

## MODEL LETTER TO STATE INSURANCE COMMISSIONER

Commissioner XXXXX  
Insurance Department

Dear Commissioner XXXXX,

On XXXXXX, the U.S. Department of Labor issued final association health plan regulations (the “final AHP regulations”) broadening the definition of “employer” under *the Employee Retirement Income Security Act* (ERISA) to include “working owners” and small employers.<sup>1</sup> The State Insurance Department has not issued guidance regarding the acceptance of health plans under the new rules. The [State AOR] is respectfully requesting guidance to clarify whether our [number] members, involved in all aspects of real estate, will have access to affordable health insurance under the new rule.

The final AHP regulations clarify that:

- A group of employers, including small employers, may qualify as a “bona fide group or association of employers” as defined under the ERISA to offer a fully insured “large group” market health plan.
- A “bona fide group or association of employers” may include “working owners” -- i.e., self-employed individuals without employees who meet certain wage and hour requirements. .
- If – upon aggregating the employees employed by *all* of the employer members of the “bona fide group” – it is determined that the “bona fide group” includes 51 or more employees, the insurance carrier and the State must treat the fully-insured health plan as a “large group” market plan (and thus apply the “large group” market insurance rules to the health coverage). This “aggregation rule” is significant because the small employer members of the “bona fide group” are considered to be a large employer, instead of an individual small employer member standing on its own.

For your reference, we are enclosing a step-by-step analysis for determining the “size” of a “bona fide group” for purposes of determining whether a fully-insured health plan sponsored by this “bona fide group” is a “small group” or “large group” plan. The analysis also explains how ERISA and the ACA (through the *Public Health Service Act* (“PHSA”)) work together from a definitional perspective. In addition, the analysis explains how a “working owner” (i.e., a self-employed individual with no employees) is aggregated as an employee of the “bona fide group” and counted together with all of the employees of the employer members of the “bona fide group.”

We respectfully request a formal written response from the Department fully articulating your interpretation of the law in this area. In your response, we request an explanation of how the Department will treat a fully-insured health plan sponsored by a “bona fide group.” We also

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<sup>1</sup> 83 Fed. Reg. 28912 *et. seq.* (June 21, 2018).

request an explanation of how the Department will treat “working owners” who are members of a “bona fide group,” and whether the Department will allow these “working owner”-members to participate in a health plan sponsored by the “bona fide group.”

Thank you for your consideration to this important matter.

Sincerely,

## **The Treatment of an Association of Employers That Qualifies as a “Bona Fide Group or Association of Employers” as Defined Under ERISA**

### *How Do the Definitions under the PHS Act and ERISA Work Hand-In-Hand?*

- The Public Health Service Act (PHSA) governs fully-insured “group health plans.”
- As a result, the definitions under the PHS Act are used to determine whether a fully-insured group health plan that is sponsored by an “association of employers” is a “small group market” plan or a “large group market” plan.
- Importantly, the determination of whether a group health plan is a “small group market” or “large group market” plan is made based on the “size” of the “employer” sponsoring the fully-insured group health plan.
- For example, a “small group market” plan is a group health plan sponsored by a “small employer” (*see* PHS Act section 2791(e)(5)).
  - A “small employer” is defined as an employer employing between 1 and 50 employees (*see* PHS Act section 2791(e)(4)).
- A “large group market” plan is a group health plan sponsored by a “large employer” (*see* PHS Act section 2791(e)(3)).
  - A “large employer” is defined as an employer employing 51 or more employees (*see* PHS Act section 2791(e)(2)).
- The PHS Act defines the term “employer” as having “the meaning given such term under section 3(5) of the Employee Retirement Income Security Act of 1974 [(ERISA)]...” (*see* PHS Act section 2791(d)(6)).
- In other words, the definition of “employer” under the PHS Act is drawn directly from the definition of “employer” under ERISA section 3(5).
- The Department of Health and Human Services (HHS) recognizes the fact that the PHS Act’s definition of “employer” is drawn from ERISA. For example, in a CMS Insurance Standards Bulletin issued in 2002 (when the “look through” rule was first created), CMS explains (in footnote 5):

“The definitions of employer and employee for purposes of the PHS Act are taken from the definitions of those terms in ERISA” (*see* <https://www.cms.gov/Regulations-and-Guidance/Health-Insurance-Reform/HealthInsReformforConsume/downloads/HIPAA-02-02.pdf>).
- HHS followed up on this understanding that the PHS Act’s definition of “employer” is drawn from ERISA in a 2011 CMS Insurance Standards Bulletin that further clarified the “look through” rule. For example, in Section III.B of the 2011 Bulletin, CMS explicitly states that:

“The PHS Act derives its definitions of group health plan and employer from the ERISA definitions of employee welfare benefit plan and employer. PHS Act § 2791(a)(1), (d)(6). Under ERISA section 3(5), an employer is ‘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.’ Thus, reference to ERISA is needed when establishing the existence of a group health plan and determining the identity of the ‘employer’ sponsoring the plan” (see [https://www.cms.gov/CCIIO/Resources/Files/Downloads/association\\_coverage\\_9\\_1\\_2011.pdf](https://www.cms.gov/CCIIO/Resources/Files/Downloads/association_coverage_9_1_2011.pdf)).

