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May 15, 2024

The Honorable Bernard Sanders
Chairman
The Honorable Bill Cassidy
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Virginia Foxx
Chairwoman
The Honorable Bobby Scott
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Labor, Employee Benefits Security Administration: Definition of “Employer”—Association Health Plans*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor, Employee Benefits Security Administration (EBSA) entitled “Definition of “Employer”—Association Health Plans” (RIN: 1210-AC16). We received the rule on April 30, 2024. It was published in the *Federal Register* as a final rule on April 30, 2024. 89 Fed. Reg. 34106. The effective date of the rule is July 1, 2024.

According to EBSA, this final rule rescinds the Department of Labor’s (Department’s) 2018 rule entitled “Definition of Employer Under Section 3(5) of ERISA—Association Health Plans” (2018 AHP Rule). EBSA stated that the 2018 AHP Rule established an alternative set of criteria from those set forth in the Department’s pre-2018 AHP Rule (pre-rule) guidance for determining when a group or association of employers is acting “indirectly in the interest of an employer” under section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA) for purposes of establishing an association health plan (AHP) as a multiple employer group health plan. Per EBSA, the 2018 AHP Rule was a significant departure from the Department’s longstanding pre-rule guidance on the definition of “employer” under ERISA. According to EBSA, this departure substantially weakened the Department’s traditional criteria in a manner that would have enabled the creation of commercial AHPs functioning effectively as health insurance issuers. The Department now believes that the core provisions of the 2018 AHP Rule are, at a minimum, not consistent with the best reading of ERISA’s statutory requirements governing group health plans.

Enclosed is our assessment of EBSA’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to

the subject matter of the rule, please contact Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

A handwritten signature in cursive script that reads "Shirley A. Jones".

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
ENTITLED
“DEFINITION OF ‘EMPLOYER’—ASSOCIATION HEALTH PLANS”
(RIN: 1210-AC16)

(i) Cost-benefit analysis

According to the Department of Labor (Department), Employee Benefits Security Administration (EBSA), although the Department’s 2018 rule entitled “Definition of Employer Under Section 3(5) of ERISA—Association Health Plans” (2018 AHP Rule) was finalized, it was never fully implemented. As a result, the Department does not believe that rescinding the 2018 AHP Rule would result in any costs.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

According to EBSA, because the 2018 AHP Rule was never fully implemented and the Department is not aware of any existing AHP that was formed in reliance on the rule, the rescission of the 2018 AHP Rule will not have a significant economic impact on a substantial number of small entities. EBSA stated that pursuant to section 605(b) of the RFA, the Assistant Secretary of EBSA certified that this final rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

EBSA determined this final rule does not include any federal mandate that would result in expenditures by state, local, or tribal governments, in the aggregate, or on the private sector of \$100 million or more, adjusted annually for inflation, in any one year.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative

Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

EBSA did not discuss the Act in this final rule. In its submission to us, EBSA indicated the Act does not apply to the rule.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On December 20, 2023, EBSA published a proposed rule. 88 Fed. Reg. 87968. EBSA received 58 comment letters. EBSA addressed the comments in this final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

The 2018 AHP Rule was not subject to the requirements of the Paperwork Reduction Act of 1995 because it did not contain a collection of information as defined in 44 U.S.C. § 3502(3). Accordingly, this final rule to rescind the 2018 AHP Rule does not contain an information collection as defined in 44 U.S.C. § 3502(3).

Statutory authorization for the rule

EBSA promulgated the final rule pursuant to section 1135 of title 29, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

OMB determined that this final rule was significant under the Order.

Executive Order No. 13132 (Federalism)

According to EBSA, because the 2018 AHP Rule was never fully implemented and the Department is not aware of any entities currently relying on the 2018 AHP Rule, the Department does not believe its rescission will have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government that were discussed in the 2018 AHP Rule.