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(Original Signature of Member)

117TH CONGRESS
1ST SESSION

H. R.

To require short-term limited duration insurance issuers to renew or continue in force such insurance coverage at the option of the enrollees, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. BUDD introduced the following bill; which was referred to the Committee on _____

A BILL

To require short-term limited duration insurance issuers to renew or continue in force such insurance coverage at the option of the enrollees, 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 “Flexibility Through
5 Lower Expenses Health Care Act” or the “FLEX Act”.

1 **SEC. 2. SHORT-TERM LIMITED DURATION INSURANCE DE-**
2 **FINED.**

3 (a) IN GENERAL.—Section 2791(b) of the Public
4 Health Service Act (42 U.S.C. 300gg–91(b)) is amended
5 by adding at the end the following:

6 “(6) SHORT-TERM LIMITED DURATION INSUR-
7 ANCE.—The term ‘short-term limited duration insur-
8 ance’ means health insurance coverage provided pur-
9 suant to a contract with a health insurance issuer
10 that has an expiration date specified in the contract
11 (not taking into account any extensions that may be
12 elected by the policyholder with or without the
13 issuer’s consent) that is less than 12 months after
14 the original effective date of the contract.”.

15 (b) APPLICABILITY.—The amendments made by this
16 subsection shall apply with respect to contracts for short-
17 term limited duration insurance that take effect on or
18 after January 1, 2022.

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

21 (a) DEFINITION OF EMPLOYER.—Section 3(5) of the
22 Employee Retirement Income Security Act of 1974 (29
23 U.S.C. 1002(5)) is amended by striking the period and
24 inserting “(which, with respect to a group health plan,
25 shall be determined in accordance with criteria that in-
26 cludes the criteria under section 735).”.

1 (b) GROUP HEALTH PLANS.—

2 (1) IN GENERAL.—Part 7 of subtitle B of title
3 I of the Employee Retirement Income Security Act
4 of 1974 (29 U.S.C. 1181 et seq.) is amended by
5 adding at the end the following:

6 **“SEC. 735. DEFINITION OF ‘EMPLOYER’ WITH RESPECT TO**
7 **GROUP HEALTH PLANS.**

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

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

14 “(1) The primary purpose of the group or asso-
15 ciation may be to offer and provide health coverage
16 to its employer members and their employees, if
17 such group or association has at least 1 substantial
18 business purpose, as described in subsection (c), un-
19 related to offering and providing health coverage or
20 other employee benefits to its employer members and
21 their employees.

22 “(2) Each employer member of the group or as-
23 sociation participating in the group health plan is a
24 person acting directly as an employer of at least 1

1 employee who is a participant covered under the
2 plan.

3 “(3) The group or association has—

4 “(A) a formal organizational structure
5 with a governing body; and

6 “(B) by-laws or other similar indications of
7 formality.

8 “(4) The functions and activities of the group
9 or association shall be controlled by the employer
10 members of the group or association, and the em-
11 ployer members of the group or association that par-
12 ticipate in the group health plan shall control the
13 plan. Control under this paragraph shall be in form
14 and substance.

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

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

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

22 “(ii) a former employee of a current em-
23 ployer member of the group or association who
24 became eligible for coverage under the group

1 health plan when the former employee was an
2 employee of the employer; and

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

6 “(B) Notwithstanding subparagraph (A), the
7 group or association shall not make health coverage
8 through the group health plan available to any indi-
9 vidual (or beneficiaries of the individual) for any
10 plan year following the plan year in which the plan
11 determines pursuant to reasonable monitoring proce-
12 dures described in subsection (f)(2)(C) that the indi-
13 vidual ceases to meet the conditions described in
14 subsection (f)(2) for being a working owner (unless
15 the individual again meets those conditions), except
16 as may be required by section 601.

17 “(7) The group or association, and any health
18 coverage offered by the group or association, shall
19 comply with the nondiscrimination provisions under
20 subsection (e).

21 “(8) The group or association shall not be a
22 health insurance issuer, or owned or controlled by
23 such a health insurance issuer or by a subsidiary or
24 affiliate of such a health insurance issuer, other
25 than to the extent such entities participate in the

1 group or association in their capacity as employer
2 members of the group or association.

3 “(c) SUBSTANTIAL BUSINESS PURPOSE.—

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

8 “(2) BUSINESS PURPOSE.—For purposes of
9 subsection (b)(1) and paragraph (1), a business pur-
10 pose shall—

11 “(A) include promoting common business
12 interests of the members of the group or asso-
13 ciation or the common economic interests in a
14 given trade or employer community; and

15 “(B) not be required to be a for-profit ac-
16 tivity.

17 “(d) COMMONALITY OF INTEREST.—

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

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

24 “(B) each employer has a principal place
25 of business in the same region that does not ex-

1 ceed the boundaries of a single State or a met-
2 ropolitan area (even if the metropolitan area in-
3 cludes more than 1 State).

4 “(2) SAME TRADE, INDUSTRY, OR LINE OF
5 BUSINESS.—In the case of a group or association
6 that is sponsoring a group health plan under this
7 section and that is itself an employer member of the
8 group or association, the group or association shall
9 be deemed for purposes of paragraph (1)(A) to be
10 in the same trade, industry, line of business, or pro-
11 fession, as applicable, as the other employer mem-
12 bers of the group or association.

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

17 “(e) NONDISCRIMINATION.—

18 “(1) IN GENERAL.—A group or association of
19 employers sponsoring a group health plan under this
20 section, and any health coverage sponsored by such
21 group or association, shall comply with each of the
22 following:

23 “(A) The group or association shall not
24 condition employer membership in the group or
25 association on any health factor of any indi-

1 individual who is or may become eligible to partici-
2 pate in the group health plan sponsored by the
3 group or association.

