

National  
Coalition on

# BENEFITS

March 15, 2009

The Honorable Peter Orszag  
Director  
Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

Dear Director Orszag:

We are writing to request a meeting to discuss our concerns about what we understand is a proposed Department of Labor regulation intended to redefine the phrase "welfare benefit plan" under the Employee Retirement Income Security Act (ERISA). It is our understanding that the Department of Labor has submitted the proposed regulation to the Office of Management and Budget for a 90-day review.

The National Coalition on Benefits is a coalition of over 200 employers and employer associations that represent companies that voluntarily provide health, retirement and other valuable benefits under the framework established by the 1974 Employee Retirement Income Security Act (ERISA).

Over 170 million Americans receive health care benefits from their employer under the framework established by the ERISA. The nationally uniform federal standard of ERISA is a critical cornerstone to the viability of the employment-based health care system because it allows employers the ability to offer the same benefits to their employees, retirees and families throughout the company, regardless of where employees may live or may be transferred.

ERISA also preserves each employer's ability to offer and maintain equal benefit plans across state and municipal lines, a critical factor for the many employers that cover beneficiaries in more than one state or locality. It is, moreover, critical to millions of employees who receive those benefits.

Throughout the legislative debate over health care reform employers have worked with both the House and Senate and the Administration on how best to control costs, improve access and allow Americans to keep the health care they currently have. From our perspective, with respect to ERISA, the Senate-passed bill reflects the shared view of policy makers that ERISA should remain intact and preserve the protection against a patchwork of different and conflicting municipal and state benefit plan requirements.

A proposed regulatory change in the definition of "welfare benefit plan" appears to move in exactly the opposite direction and negate the intent of Congress and the Administration as well as 35 years of judicial, legislative, and stakeholder understanding of the employer provisions of health care reform. It would do so by obligating employers whose plans are currently governed by nationally uniform rules under ERISA, to comply with myriad state requirements in order to comply with state sponsored health plans.

We are concerned that the proposed “clarification” is a significant and exceptional departure from the Department of Labor’s long held position with respect to ERISA preemption, a position which is reflected in 35 years of court decisions and reliance by employers that sponsor health and retirement plans.

For example, in the recent Ninth Circuit Court of Appeals consideration of *Golden Gate Restaurant Association vs. the City and County of San Francisco*, the Department of Labor filed an amicus brief in which it objected to an ordinance of the City of San Francisco that effectively required employers to provide certain benefits in their health plans that are otherwise governed by ERISA or pay a penalty/tax to the City. The Department’s brief correctly stated:

“ERISA broadly defines employee welfare benefit plans to include any plan, fund, or program through which a private employer provides health benefits to its employees, and the Act broadly preempts any state laws that “relate to” such plans. The [San Francisco ordinance] purports to directly regulate the provision of health benefits by private employers to their employees and, in this manner, governs precisely the same relationships that Congress subjected to exclusive federal regulation under ERISA.

“As this and other Courts have held, an employer creates an ERISA plan whenever it provides benefits of the type provided by an ERISA plan for its employees through an ongoing administrative program, and a reasonable person can identify the benefits, beneficiaries, source of financing, and procedures for receiving benefits. A private employer’s provision of benefits through the City-payment option meets all of these criteria and, therefore, constitutes an ERISA-covered plan.”

Given the exceptional circumstances, the fact that the Department of Labor’s proposed “clarification” appears to have profound implications for ERISA plans covering over 170 million Americans, we request the opportunity to discuss our concerns over such a radical departure from past policy.

Martin Reiser, ([martin.reiser@xerox.com](mailto:martin.reiser@xerox.com))/ 202) 414-1291 Chairs the National Coalition on Benefits and is the best contact for scheduling a meeting with the Steering Committee of the Coalition.

Sincerely

NCB steering Committee  
[www.coalitiononbenefits.org](http://www.coalitiononbenefits.org)

cc: Nancy-Ann DeParle