DC Health Benefit Exchange Authority

Public Hearing on

Bill 24-0305, the "Professional Employer Organization Registration Act of 2021"

Testimony
Mila Kofman, J.D.
Executive Director, Health Benefit Exchange Authority

Before the
Committee on Health
Council of the District of Columbia
The Honorable Vincent C. Gray, Chairperson

March 7, 2022
10AM
Virtual Meeting Platform
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004

Good morning, Chairman Gray and members of the Committee. My name is Mila Kofman. I am the Executive Director of the DC Health Benefit Exchange Authority (HBX).

I would like to thank Chairman Gray and Committee members for your commitment to health care reform and successful implementation of the Affordable Care Act (ACA), and all your efforts to help District residents and small businesses gain and maintain affordable quality health coverage.

When you were Mayor, Chairman Gray, you worked with the Council to establish HBX. We are an independent agency you created to implement the Affordable Care Act and to build and operate DC's state-based on-line health insurance marketplace called DC Health Link. And now, 100,000 people get their health insurance through DC Health Link. That includes nearly 5,300 District small businesses and nonprofits covering 83,000 people (including Congress) and 17,000 residents with individual marketplace health insurance. And with a 100,000 people covered on DC Health Link, small businesses and residents have the purchasing power of a large employer. In addition to serving District residents and small businesses, we are designated as a source of coverage for Congress. We cover approximately 10,000 Congressional designated staff on the Hill and in their district offices and Members of Congress. DC Health Link is nationally recognized as one of the premier marketplaces – receiving numerous IT and outreach awards and being chosen by the

Massachusetts exchange to replace and operate the IT system for the small business marketplace in Massachusetts.

Since we opened for business – and we were one of four state-based marketplaces to open on time on October 1, 2013 – we've helped cut the District's uninsured rate in half. Now DC is near universal coverage with more than 96% of our residents having health coverage. The District ranks second among states with the lowest uninsured rate in the nation.

Our success is a testament to the Executive and Council working together to protect consumers and to ensure stable and competitive private health insurance market for District small businesses and their workers.

- In 2014 you passed legislation creating one big marketplace to ensure transparency and price competition, and to ensure that all small businesses and residents with individual coverage had ACA protections through DC Health Link.
- In 2015, working with us and DISB, you passed legislation prohibiting stop-loss in the small group market. This legislation prevented stop-loss carriers from destabilizing our small group market through a practice of cherry-picking healthy employers.
- In 2019, you passed legislation to stop proliferation of bare-bones plans and protected the District's market from the Trump Administration's attempt to exempt association health plans from the ACA consumer protections in the District.

All of these polices have been critical to making DC's health insurance market for employers and residents strong, competitive, and affordable. No other state has enacted such strong market protections. These private market standards have led to broad choices of affordable quality health insurance from the largest insurers in the country. While in other states employers have few options due to the cherry-picking and carve-outs from the ACA allowed by those states, the District's small group marketplace is the gold standard for choice of insurers, competitive prices, and real competition for employers' business through DC Health Link.[1]

Thank you for the opportunity to testify today on Bill 24-0305, the Professional Employer Organization Registration Act of 2021." While Professional Employer Organizations (PEOs) currently successfully operate in the District, we appreciate your efforts to create more robust regulatory tools over PEOs. Currently, consistent with the District's small group market and ACA requirements, when a PEO has small businesses as client employers, the PEO offers health insurance coverage through DC Health Link. Several PEOs are even DC Health Link Certified Brokers. That being said, we are very concerned about the unintended consequences of the bill. Specifically, HBX opposes section 4(a) of the bill.

