

March 6, 2018

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Attention: Definition of Employer—Small Business Health Plans RIN 1210-AB85

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed regulation, “Definition of ‘Employer’ Under Section 3(5) of ERISA—Association Health Plans” (83 Fed. Reg. 614 (Jan. 5, 2018)) (AHP Proposed Rule), which expands the criteria under ERISA for determining when employers may join together in an association that is treated as the ERISA “employer” of a single, multiple employer group health plan. We write as the chief insurance regulators of our respective states and members of the National Association of Insurance Commissioners.

Before turning to our specific comments on the proposed regulation, we think it is helpful to provide some experiential context as insurance regulators. As you know, states have a long history of regulating insurance in general and Multiple Employer Welfare Arrangements (MEWAs) in particular. MEWAs have had a colorful and troubling history since the enactment of ERISA in 1974. While the promise of MEWAs has always been to give small employers access to low cost health coverage on terms similar to those available to large employers, that promise has never been the reality for a number of reasons.

Pre-1983, MEWAs were plagued by insolvencies. Opportunistic third party promoters saw MEWAs as profit-making opportunities. They claimed ERISA preemption of state laws, whether or not the MEWA was a legitimate ERISA plan. MEWA promoters took advantage of the regulatory void and made money at the expense of their participants. These insolvencies, whether through malice or incompetence, resulted in significant sums of unpaid claims and the loss of health insurance for participants. In 1983, in response to these troubling market conditions, Congress enacted the Erlenborn-Burton Amendment to save state regulation from ERISA’s preemption and deemer provisions. Congress recognized that it was both necessary and appropriate for the states to be able to establish, apply and enforce state insurance laws with respect to MEWAs.

Nevertheless, even after the 1983 ERISA Amendments expressly established that state regulation of MEWAs was not preempted, MEWA promoters and others continued to create confusion and uncertainty by falsely claiming ERISA coverage and protection from state regulation under ERISA’s preemption provisions. The U.S. Department of Labor (DOL) recognized that this confusion did not serve consumers, as outlined in the current AHP Proposed Rule preamble.

Notably, fraud and abuse have not been the only issues with MEWAs. Even well-intentioned non-fully-insured MEWAs have been notoriously prone to insolvencies. Keeping the cost of coverage low tends to be the primary focus of MEWAs. In the past, some MEWAs became insolvent simply because the MEWA did not want to raise rates for its member employers and their employees. Solvency is also a challenge for MEWAs under the best of circumstances because they are, by their very nature, an unstable risk pool. They do not have the consistency of membership like a true large employer.

With this historical context, we turn to the proposed regulation. The DOL and the NAIC share the same goals – providing affordable options for consumers, while ensuring markets remain stable and consumers are protected. It is particularly important that the federal rule, as it is implemented, not threaten the states’ ability to enforce existing laws or enact laws in the future that regulate insurance. States remain in the best position to monitor closely what is happening in their insurance markets and have the tools in place to respond quickly to any issues.

The AHP Proposed Rule clearly and rightly confirms that Association Plans created under the new rules are still MEWAs and are fully regulated by the states (largely indirectly in the case of fully-insured MEWAs; directly in the case of non-fully-insured MEWAs). The provisions in ERISA that preserve state regulatory authority over the MEWA and the plans it may purchase are not modified in this proposed rule and, therefore, existing state authority is not changed.

However, some entities have commented that the revisions proposed by DOL to the definition of employer could create ambiguity regarding the ability of states to regulate MEWAs: both MEWAs that are not fully insured, and the insurance products offered to MEWAs that are fully insured. To avoid potential confusion, and lawsuits, we recommend that DOL affirm in the final AHP Rule that these changes in no way limit the ability of states to regulate MEWAs, insurers offering coverage through MEWAs, and insurance producers marketing that coverage to employers.

