IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORTH WORTH DIVISION

DATA MARKETING PARTNERSHIP, LP, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, et al., Defendants.	)	Civil Action No. 4:19-cv-00800-O

JOINT STATEMENT REGARDING PROPOSED SCHEDULE

Pursuant to the Court's February 6, 2020 Order, ECF No. 15, the parties submit this joint statement regarding briefing Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("Plaintiffs' Motion").

Undersigned counsel have conferred, and Plaintiffs and Defendants have reached agreement on three key points regarding how this case should proceed:

1. The case rests on issues of law, with no need for discovery to be conducted by either party.
2. The case can and should move as quickly as possible toward consideration of the merits on cross-motions for summary judgment.
3. In the interest of expeditious merits briefing, Defendants may be relieved of their obligation to answer the First Amended Complaint (which would otherwise be due March 20, 2020, *see* ECF No. 8).

However, the parties have been unable to reach agreement regarding whether a hearing and/or

further Order without a hearing upon completion of briefing on Plaintiffs' Motion should occur before summary judgment briefing is complete and therefore submit alternative briefing proposals.

Plaintiffs' Proposal

Regardless of whether a Preliminary Injunction is granted by the Court, Plaintiffs are amenable to a schedule very similar to Defendants' proposed schedule, which would have the entire case resolved in less than three months. Plaintiffs propose the following schedule:

- Plaintiffs' motion for summary judgment due February 19, 2020;
- Defendants' opposition to Plaintiffs' Motion due February 24, 2020;
- Hearing on Plaintiffs' Motion at the Court's convenience on or after February 26, 2020 unless Court determines a hearing is not necessary to issue a ruling;
- Defendants' opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment and brief in support, due Monday, March 9, 2020;
- Plaintiffs' reply in support of their motion for summary judgment; and opposition to Defendants' cross-motion for summary judgment due Monday, April 6, 2020;
- Defendants' reply in support of their cross-motion to summary judgment due Monday, April 27, 2020;
- Oral argument scheduled at the Court's convenience on or after Monday, May 4, 2020.

The sole issue upon which the parties were unable to come to agreement is whether a Preliminary Injunction in favor of Plaintiffs is necessary and appropriate during this very brief period. Plaintiffs strongly contend that a Preliminary Injunction is both necessary and appropriate; especially absent any binding stipulation by Defendants that no investigatory or enforcement actions based upon the AO will be pursued until the Court rules on the anticipated cross-motions for summary judgment. Entirely absent from Defendants' arguments against such injunctive relief is any consideration of the effects of DOL's Advisory Opinion ("AO") issued January 24, 2020 and publicly posted January 31, 2020. Based upon DOL's own rules, the AO is binding upon

LPMS and DOL. As a direct result of this act, DOL has officially declared that 50,000 Americans and their dependents who currently receive health care through Plaintiff-sponsored, single-employer, group health plans are no longer eligible for those Plans. While Defendants have made oral representations that the AO has no immediate practical effect and that Plaintiffs and Plan participants have nothing to fear in the short-term, the Plan fiduciary cannot rely on these informal and legally unfounded claims.

Moreover, both the AO and Defendants' arguments here belie such representations. In Footnote 6 of the AO, DOL states in pertinent part "***In light of our conclusion*** that the programs are not ERISA-covered plans, ***the programs would be subject to broad state insurance regulation***..." (Emphasis added.). Here Defendants turn around and conveniently discount the likelihood of any such State enforcement actions and then squarely puts the burden on Plaintiffs to prove any such actions are imminent in order to obtain injunctive relief. It is patently obvious Plaintiffs cannot know what is in the offing by a State nor prove it before it happens. What Plaintiffs do know is Defendants appear to have called to arms all States through Footnote 6 and Plaintiffs should be afforded relief from any such actions based on the AO until there is a resolution on the merits.

Defendants dispute that there is any compelling reason for a Preliminary Injunction. DOL issued the AO to LPMS eleven (11) days before, and publicly posted it four (4) days before, its answer was due to the original Complaint. Plaintiffs then moved expeditiously to amend the Complaint and seek the TRO and Preliminary Injunction which was triggered by the issuance and public posting of the AO. Plaintiffs, one of whom is a Plan Sponsor and Named Fiduciary of a group health plan, did not create the extant crisis – DOL did so by issuing the AO rather than responding to the Complaint by answer or motion.