As introduced, section 4 of the Bill would exempt PEOs from the District's ACA consumer protections including the ACA standards that ensure that critical medical services are covered and standards that protect small businesses and their employees from abusive practices including redlining. We believe exempting PEOs from the District's ACA consumer protections in this bill

[1] And there has been legislation in Congress to make DC Health Link the exchange for other states reflecting how strong our market is due to DC's legislative actions. See e.g., Health Care Options for All Act, H.R 2770, 115th Cong, Sec 1314 (2017) – proposing to allow people in counties without insurers to enroll into coverage through the DC Health Link SHOP marketplace.

was unintentional and look forward to working with you on bill language to address this.

Section 4(a) of the bill says that a plan offered to covered employees of a PEO shall be considered a "single employer health benefit plan." **By treating coverage through PEOs as a "single employer health benefit plan," the bill exempts PEOs from the District's ACA requirements for small group coverage and from insurance protections that small businesses and their workers now have.**

This means that PEOs would no longer be required to cover maternity, mental and behavioral health, rehabilitation and habilitation, and other essential health benefits when their client is a small business. Key ACA non-discrimination protections would also no longer apply. These include prohibition on insurers from charging women higher premiums than men for the same coverage, charging smaller businesses higher premiums than larger businesses based on their size, charging employers higher premiums based on their industry, and charging older workers higher premiums without limit.

In other words, PEOs will be allowed to sell cheap coverage (i.e., they won't be paying for expensive benefits like maternity and mental health services). For example, one DC Health Link business learned too late about the junk plan they got through a PEO. An employer that dropped DC Health Link ACA coverage for PEO coverage came back and reenrolled on DC Health Link sharing with us that while the benefits and network appeared similar, in fact, the benefits were worse and that switching to worse benefits created workforce issues.

Even if PEOs offer comprehensive coverage, section 4(a) of the bill allows PEOs to engage in other activities that would hurt many employers. For example, PEOs would be allowed to target and insure only younger and healthier groups, leaving employers with older and sicker workers in the small group market.

We already are seeing some PEOs targeting employers with younger and healthier employees.[2] Based on information we collect from employers who dropped their DC Health Link coverage, last summer three employers told us that they left DC Health Link to get coverage through PEOs. Below is how demographically the three employers compare to the rest of our risk pool. The chart shows the age breakdown of the three employers that were pulled out of the District's ACA small group market by PEOs. It's an example of the cherry picking that we're concerned about. These three employers have a significantly higher percentage (74%) of enrollees under the age of 35 and no workers over the age of 55.

[2] In addition to age, zip code could be a proxy for health. Notably, the three employers are neither based nor have employees in Ward 7 or 8. In fact, while redlining practices are prohibited in the small group market, Section 4(a) of the bill would exempt PEOs from these protections.

AGE	PERCENT OF DC HEALTH LINK GROUP ENROLLMENT BY AGE	AGE OF EMPLOYERS WHO LEFT DC HEALTH LINK FOR PEOs	PERCENT
< 18	19%	< 18	15%
18-25	**10%**	**18-25**	**15%**
26 – 34	**23%**	**26 – 34**	**44%**
35 – 44	20%	35 – 44	15%
45 – 54	14%	45 – 54	11%
55 – 64	11%	55 – 64	0%
65+	3%	65+	0%
TOTAL	**100%**	**TOTAL**	**100%**

	DC HEALTH LINK GROUP ENROLLEES BY GENDER	DC HEALTH LINK EMPLOYERS WHO LEFT FOR PEOS- ENROLLEES BY GENDER
Female	55%	41%
Male	45%	59%

Note that having fewer women of child-bearing age means fewer claims.

While younger and healthier groups may have lower premiums through PEOs initially, leaving older and sicker groups in the small group market will increase premiums for employers who need coverage in the small group market. Young and healthy people have fewer claims. Premiums are based on claims so PEO premiums will be less expensive in the short run for those younger groups. However, the impact of pulling out younger and healthier groups will hurt many District employers left in the ACA small group market in the short and long term. Groups covered through PEOs will eventually need a healthy small group market to come back to as those groups get older and their claims experience gets worse. The healthy small group market DC has now will not be there in the long term if PEOs are exempted.