### ***When Does an “Association of Employers” Qualify as an “Employer” under ERISA, and By Extension Under the PHSA?***

- In CMS’s 2011 Bulletin, the agency explains (in footnote 6) that for purposes of identifying whether an “association of employers” qualifies as an “employer” under ERISA “refer to the following DOL guidance: (1) MEWA Guide ([www.dol.gov/ebsa/Publications/mewas.html](http://www.dol.gov/ebsa/Publications/mewas.html)); (2) Adv. Op. 2008-07A ([www.dol.gov/ebsa/regs/aos/ao2008-07a.html](http://www.dol.gov/ebsa/regs/aos/ao2008-07a.html)); (3) Adv. Op. 2001-04A ([www.dol.gov/ebsa/regs/aos/ao2001-04a.html](http://www.dol.gov/ebsa/regs/aos/ao2001-04a.html)); and (4) Adv. Op. 2003-13A ([www.dol.gov/ebsa/regs/aos/ao200313a.html](http://www.dol.gov/ebsa/regs/aos/ao200313a.html)).”
- The DOL guidance referenced above sets forth specific rules and requirements that an “association of employers” must satisfy to be considered a “bona fide group or association of employers” (hereinafter referred to as a “bona fide group”). If these specific rules and requirements are met, the DOL considers this “bona fide group” as an “employer” as defined under ERISA section 3(5).
- On June 21, 2018, the DOL issued final regulations establishing additional criteria for determining when an “association of employers” may be considered a “bona fide group,” and thus, an “employer” under ERISA section 3(5). The final regulations do *not* change previous guidance in this area, including the 2011 CMS Bulletin. As a result, the analysis for determining whether an “association of employers” qualifies as an “employer” under both ERISA and the PHSA (as described above) has *not* changed.

### ***How Do You Determine the “Size” of an “Association of Employers” That Is Considered a “Bona Fide Group” and Also an “Employer” Under Both ERISA and the PHSA?***

- Based on this understanding of how the PHSA and ERISA work hand-in-hand from a definitional perspective, CMS explains how the “size” of an “association of employers” that is considered a “bona fide group” (and thus an “employer” under both ERISA and the PHSA) should be determined. Specifically, CMS explains that:

“In the rare instances where the association of employers is, in fact, sponsoring the group health plan and the association itself is deemed the ‘employer,’ the association coverage is considered a single group health plan. In that case, the number of employees employed by all of the employers participating in the association determines whether the coverage is subject to the small group market or the large group market rules.”

- In this last sentence, CMS explains how the “size” of a “bona fide group” sponsoring a group health plan should be determined. According to CMS, the number of employees employed by all of the employers participating in the “bona fide group” should be counted together to determine whether the “bona fide group” (i.e., an “employer”) employs 1 to 50 employees (and thus is a “small employer”) or 51 or more employees (and thus is a “large employer”).
- In other words, CMS explains that in cases where an “association of employers” qualifies as a “bona fide group” and also an “employer” as defined under both ERISA and the PHSA, the employees employed by *all* of the employer members of the association are aggregated together for purposes of determining whether the group health plan sponsored by the association is a “small group market” or “large group market” plan.

### ***Can You Summarize All of That?***

- As discussed above, if an “association of employers” qualifies as “bona fide group,” the “bona fide group” will be considered an “employer” as defined under ERISA section 3(5), which also means that the “bona fide group” will be considered an “employer” for purposes of the PHSA. And – according to CMS’s 2011 Bulletin – the “size” of this “bona fide group” will be determined by aggregating *all* of the employees employed by *all* of the employer members of the “bona fide group.”
- After aggregating the employees employed by *all* of the employer members of the “bona fide group,” if the “bona fide group” includes 51 or more employees, the group health plan sponsored by this “bona fide group” will meet the definition of a “large group market” plan under the PHSA.

### ***Are “Working Owners” Considered an “Employer” Under the PHSA, or Is the “Bona Fide Group” the “Employer”?***

- Although the PHSA’s definition of “employer” is drawn from ERISA, the PHSA caveats that the term employer “shall include only employers with two or more employees.” (*see* PHSA section 2791(d)(6)).
- Some have argued that this means that a “working owner” (i.e., a self-employed individual with no employees) cannot participate in a “large group” plan because a “working owner” cannot be considered an “employer with two or more employees,” and therefore, a “working owner” cannot meet the PHSA’s definition of “employer.”
- However, this argument fails to recognize that the “bona fide group” is treated as the “employer” for purposes of the PHSA, *not* the “working owner.” Stated differently, this argument incorrectly treats the “working owner” as the “employer” under the PHSA, when the “employer” in this case is instead the “bona fide group.”

- The DOL has interpreted its own guidance and statutory framework as allowing a “working owner” to be treated as an “employer” for purposes of being a member of a “bona fide group.” If a “working owner” is an employer member of a “bona fide group,” the DOL has also concluded that the “working owner” may be considered an “employee” of the “bona fide group.”
- As an “employee” of the “bona fide group,” a “working owner” will be aggregated and counted together with *all* of the other employees of the employer members of the “bona fide group.”
- As a result, the “bona fide group” – and *not* the “working owner” – stands as an “employer of two or more employees” as required under the PHSA, and if the “bona fide group” includes 51 or more employees, then the health plan sponsored by the “bona fide group” (which may include “working owners”) will be considered a “large group” market plan, as explained by the Obama Administration in the 2011 CMS Bulletin.