This crisis is wholly due to several unnecessary actions by Defendants – first the issuance, and then the publication of the AO, both on the eve of consideration of the relevant points of law by the Court. Defendants could have done many things differently to avoid disruption of the status quo pending the Court's findings, but at every turn chose the most needlessly harmful course of action. A partial list of alternatives that would have prevented the current crisis includes:

- Defendants could have chosen to engage constructively with Plaintiffs, following submission of AO request in November 2018. Such engagement is specifically called for in DOL's own published guidelines for AO requests, yet Defendants never made a single written inquiry nor other communication soliciting clarification or information in the 442 days that passed between submission of the request and issuance of the AO.
- When Plaintiffs filed suit in October 2018, Defendants still could have sought constructive engagement. Instead, Defendants refused to meet or otherwise communicate, eventually forcing Plaintiffs to serve their Complaint in December.
- Once Defendants were served with Plaintiffs' lawsuit, Defendants could have simply declined to issue an AO, and instead asserted its position before the Court. Such a course of action would have preserved the status quo pending final resolution.
- Defendants could have chosen – per their own rules – to issue a non-binding "information letter" rather than an AO under ERISA Proc. 76-1, § 5.02 ("The department may, when it is deemed appropriate and in the best interest of sound administration of the Act, issue information letters calling attention to established principles under the Act, even though the request that was submitted was for an advisory opinion."). Such an "information letter" could have articulated DOL's position regarding the AO request, without imposing the immediate, pre-judicial determination threat caused by the AO.

- Given that Defendants were well aware that Plaintiffs' Plans have many thousands of participants, Defendants could have, at a minimum, inquired of Plaintiffs as to possible impacts of AO publication, and taken consideration of same.

Defendants failed to raise a single issue indicating that issuance of injunctive relief would harm them in any way. On the other hand, Plaintiffs have shown substantial harm to them. One consequence of allowing the AO to stand pending expedited resolution of the merits is that 50,000 Americans would be removed from the LPMS-managed partnership group health plans since the AO deems them ineligible to participate. That harm would be catastrophic to those limited partners. Those partners and their dependents could well be without a health plan or health insurance until January 1, 2021 because the LPMS-managed group health plans would remain in place to service the common law employees of the partnerships. As such, the removal of the partners from the group health plan may not constitute grounds for a Special Enrollment Period since the Plan would remain in effect for the common law employees. Also, it appears the partners would not have access to health insurance coverage through COBRA given the retroactive re-characterization of the partners' coverage by DOL to individual policies. Consequently, those partner plan participants would not be able to obtain other coverage until the open enrollment period late in 2020 effective January 1, 2021 or even continuation coverage through COBRA to bridge the gap.

In making its determination in the AO and opposing Plaintiff's Motion for Preliminary Injunction, Defendants also rely upon numerous misstated facts and erroneous assumptions in the AO, as well as cherry-picked and mischaracterized quotes from Declarations submitted with the Brief in Support of Plaintiffs' Motion, all in an effort to assert that Plaintiffs' claims of economic harms are speculative, and that Defendants are likely to prevail on the merits. Defendants had no

factual basis for the misstatements made in the AO, and simply repeating them in this Statement, again without foundation, does not lend them credence. Further, Defendants misconstrue Paragraph 6 of the Johnson Declaration statement concerning income. While Johnson clearly declares that DMP is a "startup" which has not "generated profits or ***substantial*** revenue yet" (emphasis added) that is ***NOT*** the same as declaring that DMP or the other LPMS-managed partnerships have not received any revenue. Profit is the income remaining after total costs are deducted from total revenue. Therefore, it is entirely feasible for a business, startup or otherwise, to receive revenue while not making a profit. *See, e.g.* Uber, Snapchat and Spotify. Plaintiffs' economic harms are neither speculative nor trivial, and the applicable law dictates that Plaintiffs will prevail on the merits.

Plaintiffs believe all of these issues militate in favor of issuing a Preliminary Injunction either immediately based on briefing once completed or after hearing as proposed above. The injunction would simply (i) enjoin the Defendants from engaging in any investigation activities or enforcement actions relating to the AO until there is a final resolution on the merits, and (ii) require Defendants to remove from the DOL's website the posted AO until further order of the Court. Based on Defendants silence on the issue of harm to them combined with the clearly articulated harm to Plaintiffs and their 50,000 Participants, such injunctive relief represents a reasonable approach to preserving the status quo until the Court rules on the merits in a few short months.