PEOs only insuring younger and healthier businesses, or "cherry picking", would increase premiums for employers left in the small group market. Section 4(a) of the Bill is like the carve-out the prior federal Administration tried through Association Health Plan (AHP) regulations. Then, our independent actuaries estimated that a carve-out for associations would cause ACA premiums for small businesses to increase by 12.7%, or $810 annually, per enrolled worker in the District.[3] Both the prior Administration's AHP regulations and section 4(a) of the bill would allow cherry-picking (by Associations in the case of the prior Administration and by PEOs under Bill 24-0305), and as a result of cherry-picking, premiums would increase for employers with ACA small group coverage in the District.

[3] Potential Impact of AHPs on ACA Premium Rates in the District of Columbia, Oliver Wyman, July 24, 2018. Available at https://hbx.dc.gov/sites/default/files/dc/sites/hbx/publication/attachments/Potential%20Impact%20of%20AHPs%20on%20Premium%20Rates%20in%20DC.pdf

In addition to increasing premiums for employers, section 4(a) could lead to our market collapsing. This happened in the 90's when Kentucky exempted associations from their reforms, leading to almost all insurers leaving Kentucky's market. Insurers are not in the business of insuring only sick people. In fact, they can't stay solvent insuring only businesses with sicker and older workers. An exemption from the ACA in the District for PEOs could result in insurers pulling out of the ACA market in DC. Also, as the small group market gets smaller, insurers will leave. We already saw in 2015 Aetna leaving the individual market because DC's individual market was too small.

Even if the bill was amended to apply rating, marketing, and all ACA small group protections, having two separate markets (i.e., risk pools)—one for PEO small groups and one for all other small groups—will have similar negative effect. That's precisely why the ACA requires a single risk pool for the small group market. A single risk pool ensures a risk mix of healthy and sick people in one large insurance pool and helps to keep premiums down for all employers.

Right now, we have one of the strongest, most robust, and competitive small group markets in the country. For 2022, three United Health Care companies, two Aetna companies, CareFirst Blue Cross Blue Shield, and KaiserPermanente offer 156 health plans and compete for small businesses based on price and benefits. Every year insurers lower rates for some of their products to compete for employers. Of the 156 plans, 36 have lower premiums than in 2021. At best, all of this will be put at risk by exempting PEOs. At worst, our market will collapse and there won't be insurers left in the District's small group market for employers and workers.

In addition to losing important consumer protections, ACA standards, and robust affordable comprehensive options, the standards adopted by the DC Health Benefit Exchange Executive Board that apply to DC Health Link health insurance would no longer apply under the introduced version of the bill, including standards to address systemic racism in health care.

At your request, the HBX Executive Board studied access issues in Wards 7 and 8 and then expanded the effort city wide. The Executive Board adopted extensive new standards to address health disparities and systemic racism in health care. These include coverage with no cost-sharing for conditions that disproportionately impact communities of color in the District. For example, in 2023 our group and individual standard plans will provide coverage for Type 2 diabetes with no cost-sharing, including services like lipid panel, basic metabolic panel, and hemoglobin A1C, foot exams, and retinal exams, supplies and medicine including insulin, without any deductibles, coinsurance or copayment. In addition to coverage standards aimed at removing cost barriers to care, DC Health Link insurers will prohibit certain clinical algorithms including race adjusted GFR by their network providers. GFR is a kidney function test that is artificially adjusted for race. The race adjusted GFR makes kidney functions appear healthier than they really are. The race adjustment results in African American patients getting delayed care and delays in getting placed on the kidney transplant list. See [link] for the full set of actions and interventions the HBX Board adopted and DC Health Link health plans agreed to implement to start addressing systemic racism in health care and health disparities. Section 4(a) of the Bill exempts PEOs from all of these standards designed to address racism in health care and health disparities.

