



**Maryland**

DEPARTMENT OF BUDGET  
AND MANAGEMENT

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## **SENATE BILL 611 – Access to Health Insurance for Child Care Professionals – Outreach and Qualifying Nonprofit Satellite Organizations**

**DATE: March 5th, 2024**

**COMMITTEE: Budget and Taxation**

### **SUMMARY OF BILL:**

SB 611 seeks to promote access to health insurance for childcare professionals and providers that receive funds from a unit of state, local, or federal government that covers more than two-thirds of an organization's operating expenses. It proposes allowing such entities to participate in the State Employee and Retiree Health and Welfare Benefits Program (Program) as satellite organizations. Allowing these providers to join the State's Program puts the Program's governmental plan status at risk; the loss of governmental plan status under federal law would, in turn, make the Program subject to numerous federal requirements and likely increase costs to members significantly.

Under federal law, only the employees of a governmental employer are eligible to participate in a governmental plan, such as the Program. Allowing non-governmental employees to participate places the Program at risk of losing its governmental plan status under the Code and its exemption from significant requirements of ERISA.

### **EXPLANATION:**

Under Internal Revenue Code ("Code") Section 414(d), the term governmental plan means "a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing." Currently, there are no regulations which interpret Code Section 414(d). However, on November 7, 2011, the Department of Treasury issued an Advance Notice of Proposed Rulemaking ("ANPRM") on the Code definition of governmental plan. Subsequently, the IRS released Notice 2015-07 which provided an update as to the guidance under consideration, specifically in the context of public charter schools.

45 Calvert Street • Annapolis, MD 21401-1907

Tel: 410-260-7041 • Fax: 410-974-2585 • Toll Free: 1-800-705-3493 • TTY Users: Call via Maryland Relay

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Section 414(d) contemplates five separate definitions for a governmental employer: (i) the United States, (ii) an agency or instrumentality of the United States, (iii) a State, (iv) a State political subdivision, and (v) an agency or instrumentality of the State or a State political subdivision. For purposes of this analysis, we address the fifth definition – whether childcare facilities receiving two thirds of their fund from state or federal sources meet the definition of an agency or instrumentality of the State.

This is determined by analyzing the following five main factors:

1. Control of Governing Body
2. Public Election of Governing Body
3. Fiscal Responsibility
4. Treatment of Employees as Public Employees
5. Delegated Sovereign Powers

There are eight additional factors which may also be considered:

1. Operational Control
2. Direct Funding
3. Specific Enabling Law
4. Treatment as Governmental Entity for Federal Tax Purposes
5. Treatment under State Law
6. Court Decisions
7. No Private Interest
8. Governmental Purpose

While there is no "bright-line" test in this regard, our initial reading of SB 611 leads us to believe that the addition of childcare providers that receive funds from a unit of state, local or federal government that cover more than two-thirds of the organization's operating expenses does not meet the requirements in this area. In fact, it appears that only one of the additional factors (direct funding) could even conceivably be applicable in the context of SB 611.

## **Other Considerations**

- States value the benefits and flexibility afforded by governmental plan status and consistently and deliberately choose to protect that status.
- Significant potential negative consequences and uncertainties associated with losing government plan status including:
  - Onerous and costly reporting, disclosure and administrative requirements
    - Annual filing of Form 5500
    - Summary of Material Modifications
    - Summary Plan Description
    - Satisfy ERISA fiduciary rules - A Fiduciary breach may result in monetary penalties and criminal prosecution for willful violations or extensive retroactive claims adjudication
  - Follow ERISA's rules relating to plan communications restricting electronic communications
  - Certain State plan employers could be subject to small group market rules
  - The Program could be subject to State MEWA licensure requirements including capital and surplus requirements
- Exemption from Title I of the Employee Retirement Income Security Act (ERISA) which requires additional coordination to ensure compliance with Title I, the Code and any applicable

State law. Governmental plans are exempt from certain excise taxes that are applicable to private sector plans. Some excise taxes include the Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act (HIPAA) and the requirement of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).

A childcare provider whose only connection with a government is its funding status would not constitute a governmental entity that could participate in the Program without compromising the Program's governmental plan status. As such, we deem that SB 611 threatens the Program's status as a governmental plan. It is imperative that the Program maintain its governmental status due to the considerable benefits that are entailed in such status.

**For additional information, contact Dana Phillips at  
(410) 260-6068 or [dana.phillips@maryland.gov](mailto:dana.phillips@maryland.gov)**