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LEGAL PROCESSING DIVISION
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By U.S. Mail

U.S. Department of Labor
Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
Attn: RIN1210-AB42
200 Constitution Avenue N.W.
Washington D.C. 20210

Office of Consumer Information and Insurance Oversight
Department of Health and Human Services
Attn: OCIIO-9991-IFC
P.O. Box 8016
Baltimore, MD 21244-1850

Internal Revenue Service
CC:PA:LPD:PR (Reg-118412-10)
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington D.C. 20004

Re: Comments on Interim Final Rule Regarding Status of Grandfathered Plans

To Whom It May Concern:

This office is counsel to certain employee benefit trust funds established through collective bargaining agreements. As you likely know, these funds are commonly referred to as "Taft-Hartley plans." They are also multiemployer plans as that term is defined in the Employee Retirement Income Security Act ("ERISA").

We wish to comment on the Interim Final Rules regarding grandfathered plan status that were jointly issued last week by the Department of Health and Human Services, the Department of Labor, and the Internal Revenue Service (collectively "the Departments"). In particular, we want to address certain assumptions and conclusions set forth in Section II.E of the Preamble.

In that Section the Departments discuss the scope and application of Section 1251(d) of the Patient Protection and Affordable Care Act ("the Act"). There are two areas where we believe that the Departments have clearly misinterpreted this Section.

A. <u>Scope</u>.

The Departments conclude that because Section 1251(d) uses the words "in the case of health insurance coverage maintained pursuant to one or more collective bargaining agreements" instead of "in the case of a group health plan maintained pursuant to one or more collective bargaining agreements," Congress must have intended that this Section applies only to Taft-Hartley plans that provide benefits through insurance contracts purchased from insurance issuers. The Departments expressly state that Section 1251(d) does not apply to self-funded Taft-Hartley plans.

The vast majority of Taft-Hartley plans provide at least some of their benefits on a self-funded basis. We find it hard to believe that the Departments would be unaware of this fact. As a practical matter, the Departments' interpretation of Section 1251(d) would effectively render this Section moot in nearly all cases.

We are confident that the Departments fully understand the policy reasons behind delayed effective date provisions like those in Section 1251(d). In any legislation where significant benefit costs are imposed on Taft-Hartley plans there has always been a provision which delays the effective date until the expiration of the last collective bargaining agreement that was in effect before the legislation was adopted.

The obvious reason is to preserve the economic terms of the collective bargaining agreements at the time they were negotiated. Employee benefits are cost items which affect the negotiation of overall employee compensation. Statutory changes which increase the cost of these benefits would obviously interfere with the give-and-take of the bargaining process if they were imposed during the term of the agreements. Avoiding such interference is exactly the reason why Congress always delays the required implementation of benefit changes until after all prior negotiated agreements have expired. When negotiations for new agreements begin the parties are able to take into account the costs resulting from the statutory mandates.

There is simply no rational support for the proposition that Congress intended to delay the application of the changes made by the Act for Taft-Hartley plans that purchase insurance but to deny such delay for Taft-Hartley plans which are self-insured. What federal labor policies would such a bizarre distinction promote? We are not aware of any.

Not only is there no reason to make this distinction, but there is absolutely no prior precedent for this treatment. Whenever Congress has delayed the effective date of health care changes for Taft-Hartley plans, it has done so for all such plans.

We are aware that the definition of "health insurance coverage" in Section 733(b)(1) of ERISA conforms to your interpretation. However, in that Section "health insurance coverage" does not include a group health plan that provides coverage through a health insurance issuer.[1/] This means that the narrow definition of "health insurance coverage" in Section 733 could not possibly support the Department's interpretation of Section 1251(d). If that strict definition were used, it would exclude all group health plans, since as used in that Section "group health plan" and "health insurance coverage" are mutually exclusive terms. Because all Taft-Hartley plans that provide medical benefits are group health plans, the Departments' reliance on Section 733 would render the delayed effective date meaningless.

Of course, the Departments could deem the words "health insurance coverage" in Section 1251(d) to really mean "group health insurance coverage" as defined in Section 733(b)(4). That construction would support the Preamble's current interpretation of Section 1251(d). But if the Departments have the freedom to make that construction, they can also construe "health insurance coverage" to mean "group health plan." That interpretation would be consistent with past practice and federal labor policy.

It is quite common for collective bargaining agreements to contain "maintenance of benefits" provisions, where increases in health care costs can trigger mid-contract contribution increases. In many cases the employer contribution is capped, which means that additional cost increases are paid for through employee wage reductions. If the Departments continue with their current interpretation of Section 1251(d), these wage reductions will undoubtedly occur.

It is virtually certain that Congress did not desire such an outcome, and intended Section 1251(d) to apply to all Taft-Hartley plans. The regulations should acknowledge this intent.

[1/]Section 733(b)(4) defines the term "group health insurance coverage" to mean a group health plan that provides benefits through health insurance coverage, but that is not the term that appears in Section 1251(d).

B. Grandfathered Status.

The Departments also conclude that plans which are entitled to the delayed effective date are grandfathered plans from the date of enactment. Hence, despite the clear language in Section 1251(d), which delays all of the provisions of Subtitle A and Subtitle C, the Departments conclude that only some of those provisions are delayed. Accordingly, provisions such as the elimination of annual and lifetime benefit caps, which are contained in Subtitle A, are purportedly operative at the same time as they are for noncollectively bargained plans.

The Departments conclude, without analysis or explanation, that the delayed effective date provisions in Section 1251(d) merely mean that plans described in that Section will not lose grandfathered status if they engage in any of the proscribed actions (e.g., increasing copayments) prior to the expiration of the last collective bargaining agreement. In effect, the Departments have arbitrarily created two kinds of group health plans: "ordinary grandfathered" plans, which can lose grandfathered status at any time, and "super-grandfathered" plans, which cannot lose grandfathered status until the delayed effective date. Nothing in the Act supports this construction.

We suspect that the Departments' interpretation comes from the language in Section 1251(e), which says that "grandfathered health plan" means any plan "to which this Section applies." However, "this Section" (meaning Section 1251) is part of Subtitle C. No part of Subtitle C, including Section 1251(e), becomes effective until after the delayed effective date. Accordingly, the proper construction is that plans entitled to the delayed effective date do not become grandfathered plans until after that date.

This construction not only follows the statutory language, but is consistent with the policy reasons behind the delayed effective date that are discussed above. Again, it has always been the intent of Congress to delay the implementation of health care changes that significantly impact the costs of Taft-Hartley plans, since those costs are an integral part of the negotiation process. It makes no sense to abandon that policy here.

Very truly yours,

John R. St. John
Of ST. JOHN, WALLACE, BRENNAN & FOLAN LLP

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