In summary, DC Health Link's ability to provide 156 affordable comprehensive coverage options to District employers is jeopardized by section 4(a) of the bill, which will erode the affordable

comprehensive coverage options available to all District small businesses and non-profits. The result would be small businesses, non-profits, and their workers losing choice of insurers and coverage options; premiums would increase for employers with ACA coverage by an estimated $800 annually per employee; and the District's small group market could collapse.

My testimony today is informed by my prior professional expertise including as the former Superintendent of Insurance in Maine and as a federal regulator at the U.S. Department of Labor with oversight over PEOs. It is also informed by my experience as a Research Professor at Georgetown University where I focused my research on studying health insurance scams promoted through real and phony multiple employer arrangements including PEOs.[4] I was the first in the country to document a third wave of health insurance scams and that research informed a U.S. Senate hearing and a Government Accountability Office report on health insurance scams through associations and PEOs.[5]

We thank you for your strong advocacy for District employers and residents, strong consumer protections, and the Affordable Care Act. Your intent to strengthen oversight over PEOs is laudable, given that some PEOs have a history of fraud and abuse including collecting health insurance premiums and not paying claims,[6] collecting workers' compensation premiums and not buying coverage,[7] and collecting payroll taxes and not paying the IRS.[8] Your goal of additional

---

[4] See e.g., "Proliferation of Phony Health Insurance: States and the Federal Government Respond, M. Kofman, K., Lucia, and E. Bangit, The Bureau of National Affairs, Inc., Fall 2003.

[5] The GAO noted that the two most common vehicles promoters of phony health insurance used were associations and PEOs. "Private Health Insurance: Employers and Individuals are Vulnerable to Unauthorized or Bogus Entities Selling Coverage," General Accounting Office, GAO-04-312, February 2004, page 8.

[6] Employment Tax Scams: U.S. Department of Treasury Inspector General for Tax Administration report noting the risk of employment tax scams by PEOs that are not certified by the IRS. In one example, an individual controlling a PEO stole $53 million that was intended to pay for employment taxes. See "Further Actions are Needed to Reduce the Risk of Employment Tax Fraud to Businesses That Use the Services of Professional Employer Organization," Reference No. 2017-40-085, Treasury Inspector General for Tax Administration, September 13, 2017, available at https://www.treasury.gov/tigta/auditreports/2017reports/201740085fr.pdf. Health Insurance Scam: operators of a PEO used premiums to buy boats instead of paying claims. The PEO left workers and their families with over $3.6 million in unpaid medical claims. One of the PEO's operators had previously been sentenced to six years in federal prison for tax and health care fraud operating another PEO. "US Labor Department Sues Florida Outsourcing Company, Fiduciaries, Service Providers To Restore $1.5 Million to Health, Welfare Arrangement," U.S. Department of Labor Aug. 11, 2016, available at https://www.dol.gov/newsroom/releases/ebsa/ebsa20160825-0; and "Federal Agents Seize HB Resident's Boat, Car," The Islander, available at https://www.islander.org/2012/12/federal-agents-seize-hb-residents-boat-cars/.

[7] Worker's Compensation Scam: operators of a nationwide PEO scam collected $5.8 million in premiums but did not pay for the promised worker's compensation insurance for 33,000 people. "Fla. Workers' Comp Fraud Results in 14 Year Prison Sentence," Insurance Journal, May 21, 2007, available at https://www.insurancejournal.com/news/southeast/2007/05/21/79853.htm. "Twenty-Seven Victims of Fraud Scheme to Receive Restitution Totaling $2.9 Million," U.S. Atty Office Middle District of Florida, June 02, 2009, available at https://archives.fbi.gov/archives/jacksonville/press-releases/2009/ja060209.htm.

