

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

STATE OF NEW YORK, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF LABOR, et  
al.,

Defendants.

Civ. Action No. 18-1747-JDB

**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION FOR A STAY**

Plaintiffs oppose Defendants’ motion to stay the requirement to prepare the Joint Appendix in this action – currently due January 2, 2019 – and to extend all other deadlines “commensurate with the duration of the lapse in appropriations.” Docket No. 68, ¶¶ 3-4. In light of the harms that the Association Health Plan Final Rule will cause to the Plaintiff States – harms that will be amplified following the Final Rule’s January 1, 2019 effective date – the continuation of this litigation on its current schedule falls well within the definition of allowable activities under both the Antideficiency Act and the Justice Department’s own contingency plan for its operations following a lapse in appropriations. 31 U.S.C. §§ 1341, 1342.

This lawsuit is a challenge brought by twelve states to the Department of Labor’s final rule permitting a broad range of associations to offer health plans that do not have to comply with various Affordable Care Act protections. Docket No. 1; *see* 83 Fed. Reg. 28,912 (June 21, 2018). The Final Rule includes a series of effective dates, including a January 1, 2019, effective date allowing existing self-insured Association Health Plans to expand their availability to additional industries and to so-called “working owners” who do not have any employees. 83

Fed. Reg. at 28,953. The effect of this expansion, as alleged in Plaintiffs' complaint and documented in the declarations supporting Plaintiffs' motion for summary judgment, will be to cause significant harm to Plaintiffs by dramatically disrupting Plaintiffs' insurance markets, destabilizing those markets and subjecting Plaintiffs to increased enforcement costs, increased harm from uncompensated care, and decreased tax revenue. *See* Docket No. 1 (Complaint), at ¶¶ 15, 100-106; Docket No. 31-1 (Brown Declaration); Docket No. 31-2 (Caride Declaration); Docket No. 31-3 (Dutt Declaration); Docket No. 31-4 (Gasteier Declaration); Docket No. 31-5 (Kreidler Declaration); Docket No. 31-6 (Kofman Declaration); Docket No. 31-7 (MacEwan Declaration); Docket No. 31-8 (Monahan Declaration); Docket No. 31-9 (Navarro Declaration); Docket No. 31-10 (O'Connor Declaration); Docket No. 31-11 (Stolfi Declaration); Docket No. 31-12 (Taylor Declaration); Docket No. 31-13 (Vullo Declaration); Docket No. 31-14 (Whorley Declaration); Docket No. 31-15 (Lucia Declaration). Many States relied on the ACA's individual and small market protections as intended by Congress, and have not enacted similar protections in their own statutes. *See* Plaintiffs' Mem. Supp. Summ. J. 12-13 (Docket No. 31-17). That means that when these applicability dates occur, Plaintiffs' insurance markets become immediately and increasingly vulnerable to disruption.

The Justice Department's contingency plan for operations in the event of a lapse in appropriations acknowledges that the Antideficiency Act permits continued agency operations where there is "some reasonable likelihood" that the "protection of property would be compromised, in some significant degree, by delay in the performance of the function in question."<sup>1</sup> U.S. Dep't of Justice, FY 2019 Contingency Plan, at

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<sup>1</sup> The Justice Department has also designated fully 49% of all Civil Division staff as "excepted employees" – that is, employees whose availability to continue litigating civil matters involving federal defendants is projected to fall within an exception to the Antideficiency Act. U.S. Dep't of Justice, FY 2019 Contingency Plan 12 tbl. 2, at <https://www.justice.gov/jmd/page/file/1015676/download>.

<https://www.justice.gov/jmd/page/file/1015676/download>; *see also* White House Office of Mgmt. & Budget, *Frequently Asked Questions During a Lapse in Appropriations*, at <https://www.whitehouse.gov/wp-content/uploads/2018/12/Frequently-Asked-Questions-During-a-Lapse-in-Appropriations.pdf>. The financial harms that Plaintiffs will incur, as a result of the imminent and dramatic disruption of their group and individual health insurance markets, surely amount to a “reasonable likelihood” that “protection of property would be compromised” – indeed, that disruption was both the anticipated and the *intended* purpose of Defendants’ rulemaking. Docket No. 1, ¶¶ 5-6, 90-99.

Because the Final Rule will continue to take effect with all its attendant harms,<sup>2</sup> Plaintiffs should not be delayed in moving forward with their litigation of this critical case. Plaintiffs respectfully request that the Court deny Defendants’ pending motion and maintain all current deadlines in this action. *See, e.g.*, Order Denying Stay Due To Lapse of Appropriations, *California v. Ross*, No. 18-cv-1865, Docket No. 122 (N.D. Cal. Dec. 26, 2018).

Dated: December 27, 2018

Respectfully Submitted,

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<sup>2</sup> The United States Department of Labor has not incurred a lapse in appropriations; the Department of Labor is funded in full for Fiscal Year 2019 (that is, the fiscal year ending September 30, 2019), and is not affected by the current government shutdown. Pub. L. No. 115-245. That agency will therefore be able to oversee implementation of the Final Rule notwithstanding the lapse in appropriations to the Department of Justice.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 27, 2018, I electronically filed the foregoing Opposition to Defendants' Motion for a Stay using the Court's CM / ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: December 27, 2018

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