

117TH CONGRESS
1ST SESSION

S. _____

To amend the Employee Retirement Income Security Act of 1974 to establish additional criteria for determining when employers may join together in a group or association of employers that will be treated as an employer under section 3(5) of such Act for purposes of sponsoring a group health plan, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. KENNEDY introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend the Employee Retirement Income Security Act of 1974 to establish additional criteria for determining when employers may join together in a group or association of employers that will be treated as an employer under section 3(5) of such Act for purposes of sponsoring a group health plan, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Association Health
5 Plans Act of 2021”.

1 **SEC. 2. FINDINGS.**

2 Congress finds the following:

3 (1) Association health plans allow small busi-
4 nesses to band together on a regional or national
5 basis and leverage their combined power to obtain
6 the health benefits they want and need, at a price
7 they can afford.

8 (2) Small business owners have experienced av-
9 erage premium decreases of up to 29 percent under
10 an association health plan.

11 (3) Association health plans are governed under
12 the same rules that apply to employer-sponsored in-
13 surance arrangements for large employers utilized by
14 more than 160,000,000 Americans.

15 (4) Important consumer protections established
16 on a bipartisan basis under the Employee Retirement
17 and Income Security Act of 1974, the Health
18 Insurance Portability and Accountability Act of
19 1996, and the Consolidated Omnibus Budget Rec-
20 onciliation Act of 1985 apply to association health
21 plans.

22 (5) Association health plans comply with re-
23 quirements for large employer health plans under
24 the Public Health Service Act, as amended by the
25 Patient Protection and Affordable Care Act.

1 (6) Association health plans cannot limit plan
2 eligibility on the basis of medical history, health sta-
3 tus, claims experience, or genetic information.

4 (7) Fully insured association health plans must
5 comply with State benefit mandates.

6 (8) Self-insured association health plans are
7 subject to State multiple-employer welfare arrange-
8 ment laws.

9 (9) The Secretary of Labor used its rulemaking
10 authority to issue a final rule on June 21, 2018, to
11 expand access to association health plans for Amer-
12 ican small businesses and working families, includ-
13 ing self-employed business owners.

14 (10) The Secretary of Labor required associa-
15 tion health plans formed under the final rule to com-
16 ply with even stronger nondiscrimination protections
17 than the nondiscrimination protections under Fed-
18 eral law prior to the final rule.

19 (11) On March 28, 2019, a Federal district
20 judge vacated the Secretary of Labor's final rule,
21 threatening to disrupt coverage for current enrollees
22 and restrict the ability of small businesses and work-
23 ing families to band together to obtain affordable
24 and high quality plans in the future.

1 (12) Health care is one of the most important
2 issues facing American families, and small business
3 owners and self-employed Americans want secure
4 and affordable association health plans to provide
5 comprehensive coverage for themselves and their
6 families.

7 **SEC. 3. DEFINITION OF “EMPLOYER” UNDER ERISA WITH**
8 **RESPECT TO GROUP HEALTH PLANS.**

9 (a) DEFINITION OF EMPLOYER.—Section 3(5) of the
10 Employee Retirement Income Security Act of 1974 (29
11 U.S.C. 1002(5)) is amended by striking the period and
12 inserting “(which, with respect to a group health plan,
13 shall be determined in accordance with criteria that in-
14 cludes the criteria under section 736).”.

15 (b) GROUP HEALTH PLANS.—Part 7 of subtitle B
16 of title I of the Employee Retirement Income Security Act
17 of 1974 (29 U.S.C. 1181 et seq.) is amended by adding
18 at the end the following:

19 **“SEC. 736. DEFINITION OF ‘EMPLOYER’ WITH RESPECT TO**
20 **GROUP HEALTH PLANS.**

21 “(a) IN GENERAL.—A group or association of em-
22 ployers that meets the criteria under subsection (b) shall
23 be considered an employer under section 3(5) for purposes
24 of sponsoring a group health plan.

1 “(b) REQUIREMENTS.—The requirements under this
2 subsection are each of the following:

3 “(1) The primary purpose of the group or asso-
4 ciation may be to offer and provide health coverage
5 to its employer members and their employees, if
6 such group or association has at least 1 substantial
7 business purpose, as described in subsection (c), un-
8 related to offering and providing health coverage or
9 other employee benefits to its employer members and
10 their employees.

11 “(2) Each employer member of the group or as-
12 sociation participating in the group health plan is a
13 person acting directly as an employer of at least 1
14 employee who is a participant covered under the
15 plan.

16 “(3) The group or association has—

17 “(A) a formal organizational structure
18 with a governing body; and

19 “(B) by-laws or other similar indications of
20 formality.

21 “(4) The functions and activities of the group
22 or association shall be controlled by the employer
23 members of the group or association, and the em-
24 ployer members of the group or association that par-
25 ticipate in the group health plan shall control the

1 plan. Control under this paragraph shall be in form
2 and substance.