[8] Payroll Scam: the CEO of a PEO was sentenced to 70 months in prison and three years of supervised release and ordered to pay more than 29 million dollars in restitution to the IRS. In this case the PEO used the payroll funds collected from its customers to pay company and personal expenses of its operators instead of paying the IRS. The U.S. Congress had to pass legislation to address tax fraud in the PEO industry. The law required the Internal Revenue Service (IRS) to create a voluntary certification process for PEOs. According to the US Treasury Office of Inspector General for Tax Administration, tax fraud continues to be an issue in the PEO industry. "Further Actions Are Needed to Reduce the Risk of Employment Tax Fraud to Businesses That Use the Services of Professional

oversight tools can be accomplished without exempting PEOs from the District's ACA and other consumer protections. To that end, we are attaching amendments for your consideration that remove the proposed exemption for PEOs and clarify that PEOs serving small employer groups have to meet all the requirements applicable to the small group market.

We look forward to working with you to ensure that the ACA and other consumer protections remain strong in the District by not allowing exemptions for PEOs. This concludes my testimony and I am happy to answer any questions you may have.

Employer Organizations", Treasury Inspector General for Tax Administration, September 13, 2017, available at https://www.treasury.gov/tigta/auditreports/2017reports/201740085fr.pdf.

DC Health Benefit Exchange Authority Amendments to B24-0305:

Sec. 2. Definitions

. . . .

Delete: (3) "Covered Employees"

. . . .

Add: (6) "Health insurer" means any person that provides one or more health benefit plans or insurance in the District of Columbia, including an insurer, a hospital and medical services corporation, a fraternal benefit society, a health maintenance organization, a multiple employer welfare arrangement, or any other person providing a plan of health insurance subject to the authority of the Commissioner.

Sec (4)

Delete and Replace Sec 4.

NEW Sec. 4. PEOs offering health insurance coverage.

(a) A PEO providing health insurance coverage in the District shall only offer health benefit plans issued by insurers, hospital, and medical services corporations, health maintenance organizations entities licensed in the District, and that use forms and rates approved by the Commissioner.

(b) Notwithstanding any provision of this act or any co-employment relationship, a client of a PEO shall be deemed the employer for purposes of a PEO providing health insurance coverage through a health benefit plan.

(c) Notwithstanding any provision of this act or any co-employment relationship, all of the statutory and regulatory requirements of the District applicable to the business of insurance related to the small group market, including sections 10 and 10a of the Health Benefit Exchange Authority Establishment Act of 2011, effective Mar. 2, 2012 (as amended) (D.C. Law 19-94; D.C. Official Code §§ 31-3171.09, 31-3171.09a); sections 102, 103, 104a, 104b, 111, and 302 of the Reasonable Health Insurance Ratemaking and Health Care Reform Act of 2010, effective April 8, 2011 (as amended) (D.C. Law 18-360; D.C. Official Code § 31-3311.01 et seq.); Title III of the Health Insurance Portability and Accountability Federal Law Conformity and No–Fault Motor Vehicle Insurance Act of 1998, effective April 13, 1999 (as amended) (D.C. Law 12–209; D.C. Official Code § 31-3303.01 et seq.); Subtitle III of the Health Insurance Portability and Accountability Federal Law Conformity and No–Fault Motor Vehicle Insurance Act of 1998, effective April 13, 1999 (as amended) (D.C. Law 12–209; D.C. Official Code § 31-3303.01 et seq.); and sections 101, 201, and 202 of the Federal Health Reform Implementation and Omnibus Amendment Act of 2014, effective May 2, 2015 (as amended) (D.C. Law 20-265; D.C. Official Code §§ 31-3461, 31-3182, 31-3183), shall apply to a health benefit plan offered by a PEO if the PEO's client is a small employer, as that term is defined in section 101(42) of the Health Insurance Portability and Accountability Federal Law Conformity and No–Fault Motor Vehicle Insurance Act of 1998, effective April 13, 1999 (D.C. Law 12–209; D.C. Official Code § 31-3301.01(42)).