



**Department of
Social Services**

Human Resources
Administration

Department of
Homeless Services

Steven Banks
Commissioner

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March 5, 2018

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: Definition of Employer – Small Business Health Plans RIN 1210-AB85

Ref. RIN 1210-AB85: Definition of “Employer” under Section 3(5) of ERISA -
- Association Health Plans

Dear Sir/Madam,

The City of New York Department of Social Services (NYC DSS) respectfully submits the following comments in response to the proposed rule “Definition of ‘Employer’ Under Section 3(5) of ERISA – Association Health Plans” as published on January 5th, 2018.

The Office of Citywide Health Insurance Access (OCHIA) within NYC DSS has an overall mission to expand access to health insurance coverage for NYC residents and small businesses. We help children, families, working individuals, and small business owners learn about and find coverage and care that meets their health care needs and budgets.

Working with a broad network of public and private sector partners, OCHIA provides outreach, education, enrollment assistance, and training on available public and private health insurance options. We also help people over 65 years old, living with a disability or visually impairment learn about and enroll in Medicaid and Medicare Savings programs.

Attached are comments and recommendations that we believe will support our agency’s goal to maximize access to good quality, affordable health insurance for all individuals, families, and small businesses, while also ensuring for consumer choice in the marketplace.

Solicitation of Comments: The Department of Labor (DOL) solicits comments on the proposed changes to their long-standing interpretation of the definition of “employer” under the Employee Retirement Income Security Act (ERISA), including how it should apply the commonality of interest test, as well as the

overall impact this proposal may have on the risk pools of the individual and small group health insurance markets.

Recommendation 1: NYC DSS recommends that the DOL work to implement regulations that strike a balance between stabilizing the individual and small group markets and expanding consumer choice in the marketplace, rather than prioritizing one objective over the other. This balance can best be achieved by maintaining the current definition of “employer” under Section 3(5) of ERISA with respect to the eligibility of sole proprietors, commonality of interest standards, and Federal standards for an Association Health Plan (AHP) to be considered a “bona fide group.”

By changing the definition of employer in §2510.3-5 in the proposed fashion, this rule would make it easier for entities to form and individuals to join AHPs, which are often less regulated than plans in the individual and small group markets. While NYC DSS strongly believes in the importance of expanding consumer choice in the marketplace to, in part, reduce the cost of insurance, doing so should not come at the expense of the stability of the individual and small group markets.

As currently proposed, this rule would prioritize choice over stability. Despite the non-discrimination policies outlined in the proposed rule, this policy would make it easier for more health insurance plans to tailor their benefit packages to certain segments of the population. Specifically, this rule would facilitate the formation of, and incentivize movement into, plans that are not required to cover Essential Health Benefits (EHBs) as defined in the Affordable Care Act (ACA) by virtue of their large group market status. In turn, AHPs could decide to eliminate certain areas of coverage such as prescription drug or mental health services as a way of discouraging enrollment of individuals who rely on these services and keeping premiums low. These less regulated, likely cheaper health plans may attract younger, healthier individuals out of the individual and small group markets which would, in turn, contribute to the destabilization of these risk pools. Shifting this risk out of the individual and small group markets is likely to drive up the cost of coverage for those who depend on a comprehensive array of services, placing an adverse financial burden on the beneficiaries in these pools. This is an outcome that seems contrary to the letter and spirit of this proposed regulation, which strives to expand access to more high-quality coverage.

Solicitation of Comments: DOL solicits comments on whether additional guidance to protect consumers is needed to complement ERISA and Affordable Care Act (ACA) standards that currently govern AHPs.

Recommendation 2: NYC DSS recommends that DOL work to create a regulatory environment in which individuals are incentivized to enroll in health

coverage that affords them with comprehensive care to meet their current and future needs.

This objective can be realized by maintaining the current scope of plans that are required to cover the 10 Essential Health Benefits, as outlined in Section 1302 of the ACA. Incentivizing individuals to join plans that escape regulation of basic health benefit packages, as this proposed rule does, will leave more people with skimpier coverage that may not match their healthcare needs. On the surface, these plans may be cheaper than those that are more stringently regulated, but they carry financial risk by way of hidden costs for consumers if there is a gap between the coverage offered and needed services.

Fundamentally, NYC DSS believes that consumer choice, which is a driving principle for the administration's promulgation of this rule, does not begin and end with the initial selection of a healthcare plan; rather, it must extend for the life/duration of one's ownership of the coverage policy. To this end, if individuals are left unable to receive or pay for care solely on the basis of having a less comprehensive health plan, their ability to exercise cost-effective choice over their healthcare decisions is greatly diminished. Therefore, NYC DSS recommends that DOL refrain from implementing the aforementioned aspects of this rule that incentivize consumers to join less comprehensive plans and instead work to promulgate regulations that will help consumers obtain coverage that matches their current and future healthcare needs.

Solicitation of Comments

The proposed rule welcomes input on the relationship between federal and state governments with specific regard to State regulation of Association Health Plans.

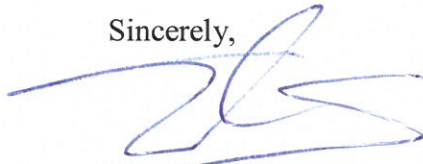
Recommendation 3: NYC DSS recommends that DOL clarify in the final implementation of this rule that States will have the authority to maintain and uphold any of their current regulations and standards that govern their respective insurance markets.

Recent federal regulations maintained States' ability to establish practices and implement policies that best account for their respective needs and those of their residents. States are uniquely attuned to the issues they are facing, and thus should have the ability to exercise regulatory authority over their respective insurance markets. While NYC DSS interprets this proposed rule as maintaining such authority, it is critical for DOL to clarify as much. This is especially important in light of the agency's proposal to create a more flexible commonality of interest test, which would make it easier for AHPs to form across state lines.

On the subject of interstate AHPs, DOL should maintain/confirm the view that one State's laws will not be preempted by those of another State solely on the basis of where the plan was written or issued and without regard to the nature of the plan itself. As the standards of health insurance laws and regulations vary by State, if DOL fails to clarify this point, it could result in a scenario where more plans are formed in less regulated States and sold elsewhere. This type of situation could create a "race to bottom" where consumers are incentivized to enroll in cheaper, less comprehensive plans, in turn undermining markets in States with more stringent benefit and fiscal standards. With its aim to protect consumers and ensure market stability, NYC DSS recommends that DOL clarify in the final iteration of this rule that States will retain the ability to uphold the laws and regulations that currently govern their respective insurance markets.

Thank you for your consideration of these comments. We are available at your convenience to further discuss these matters.

Sincerely,



Steven Banks
Commissioner
New York City Department of Social Services