3 “(5) The employer members shall have a com-
4 monality of interest as described in subsection (d).

5 “(6)(A) The group or association shall not
6 make health coverage through the group health plan
7 available other than to—

8 “(i) an employee of a current employer
9 member of the group or association;

10 “(ii) a former employee of a current em-
11 ployer member of the group or association who
12 became eligible for coverage under the group
13 health plan when the former employee was an
14 employee of the employer; and

15 “(iii) a beneficiary of an individual de-
16 scribed in clause (i) or (ii), such as a spouse or
17 dependent child.

18 “(B) Notwithstanding subparagraph (A), the
19 group or association shall not make health coverage
20 through the group health plan available to any indi-
21 vidual (or beneficiaries of the individual) for any
22 plan year following the plan year in which the plan
23 determines pursuant to reasonable monitoring proce-
24 dures described in subsection (f)(2)(C) that the indi-
25 vidual ceases to meet the conditions described in

1 subsection (f)(2) for being a working owner (unless
2 the individual again meets those conditions), except
3 as may be required by section 601.

4 “(7) The group or association, and any health
5 coverage offered by the group or association, shall
6 comply with the nondiscrimination provisions under
7 subsection (e).

8 “(8) The group or association shall not be a
9 health insurance issuer, or owned or controlled by
10 such a health insurance issuer or by a subsidiary or
11 affiliate of such a health insurance issuer, other
12 than to the extent such entities participate in the
13 group or association in their capacity as employer
14 members of the group or association.

15 “(c) SUBSTANTIAL BUSINESS PURPOSE.—

16 “(1) IN GENERAL.—For purposes of subsection
17 (b)(1), a substantial business purpose shall exist if
18 the group or association would be a viable entity in
19 the absence of sponsoring an employee benefit plan.

20 “(2) BUSINESS PURPOSE.—For purposes of
21 subsection (b)(1) and paragraph (1), a business pur-
22 pose shall—

23 “(A) include promoting common business
24 interests of the members of the group or asso-

1 ciation or the common economic interests in a
2 given trade or employer community; and

3 “(B) not be required to be a for-profit ac-
4 tivity.

5 “(d) COMMONALITY OF INTEREST.—

6 “(1) IN GENERAL.—Subject to paragraph (3),
7 employer members of the group or association shall
8 be treated as having a commonality of interest for
9 purposes of subsection (b)(5) if—

10 “(A) the employers are in the same trade,
11 industry, line of business, or profession; or

12 “(B) each employer has a principal place
13 of business in the same region that does not ex-
14 ceed the boundaries of a single State or a met-
15 ropolitan area (even if the metropolitan area in-
16 cludes more than 1 State).

17 “(2) SAME TRADE, INDUSTRY, OR LINE OF
18 BUSINESS.—In the case of a group or association
19 that is sponsoring a group health plan under this
20 section and that is itself an employer member of the
21 group or association, the group or association shall
22 be deemed for purposes of paragraph (1)(A) to be
23 in the same trade, industry, line of business, or pro-
24 fession, as applicable, as the other employer mem-
25 bers of the group or association.

1 “(3) NONDISCRIMINATION.—The standards
2 under paragraph (1) shall not be implemented in a
3 manner that is subterfuge for discrimination as is
4 prohibited under subsection (e).

5 “(e) NONDISCRIMINATION.—

6 “(1) IN GENERAL.—A group or association of
7 employers sponsoring a group health plan under this
8 section, and any health coverage sponsored by such
9 group or association, shall comply with each of the
10 following:

11 “(A) The group or association shall not
12 condition employer membership in the group or
13 association on any health factor of any indi-
14 vidual who is or may become eligible to partici-
15 pate in the group health plan sponsored by the
16 group or association.

17 “(B) The group health plan sponsored by
18 the group or association shall comply with the
19 rules under section 2590.702(b) of title 29,
20 Code of Federal Regulations (as in effect on
21 June 21, 2018), with respect to nondiscrimina-
22 tion in rules for eligibility for benefits, subject
23 to subparagraph (D).

24 “(C) The group health plan sponsored by
25 the group or association shall comply with the

1 rules under section 2590.702(c) of title 29,
2 Code of Federal Regulations (as in effect on
3 June 21, 2018), with respect to nondiscrimina-
4 tion in premiums or contributions required by
5 any participant or beneficiary for coverage
6 under the plan, subject to subparagraph (D).

7 “(D) In applying subparagraphs (B) and
8 (C), the group or association may not treat the
9 employees of different employer members of the
10 group or association as distinct groups of simi-
11 larly situated individuals based on a health fac-
12 tor of 1 or more individuals.

13 “(2) DEFINITION OF HEALTH FACTOR.—For
14 purposes of this subsection, the term ‘health factor’
15 has the meaning given such term in section
16 2590.702(a) of title 29, Code of Federal Regulations
17 (as in effect on June 21, 2018).