Therefore, we encourage you to confirm that states retain full authority, as recognized by the Erlenborn-Burton amendment to ERISA, to set and enforce solvency standards for all MEWAs, and comprehensive licensure requirements and oversight for non-fully-insured MEWAs. The states’ authority over non-fully-insured MEWAs includes benefit, rating and consumer protection standards, and laws specifying who is eligible to apply for licensure. We also encourage you to affirm that states retain full authority under ERISA’s saving clause to regulate the terms of the insurance coverage that may be offered to fully insured MEWAs.

Given that bad actors have historically used any ambiguity regarding ERISA preemption as a shield to challenge state oversight and defraud consumers, it is critical that the final rule dispel any questions.

In addition to our overarching concerns, we provide the following comments:

- **Coordination between DOL and State Insurance Departments** – It is critical that the DOL focus efforts and resources on coordination with state insurance departments. The NAIC has enjoyed a long-standing cooperative relationship with the DOL, especially with respect to MEWAs. In the past, the DOL and states have worked together to identify bad actors and support the coordinated use of state and federal tools to prevent harm to consumers. We trust that this relationship will continue and look forward to renewed coordination with DOL to make sure that this expansion of AHPs doesn’t lead to a new era of fraud, abuse and insolvencies that ultimately harm consumers.
- **Exception for certain not fully insured MEWAs** – Consistent with our desires to coordinate with the DOL and avoid repeating the troubled history of MEWAs, we strongly caution against an exception from state law for certain not fully-insured MEWAs. Granting such exceptions without first assembling all the resources and expertise necessary to carry out the regulatory functions currently exercised by the states would ignore the reasons (detailed above) for the preservation of the state regulation of MEWAs under current law.

- **Region not to Exceed State or Metropolitan Area** – The AHP Proposed Rule allows an AHP to satisfy the commonality requirement if its members have a principal place of business within a region that does not exceed the boundaries of the same state or metropolitan area. We suggest that DOL define a metropolitan area consistent with definitions developed by the Office of Management and Budget and used by the census bureau and other federal agencies. We are also concerned that the DOL commonality requirement does not include a definition of region. Without clear guidelines, an AHP could define a region or a metropolitan area to avoid areas that are less affluent and, therefore, more likely to have chronic health problems. States should continue to have the authority to set required service areas.
- **Working Owners** – The AHP Proposed Rule extends the ability to join an AHP as an employer and as an employee to “working owners” and requests comment on whether the rule should use different criteria than the number of hours of service per week or month or income that at least equals the cost of coverage. We suggest that the DOL should limit working owners to individuals who can substantiate the claimed income or work hours through tax filings as self-employed individuals or members of partnerships under the Internal Revenue Code (IRC). Using the IRC definition would ensure, consistent with the stated intent of the NPRM, that “working owners” who join an AHP are genuinely engaged in a trade or business and are performing services for the trade or business in a manner that is in the nature of an employment relationship.
- **Nondiscrimination** – The AHP Proposed Rule requests comment on the nondiscrimination provisions. We agree that nondiscrimination provisions are critical to preventing outright adverse selection against the individual and small group markets in a state. However, AHPs could also use benefit designs, membership requirements or dues structures to discriminate against employers with higher cost employees. This is another example of why it remains critical for states to be able to continue to regulate in this area.
- **Notice Requirements** – The AHP Proposed Rule asks for comment on whether there should be additional notice requirements to ensure that employers, their employees and beneficiaries are adequately informed of their rights and responsibilities with respect to AHP coverage. We support robust notice requirements; however, DOL must be sure to coordinate with the states on the contents of the notices to avoid confusion and undue administrative costs.
- **Timing** – The DOL should postpone the effective date of the rule to 2020 to give states time to review their rules and regulations and facilitate a smooth transition.

Thank you for this opportunity to comment, and for the efforts of Secretary Acosta and DOL leadership to engage with us constructively on this proposal. We are available to discuss these or other issues as the AHP Proposed Rule is finalized.

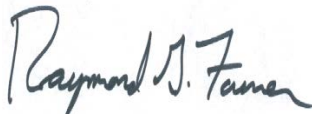
Sincerely,



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