

March 6, 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

RE: Docket No. EBSA-2018-0001, Definition of Employer—Small Business Health Plans, RIN 1210-AB85

The American Farm Bureau Federation (AFBF) supports the creation of Association Health Plans (AHPs). As the nation's largest general farm organization with nearly 6 million member families who are located across all 50 states and Puerto Rico, AFBF supports the framework of the U.S. Department of Labor's (DOL) notice of proposed rulemaking (NPRM) that broadens the criteria under the Employee Retirement Income Security Act (ERISA) for determining the criteria for when employers can join together to form an AHP.

Farmers, ranchers and rural Americans need quality and affordable health care for themselves, their families, the people they employ, and the communities where they reside. Some provisions of the Affordable Care Act (ACA), however, have created circumstances that add to health insurance costs and complicate the administration of group provided healthcare plans. According to comments submitted by the National Federation of Independent Business, the Centers for Medicare and Medicaid Services issued a guidance document on September 1, 2011 that required all AHPs to be bound by the small group insurance requirements.¹ This guidance document forced many AHPs, including multiple state Farm Bureau AHPs, to stop offering insurance coverage because the small group insurance requirements defeat the advantages and cost savings that AHPs provide. The NPRM framework corrects the provisions of the ACA that diminished AHPs as a quality and affordable health insurance option for farmers, ranchers and rural Americans.

While the proposed rule if finalized would prevent AFBF from forming a national AHP, AFBF supports allowing state Farm Bureaus to create AHPs and to offer those plans across state lines. Allowing AHPs to be made available across state lines increases competition and allows farmers, ranchers and rural Americans to gain insurance coverage at the most cost-effective rate.

Numerous state Farm Bureaus have announced their interest in creating an AHP, while Washington Farm Bureau has been offering an AHP, the Washington Farm Bureau Healthcare Trust, since 2004. Many of these state Farm Bureaus will be filing their own comments that specify the benefits and obstacles the NPRM would create.

¹ NFIB. Comments to HHS re: Notice ID: CMS-9928-NC (82 Fed. Reg. 26885), 2017 July 10.

AFBF received the following feedback from a few state Farm Bureaus concerning the NPRM. AFBF does not have a policy position on these comments but felt it was necessary to share these concerns to ensure these comments were included in the docket and provide the DOL an opportunity to clarify its interpretation in the final rule.

Section 4.a: Employers Could Band Together for the Single Purpose of Obtaining Health Coverage

- There is a concern with how broadly or narrowly the DOL plans to interpret paragraph (c)(1). It is recommended that the DOL provide some examples, similar to the non-discrimination provision, which would provide more certainty for organizations that choose to proceed under the commonality provision.
- The “commonality of interest” as defined with the NPRM, should allow state and federally regulated AHPs to become the “Plan Sponsor” and would reduce the administrative burdens placed on small employers to individually file Form 5500s and Form 5500 Short-forms. Allowing state regulated AHPs to continue along with the federally qualified fully insured option would increase choices.
- The agricultural industry is diverse with many forms of livestock, aquatic and crop production. While diverse, it is ultimately all agriculture. The DOL should use the broadest consideration to the definition of agriculture to define which employers may be able to participate in various AHPs.
- The DOL bona fide test should be modified, not abandoned – AHPs should not be limited to an industry; however, AHPs should be limited to membership-based organizations, which are tax exempt under Internal Revenue Code Section 501(c), and which are not formed solely for the purpose of providing health benefits.