For all of these reasons, as well as those articulated in the Brief in Support of Plaintiffs' Motion, the Court should enter a scheduling order for briefing dispositive motions on an expedited basis and either grant Plaintiffs' request for Preliminary Injunction hearing or grant the injunctive relief requested based upon the briefing and declarations submitted, once completed.

Defendants' Proposal

In Defendants' view, judicial economy and the interests of the parties would be best served if briefing was completed both on Plaintiffs' Motion and on cross-motions for summary judgment before the Court schedules its hearing. That would provide the most efficient way to resolve the uncertainty hanging over Plaintiffs' businesses. Indeed, the parties have agreed that there is no impediment to immediate summary judgment briefing. Accordingly, Defendants propose the following schedule:

- Plaintiffs' motion for summary judgment due February 19, 2020;
- Defendants' combined opposition to Plaintiffs' motion for temporary restraining order and preliminary injunction and motion for summary judgment, and cross-motion for summary judgment and brief in support, due March 9, 2020 (not to exceed 50 pages);
- Plaintiffs' combined reply on their motion for temporary restraining order and preliminary injunction; reply in support of their motion for summary judgment; and opposition to Defendants' cross-motion for summary judgment due April 6, 2020 (not to exceed 50 pages);
- Defendants' reply in support of their cross-motion to summary judgment due April 24, 2020;
- Oral argument scheduled at the Court's convenience on or after April 29, 2020.

This schedule would expeditiously set the case for final disposition within three months, and would ensure that the Court has sufficient time to consider the complexities of the statutory framework and the relevant legal authority.

If the Court decides, however, to hold a preliminary injunction hearing separate from dispositive motion briefing, Defendants request one modification to Plaintiffs' proposed schedule. Defendants request that their opposition to Plaintiffs' Motion for Summary Judgment and cross-motion for summary judgment not be due until 21 days after the Court's ruling on Plaintiffs' Motion for Preliminary Injunction. Under Plaintiffs' proposal, Defendants' filing would be due

shortly before or shortly after the preliminary hearing, and it would be inefficient for the parties' dispositive briefs not to address the Court's reasoning. Moreover, there would be less need for an accelerated schedule if the Court had already decided to grant or deny interim injunctive relief.

Defendants recommend their schedule to the Court because Plaintiffs have not demonstrated any need to burden the Court with two overlapping hearings and the drafting of two opinions within three months. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Thus, "[t]here should not be a preliminary injunction to protect [the status quo] . . . unless the court's ability to render a meaningful decision on the merits would otherwise be in jeopardy." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). Here, Defendants' proposed summary judgment hearing date (April 29) is a mere 63 days after Plaintiffs' proposed preliminary injunction hearing date (February 26). For several reasons, Plaintiffs have failed to show that interim injunctive relief is needed within this limited period.

First, Plaintiffs have not shown that the mere publication of this advisory opinion *actually disrupted the status quo*. The advisory opinion states the Department's interpretation of the law but does not bind Plaintiffs or direct them to take any immediate action. Plaintiffs principally complain about uncertainty regarding the legal status of the health insurance plans they have created. *See* Pls.' Mem. at 21, ECF No. 11 (alleging that they are harmed "[e]very day" by the "uncertainty surrounding their novel partnership and health plan structure"). But that uncertainty preceded this lawsuit, and is the reason Plaintiffs sought the advisory opinion and filed this lawsuit in the first place. *See* Renfro Declaration ¶ 17, ECF No. 11-1 (explaining that Plaintiffs sought the advisory opinion because "the fifty-six separate state and territorial insurance commissioners could pose significant and indefinite regulatory burdens on LPMS-managed partnership plans through

investigations and rulings of their own"); Compl. ¶ 11, ECF No. 1 (Oct. 4, 2019) (asserting that "the lack of clarity . . . will continue to result in many potential limited partners declining to join DMP for fear that their health coverage will be cancelled"). Nor can a temporary ruling from this Court alleviate that uncertainty, because it is likely that "potential partners [will] sit on the sidelines," Pls.' Mem. at 21, until an actual ruling on the merits.