18 “(f) DUAL TREATMENT OF WORKING OWNERS AS
19 EMPLOYERS AND EMPLOYEES.—

20 “(1) IN GENERAL.—A person determined in ac-
21 cordance with paragraph (2) to be a working owner
22 of a trade or business may qualify as both an em-
23 ployer and as an employee of the trade or business
24 for purposes of the requirements under subsection

1 (b), including the requirements under paragraphs
2 (2) and (6) of such subsection.

3 “(2) WORKING OWNER.—

4 “(A) ELIGIBILITY.—A person shall qualify
5 as a ‘working owner’ if a responsible fiduciary
6 of the group health plan reasonably determines
7 that the person—

8 “(i) does not have any common law
9 employees;

10 “(ii) has an ownership right of any
11 nature in a trade or business, whether in-
12 corporated or unincorporated, including a
13 partner and other self-employed individual;

14 “(iii) is earning wages or self-employ-
15 ment income from the trade or business
16 for providing personal services to the trade
17 or business; and

18 “(iv) either—

19 “(I) works on average at least 20
20 hours per week, or at least 80 hours
21 per month, providing personal services
22 to the person’s trade or business, or

23 “(II) has wages or self-employ-
24 ment income from such trade or busi-
25 ness that at least equals the person’s

1 cost of coverage for participation by
2 the person, and any covered bene-
3 ficiaries, in the group health plan
4 sponsored by the group or association
5 in which the person is participating.

6 “(B) DETERMINATION.—The determina-
7 tion under subparagraph (A) shall be made
8 when the person first becomes eligible for cov-
9 erage under the group health plan.

10 “(C) REASONABLE MONITORING PROCE-
11 DURES.—A responsible fiduciary of the group
12 health plan shall, through reasonable moni-
13 toring procedures, periodically confirm the con-
14 tinued eligibility of a person to qualify as a
15 working owner under subparagraph (A) for pur-
16 poses of meeting the requirements under sub-
17 section (b) for the group health plan sponsored
18 under this section.

19 “(g) APPLICABILITY.—

20 “(1) FULLY INSURED.—This section shall apply
21 beginning on September 1, 2021, with respect to a
22 group or association of employers sponsoring a
23 group health plan that is fully insured.

24 “(2) PLANS EXPANDING TO INCLUDE BROADER
25 GROUP.—This section shall apply beginning on Jan-

1 uary 1, 2022, with respect to a group or association
2 of employers sponsoring a group health plan that—

3 “(A) is not fully insured;

4 “(B) is in existence on June 21, 2018;

5 “(C) meets the requirements that applied
6 with respect to such plan before June 21, 2018;

7 and

8 “(D) chooses to be a plan sponsored under
9 this section (and subject to the requirements
10 under subsections (b) through (f)).

11 “(3) OTHER ASSOCIATION HEALTH PLANS.—

12 This section shall apply beginning on April 1, 2022,
13 with respect to any other group or association of em-
14 ployers sponsoring a group health plan.

15 “(4) OTHER CRITERIA IN ADVISORY OPIN-
16 IONS.—The criteria under this section shall not in-
17 validate any criteria provided in an advisory opinion,
18 in effect on or after the date of enactment of the As-
19 sociation Health Plans Act of 2021, that the Sec-
20 retary may use to determine if a group or associa-
21 tion of employers is an employer under section 3(5)
22 for purposes of sponsoring a group health plan.

23 “(h) DETERMINATION OF EMPLOYER OR JOINT EM-
24 PLOYER STATUS.—

1 “(1) IN GENERAL.—Participating in or facili-
2 tating a group health plan sponsored by a bona fide
3 group or association of employers pursuant to sub-
4 section (a) shall not be construed as establishing an
5 employer or joint employer relationship under any
6 Federal or State law.

7 “(2) APPLICATION OF PROVISION.—Paragraph
8 (1) shall apply to a group health plan sponsored or
9 facilitated by a franchisor and any franchisee, by
10 multiple franchisors for the benefit of the employees
11 of such franchisors and their franchisees, by mul-
12 tiple franchisees for the benefit of the employees of
13 such franchisees, by a franchisor whose franchisee or
14 franchisees participate or participates in the plan, or
15 by a person or entity that contracts with any indi-
16 vidual as an independent contractor for whom the
17 plan benefits.

18 “(i) RULE OF CONSTRUCTION.—Nothing in this sec-
19 tion shall be construed as repealing or otherwise limiting
20 the application of this Act (including section 712 relating
21 to mental health parity) to group health plans and em-
22 ployee welfare benefit plans.”.

23 (c) CLERICAL AMENDMENT.—The table of contents
24 in section 1 of the Employee Retirement Income Security
25 Act of 1974 (29 U.S.C. 1001 et seq.) is amended by in-

1 inserting after the item relating to section 735 the following

2 new item:

“Sec. 736. Definition of ‘employer’ with respect to group health plans.”.