Section 4.c.: Group or Association Plan Coverage Must Be Limited to Employees of Employer Members and Treatment of Working Owners

- Allowing sole proprietors and small groups to band together would increase coverage options for the working sole proprietor. Current VEBA restrictions imposing a 10 percent limit on sole proprietors should be eliminated for both state regulated and federally qualified AHPs.
- The rules should acknowledge the important statutory and regulatory requirements that are already in place for fully insured AHPs. Except for the definition of employer and requested clarifications concerning preemption addressed below, all other provisions of the rule should be limited to self-funded AHPs.
- The proposed rule to expand the availability of AHP group coverage to self-employed individuals referred to as “working owners” should be retained. Under the rule, a working owner would be considered both an employer and an employee for purposes of enrollment in a group health AHP. This “dual treatment” would allow a self-employed individual to be an employer and qualify for the health coverage offered by the AHP.
- There is concern with the self-employment earned income reference in paragraph (e)(2)(ii) of the proposed rule, which requires self-employed individuals to earn income to qualify as a working owner eligible to join an association health plan. To the extent

this provision sets an earned income standard as the term is defined in § 32(c)(2)(A)(ii) of the IRS Code (26 U.S.C.), i.e., “net earnings from self-employment income,” this condition would prove problematic for farmers since many of them have years where net earnings are not gained. Therefore, if the provision were strictly construed it may force such individuals to either erroneously certify their compliance with the working owner definition or forego the benefit of joining plans that were specifically intended to help professions such as farming. A possible solution is amending paragraph (e)(2)(ii) to allow the condition to be satisfied if a self-employed individual earns “gross” income from their trade or business. Additionally, the term “earned income” is also specifically used in paragraph (e)(2)(iv) of the proposed rule, but unlike paragraph (e)(2)(ii), the second provision isn’t mandatory and may also be satisfied by working a minimum of 30 hours per week or 120 hours per month. Given that farmers would likely easily meet the working-hours element, the second reference is not as problematic.

Section 4.d.: Health Nondiscrimination Protections

- AHPs should have the ability to offer differing rates to individuals based on multiple factors including age, health status and pre-existing conditions. By offering plans that support healthy individuals and encouraging a healthy lifestyle, the ability for the group to sustain an AHP will be greatly enhanced if they can mitigate the risk they bring into the pool. The AHP can still accept everyone that applies with their plan, but charge a standard rate and a substandard rate based on the underwritten risk.
- Fully insured federally qualified plans should offer rates that are non-discriminatory in order to reduce the need for the federal government to regulate AHP rates and benefits.
- The rule should eliminate the proposed nondiscrimination provision and allow experience-based underwriting at the employer level for insured plans. If the nondiscrimination provision is included in the final rule, existing AHPs underwriting methodology should be grandfathered. Alternatively, the nondiscrimination provision should be limited to self-funded AHPs and the rule should leave to the states how fully insured AHPs should be underwritten (provided it is not more restrictive than large group underwriting).
- Allowing healthcare coverage providers to offer differing rates to individuals based on pre-existing conditions would cause market offering to these individuals that would not be affordable.

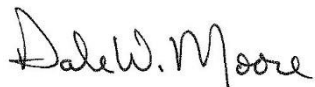
Section: Impact of State Law Interaction

- State regulation of insurance in the general case and health benefits in the specific case should be preserved. Regulation and decision-making at the state level allows for state regulated AHPs to be managed at the state level which allows for states to create solutions oriented to the needs of their constituents. The existing regulatory infrastructure is at the state level.
- The proposed regulation allows for the existing infrastructure of regulation to be applied to fully insured programs at the association level. Presumably, the state of the domiciled insurance carrier writing the national policy would be in the best position to regulate the solvency of the carrier.

- The final rule should clarify that ERISA preempts state laws, which impose requirements on insurance carriers offering coverage to AHPs, which are more restrictive than the requirements, which would apply if the insurance carrier is offering coverage to other employers purchasing insurance coverage in the market. Additionally, to the extent legally permissible, the final rule should clarify that state law, which prohibit AHPs from sponsoring a health plan or from self-funding are preempted.
- A national program would allow associations that are national in scope to better serve their membership and offer a baseline of coverage that is universal to all states. Moreover, the ability to offer plans that cross state lines will benefit the entire membership.

AFBF supports the creation of AHPs, which have the potential to offer farmers, ranchers and rural Americans a quality and affordable health insurance option that currently does not exist.

Sincerely,

A handwritten signature in cursive script that reads "Dale W. Moore".

Dale Moore
Executive Director
Public Policy