Second, Plaintiffs' alleged economic harms are speculative. *Cf. Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016) ("An injunction is appropriate only if the anticipated injury is imminent and not speculative"). They acknowledge that they are startups that have not "generated profits or substantial revenue yet," Johnson Decl. ¶ 6, and lack "sufficient numbers of partners to reach the quantity of electronic data necessary to generate profitable offers to purchase the data," *id.* ¶ 24. Thus, it appears that they are currently making no money. Indeed, they do not allege that any of the existing partnerships under LPMS's umbrella are already generating electronic data for sale, or that they have any buyers for that data. Yet, in light of their decision to suspend signing up new limited partners, *see* Johnson Decl. ¶ 25, ECF No. 11-2, they ask the Court to conclude that a delay of a few weeks or months would somehow irreparably harm them from reaching those goals. Nor do they provide any basis for the assertion that the limited partners' "coverage would terminate immediately absent [an] injunction." Pls.' Mem. at 2. Neither of their declarants make such an assertion, nor do Plaintiffs explain why they would choose to remove the limited partners or terminate these plans before judicial resolution of the case.

Third, Plaintiffs improperly disclaim their "burden . . . to prove any [state] actions are imminent in order to obtain injunctive relief," *supra* at 3. The Fifth Circuit recently reiterated that even where constitutional rights are at stake—unlike here—the plaintiff must still show "an imminent, non-speculative irreparable injury." *Google, Inc. v. Hood*, 822 F.3d 212, 228 (5th Cir.

2016). In that case, the Fifth Circuit concluded that a 79-page administrative subpoena served on the plaintiff by a state attorney general did not make an enforcement action "sufficiently imminent . . . to justify an injunction." *See id.* at 219, 227-28. Here, the Department's advisory opinion did not initiate a federal investigation or enforcement action. And any state that reviews the opinion—which expressly acknowledges this lawsuit, *see* Advisory Opinion at 1, ECF No. 9-2—likely will await the conclusion of this litigation before taking regulatory action. But even if a state opened an investigation and subpoenaed Plaintiffs, that would merely make the case analogous to *Google*. Plaintiffs have failed to show that any sort of enforcement action is sufficiently imminent to require an injunction before summary judgment briefing can be completed.

Fourth, the interim relief they seek is mismatched to their alleged harms. For example, they provide no explanation for why "enjoin[ing] the Defendants from engaging in any investigation activities," *supra* at 6, is necessary or what irreparable harm would flow from the mere initiation of an investigation by the Department or state or territorial authorities. *Cf. Google*, 822 F.3d at 224-25 (discussing cases concluding that "pre-enforcement relief" would be "inappropriate" for many administrative subpoenas). More fundamentally, where they primarily fear state enforcement actions, their proposed injunctions against the Department would not prevent any of the harms they allege. Enjoining the Department would not prevent states from initiating their own enforcement or remove the uncertainty that is limiting the growth of their business. And forcing the Department to remove its advisory opinion from its website, *see* Pls.' Mot. at 2, ECF No. 10—an action for which Plaintiffs cite no precedent and which would be fundamentally inappropriate interim relief—would not alter the Department's view of the law or the public's awareness of that view.

Finally, the Department is likely to prevail on the merits. The Department acted well within

its authority in publishing this advisory opinion. This case boils down to whether the limited partners under Plaintiffs' scheme are in fact "working owners" who can be characterized as employees for purposes of the *Employee* Retirement Income Security Act of 1974 ("ERISA"). That is determined based on the totality of the circumstances under the relevant ERISA regulations. *See* Jan. 24, 2020 Advisory Opinion at 3-5, ECF No. 9-2. The Department reasonably concluded, after consulting with the Department of Health and Human Services and the Department of the Treasury, that Plaintiffs' limited partners do not satisfy those standards. *Id.* at 6. Given the long recognition that ERISA involves "a complex and highly technical regulatory program," *Meredith v. Time Ins. Co.*, 980 F.2d 352, 357 (5th Cir. 1993), it is appropriate to give the parties adequate time to fully brief the relevant legal standards and their application to Plaintiffs' circumstances.

For these reasons, the Court should enter a scheduling order for briefing dispositive motions and combine the preliminary injunction hearing with the summary judgment hearing.

Conclusion

For the foregoing reasons, the parties respectfully submit their alternative proposals for the Court's consideration. Proposed orders in Word format are being submitted by email to the Court's "orders" email address.

Dated: February 13, 2020

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CERTIFICATE OF SERVICE

On February 13, 2020, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties to the three actions electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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