agency's review and request for comments. For too long, small businesses have struggled with providing affordable health insurance to their employees. Seen as essential to attract and retain employees, however, small businesses feel compelled to offer health insurance. WIPP's comments are based on practical considerations rather than philosophical views. Our logic is simple – larger employer pools, as facilitated through AHPs or exchanges, will result in better choices for small employers. We urge the Department to implement a program that works. Unduly restricting the criteria for joining an employer pool will lead to a failed program. Although we are not experts on how to technically structure these AHPs, we urge the Department to use its expertise to structure a rule that maximizes the number of businesses that can participate. Our members need increased access and better prices to continue the economic contribution women owned businesses make to the nation's economy.

If you have any questions, please feel free to reach out to Ann Sullivan, our Chief Advocate, at asullivan@madisonservicesgroup.com or (202) 626-8528.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa Firestone". The signature is fluid and cursive, with a large initial "L" and "F".

Lisa Firestone
Chair, Women Impacting Public Policy