

March 5, 2018



Pete Ricketts, Governor

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)) ("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. The Nebraska Department of Insurance offers comments on two main points: collaboration for successful implementation and effective enforcement; and state laws that should survive preemption to preserve options in the Nebraska market.

Collaboration for Successful Implementation and Effective Enforcement:

State regulators are best positioned to regulate solvency, and regulation of self-funded MEWA plans should remain with the states. In addition, state regulators are most familiar with our markets and can best oversee employer-level compliance with rules about the purchase of insurance. Therefore, the states will need to know about which AHPs formed under the Proposed Rule are operating in our jurisdictions. Because the Department of Labor does not require registration or pre-approval for MEWAs, and there appears to be no registration or pre-approval process for AHPs contemplated in the Proposed Rule, states will likely need to develop some way to distinguish legitimate AHPs from those that do not meet the Rule's representation and nondiscrimination requirements, the states will need resources to implement the Proposed Rule. Enforcement of the Proposed Rule will also require that Nebraska expend resources on fraud prevention.

The partnership between the Nebraska Department of Insurance and the federal Department of Labor is crucial to protect consumers. Clear guidance as to what membership criteria and membership fees are permissible for AHPs will be necessary to avoid adverse selection among AHPs and other options in the market. Employers will shop for the lowest premiums, which can result in questionable solvency if self-insured plans are not monitored closely. Administrators and vendors for self-insured plans, when given control over the plans' operations, can take advantage of employer members by overcharging or leaving members exposed to personal liability for medical bills. Additionally, for fully-insured AHPs created under the Proposed Rule, terminology used in the sale of plans should clearly explain the limitations on coverage. Clarity at the outset will minimize consumer confusion and provide a uniform template for enforcement.

State Laws that Should Survive Preemption to Preserve Options in the Nebraska Market:

Nebraska laws for MEWAs and group health insurance, compared to the Proposed Rule, are in some ways more permissive than the Proposed Rule and in other ways more restrictive. The Nebraska Department of Insurance will endeavor to allow plans created under Nebraska law to survive as compliant, even if they do not meet requirements in the Proposed Rule. In the same way, plans created under the Proposed Rule would be treated as "employers" for purposes of Nebraska group coverage laws, with employees of all AHP members counted together for purposes of determining group size. If a plan does not meet the requirement in Nebraska law that it be organized for a good faith purpose other than the purchase of insurance, then the nondiscrimination requirements in the Proposed Rule would apply. If a plan is organized for a good faith purpose other than the purchase of insurance, then the nondiscrimination requirements in the Proposed Rule would not apply. Every other Nebraska law would remain, and would not be preempted.

The Nebraska Medical Association Employers Insurance Consortium, which wrote its own comment letter on the Proposed Rule, is a successful Nebraska association organized for a good faith purpose other than the purpose of insurance, which charges different rates to employers based on each employer's experience. This organization's rating practices should be allowed to continue based on compliance with Nebraska law and the organization's long history as a successful health insurance plan. This is one example of an association that is an "employer" under ERISA 3(5) without aid of the

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broadened definition of "employer" in the Proposed Rule. Only when an association relies on the broadened definition of "employer" in the Proposed Rule should the stricter rate nondiscrimination requirements in the Proposed Rule apply.

Nebraskans need options. The Proposed Rule appears to provide an additional option for sole proprietors, which could be rural Nebraskans engaged in agriculture or any Nebraskan who operates a small business. The Nebraska Department of Insurance tours the state every year before open enrollment, and the most frequent issue raised by consumers is frustration with limited, expensive options for health insurance. Combined state and federal efforts to expand choices for Nebraskans will serve as welcome relief for consumers, and combined enforcement efforts will ensure the promise of coverage is realized.

Sincerely,



Bruce R. Ramge
Director

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