

117TH CONGRESS  
1ST SESSION

# H. R. 742

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.

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## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 3, 2021

Mr. BUDD (for himself and Mr. HARRIS) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on Education and Labor, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## 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.”.

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