4 “(B) The group health plan sponsored by
5 the group or association shall comply with the
6 rules under section 2590.702(b) of title 29,
7 Code of Federal Regulations (as in effect on
8 June 21, 2018), with respect to nondiscrimina-
9 tion in rules for eligibility for benefits, subject
10 to subparagraph (D).

11 “(C) The group health plan sponsored by
12 the group or association shall comply with the
13 rules under section 2590.702(c) of title 29,
14 Code of Federal Regulations (as in effect on
15 June 21, 2018), with respect to nondiscrimina-
16 tion in premiums or contributions required by
17 any participant or beneficiary for coverage
18 under the plan, subject to subparagraph (D).

19 “(D) In applying subparagraphs (B) and
20 (C), the group or association may not treat the
21 employees of different employer members of the
22 group or association as distinct groups of simi-
23 larly situated individuals based on a health fac-
24 tor of 1 or more individuals.

1 “(2) DEFINITION OF HEALTH FACTOR.—For
2 purposes of this subsection, the term ‘health factor’
3 has the meaning given such term in section
4 2590.702(a) of title 29, Code of Federal Regulations
5 (as in effect on June 21, 2018).

6 “(f) DUAL TREATMENT OF WORKING OWNERS AS
7 EMPLOYERS AND EMPLOYEES.—

8 “(1) IN GENERAL.—A person determined in ac-
9 cordance with paragraph (2) to be a working owner
10 of a trade or business may qualify as both an em-
11 ployer and as an employee of the trade or business
12 for purposes of the requirements under subsection
13 (b), including the requirements under paragraphs
14 (2) and (6) of such subsection.

15 “(2) WORKING OWNER.—

16 “(A) ELIGIBILITY.—A person shall qualify
17 as a ‘working owner’ if a responsible fiduciary
18 of the group health plan reasonably determines
19 that the person—

20 “(i) does not have any common law
21 employees;

22 “(ii) has an ownership right of any
23 nature in a trade or business, whether in-
24 corporated or unincorporated, including a
25 partner and other self-employed individual;

1 “(iii) is earning wages or self-employ-
2 ment income from the trade or business
3 for providing personal services to the trade
4 or business; and

5 “(iv) either—

6 “(I) works on average at least 20
7 hours per week, or at least 80 hours
8 per month, providing personal services
9 to the person’s trade or business; or

10 “(II) has wages or self-employ-
11 ment income from such trade or busi-
12 ness that at least equals the person’s
13 cost of coverage for participation by
14 the person, and any covered bene-
15 ficiaries, in the group health plan
16 sponsored by the group or association
17 in which the person is participating.

18 “(B) DETERMINATION.—The determina-
19 tion under subparagraph (A) shall be made
20 when the person first becomes eligible for cov-
21 erage under the group health plan.

22 “(C) REASONABLE MONITORING PROCE-
23 DURES.—A responsible fiduciary of the group
24 health plan shall, through reasonable moni-
25 toring procedures, periodically confirm the con-

1 tinued eligibility of a person to qualify as a
2 working owner under subparagraph (A) for pur-
3 poses of meeting the requirements under sub-
4 section (b) for the group health plan sponsored
5 under this section.

6 “(g) APPLICABILITY.—

7 “(1) FULLY INSURED.—This section shall apply
8 beginning on September 1, 2022, with respect to a
9 group or association of employers sponsoring a
10 group health plan that is fully insured.

11 “(2) PLANS EXPANDING TO INCLUDE BROADER
12 GROUP.—This section shall apply beginning on Jan-
13 uary 1, 2022, with respect to a group or association
14 of employers sponsoring a group health plan that—

15 “(A) is not fully insured;

16 “(B) was in existence on June 21, 2018;

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

19 and

20 “(D) chooses to be a plan sponsored under
21 this section (and subject to the requirements
22 under subsections (b) through (f)).

23 “(3) OTHER ASSOCIATION HEALTH PLANS.—

24 This section shall apply beginning on April 1, 2022,

1 with respect to any other group or association of em-
2 ployers sponsoring a group health plan.

3 “(4) OTHER CRITERIA IN ADVISORY OPIN-
4 IONS.—The criteria under this section shall not in-
5 validate any criteria provided in an advisory opinion,
6 in effect on or after the date of enactment of the
7 FLEX Act, that the Secretary may use to determine
8 if a group or association of employers is an employer
9 under section 3(5) for purposes of sponsoring a
10 group health plan.

11 “(h) DETERMINATION OF EMPLOYER OR JOINT EM-
12 PLOYER STATUS.—

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

19 “(2) APPLICATION OF PROVISION.—Paragraph
20 (1) shall apply to a group health plan sponsored or
21 facilitated by a franchisor and any franchisee, by
22 multiple franchisors for the benefit of the employees
23 of such franchisors and their franchisees, by mul-
24 tiple franchisees for the benefit of the employees of
25 such franchisees, by a franchisor whose franchisee or

1 franchisees participate or participates in the plan, or
2 by a person or entity that contracts with any indi-
3 vidual as an independent contractor for whom the
4 plan benefits.

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

10 (2) CLERICAL AMENDMENT.—The table of con-
11 tents in section 1 of the Employee Retirement In-
12 come Security Act of 1974 is amended by inserting
13 after the item relating to section 734 the following
14 new item:

“Sec. 735. Definition of ‘employer’ with respect to group health plans.”.