



March 5, 2018

The Honorable R. Alexander Acosta
Secretary of Labor
U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue NW Room N-5655
Washington, DC 20210



Submitted Electronically: Email to e-ORI@dol.gov and via Regulations.gov

RE: Proposed Comments Request for the Definition of "Employer" under Section 3(5) of ERISA - Association Health Plans RIN 1210-AB85

Dear Mr. Secretary:

The Kentucky Homebuilders Association Trust is responding to your request for comments on the proposed rule published in the Federal Register on January 5, 2018, titled, "Definition of 'Employer' under Section 3(5) of ERISA – Association Health Plans."

The Kentucky Homebuilders Association Trust (HBA) was established in 1970 for the employers within the home building and home manufacturing-related industry in Kentucky. The trust is tax exempt under the provisions of Section 501(c)(9) of the Internal Revenue Code. The trust provides health, dental, vision, life and disability benefits to approximately 350 employers with 2,200 participants. The trust is filed as a group insurance arrangement as currently defined by the Department of Labor (Department) and all benefits provided by the trust are fully insured through various contracts issued by insurance companies. We are pleased to offer these comments for consideration, which draw on insights and feedback from the plan trustees, plan participants and administrators of our existing and very successful association health plan (AHP).

The focus of the proposed rule is to give groups of employers the ability to start new AHPs. It does not address the current AHPs that have been existence for many years like the HBA. Our primary concern with the proposed regulation is with the **nondiscrimination provisions**. If it is finalized as proposed, the new rules will be so disruptive to the current business practices of existing AHPs, plans like the HBA will in all likelihood cease to exist.

Since the Department specifically solicited comments on the nondiscrimination requirements in the preamble to the proposed rule, including how they balance risk selection issues with the stability of the AHP market and the ability of employers to innovate and enter voluntary coverage arrangements, the HBA assumes it is not the

Department's intention to damage the existing AHP market space and the positive insurance coverage arrangements that hundreds of thousands of American small businesses and their millions of employees and dependents are already enjoying through existing AHP arrangements. So to preserve the existing AHP market, and allow the HBA and other organizations like ours to continue to provide coverage, it is imperative that the Department makes adjustments to the nondiscrimination section of the proposed rule.

History and Background

The HBA has been providing benefits to its participants for over forty-eight years. Average rate increases have been in the single digits for most of those years, allowing for a stable and sustainable program. The HBA has also been able to offer wellness and telemedicine programs free of charge to its members through prudent fund management. The HBA current premium rating structure uses factors of age, location, industry code, plan product and **medical risk**. The medical risk factor is determined by our health insurance carrier, Anthem BCBS, and is based on historical claims data through medical underwriting. The trust is operated under state regulations that limit the range of medical risk factors with a floor and ceiling and limits on the annual change that can be made to a risk factor. These limits keep large increases or decreases in check over annual renewals but also allow high utilizing groups year over year to be rated up to contribute at a level commensurate with their utilization.

Based on the HBA's history and experience managing an AHP, a key component of balancing risk and creating a stable and sustainable plan is directly related to the ability to assign appropriate premium contribution levels to each group. The medical underwriting available to the plan keeps the trust viable.

Proposed Immediate Application to Existing AHPs

The probable outcome of proposed rules on existing AHPs that medically underwrite will be catastrophic. The HBA's participating employer groups that currently receive lower risk factors and who are lower utilizing employers will immediately receive up to 112% increase in premium upon their next renewal. These groups will have no choice but to seek insurance outside of the trust. Groups that currently receive higher risk factors because they are higher utilizers will receive a decrease in premium upon renewal. While this appears to be advantageous, those groups will contribute less premium in the year of implementation and the trust as a whole will not collect enough premium to cover claims. The carrier will need to rate the next renewal to bring in enough premium which will create large renewals in year two for all plan participants. The remaining groups left in the trust will also leave. Some in the industry call this a death spiral.

Wellness Activity Impact

Another negative impact of the proposed nondiscrimination requirements would be the inability to reward an employer group that implements a wellness program to promote healthy activities and drive positive health outcomes. This consequence of the non-discrimination rule is counterproductive and intuitively inconsistent with the intent of the expanded access to care through AHPs.

Kentucky Statute 304.17A-0954

The State of Kentucky enacted a statute to specifically address premium rate guidelines for employer organized association plans in 1998 with amendments in 2010. A copy of the statute is attached with this letter. The statute addresses definitions of Employer and Employer-organized Associations, Base Premium Rates, and Index rates. The statute details parameters for establishing rates and renewal increases and establishes the ratio of the highest rate factor to the lowest rate factor of five to one (5:1). These parameters have been a model for success in the Association Health Plan arena for Kentucky and could serve as model language for the final rules proposed by the DOL.

Proposed Changes To The Rule To Support Existing AHPs

When the ACA was first enacted, existing health insurance markets were given over three years to transition to new premium rating and nondiscrimination requirements. Additionally, individuals and employers were able to access the “grandfathered” plan clause of the ACA so that they could maintain existing plan options that were meeting their needs. When it was revealed that as a consequence of the ACA many Americans and small employers were not actually able to keep “grandfathered” plans, the previous Administration allowed for “grandmothered” plan options to continue if states wished, so that employers could maintain old plan options that they liked and were affordable for them and their group beneficiaries. Many Americans still maintain both grandfathered and grandmothered plan options today, but under this proposed rule, current AHP participants would not have a similar option.

Remove nondiscrimination language at the employer level: To avoid disruption of existing AHPs and their employer participants, the HBA respectfully requests that the final rule allow AHPs to enforce nondiscrimination rules only at the employer level, not at the association level.

Allow State Waiver for existing AHPs: If the nondiscrimination rule as written is included in any final regulation, we would urge the Department to require states to allow AHPs to seek state-level waivers to continue to utilize health status rating factors, as allowed by existing state law. This would give state departments of insurance the ability to review an AHP’s premium rating practices and approve a waiver of continued existing practice for AHPs either on a grandfathered basis or another form of state review and approval process.

The State of Kentucky statutes mentioned above could serve as model language for existing programs to follow after being issued a state based waiver.

Provide a Transition Period: If the non-discrimination provisions are included in the final rules and a state waiver is not agreed upon, we would finally suggest existing AHPs be allowed an implementation window over at least five years to allow them to phase out the medical underwriting without immediately dismantling and disrupting their current situations.

In summary, we believe there is an unintended consequence of the proposed rule, and if it is finalized without adjustment, our existing AHP and hundreds of others like it will be grievously harmed. If the intent of the proposed rule is to open up markets and promote association health plans, it will miss the mark and actually destabilize the market in place today. The HBA would support the finalization of an AHP rule that allowed us to build upon our thriving health insurance coverage arrangement and expand it to help even more business owners. We hope that in providing these comments, we have provided you with a path to allow for, and encourage that outcome.

The HBA sincerely appreciates the opportunity to provide comments on this proposed rule. If you have any questions about how the current AHP marketplace is serving employers, employees and dependents today, or how we believe the current proposal could shatter our existing and well-functioning AHP rather than improve our operations, please do not hesitate to contact us at our Administrator at either (859)226-1767 and / or Administrativeservicesgroup@umr.com.

Sincerely,

Kentucky Homebuilders Association Trust Participating Employer Committee

304.17A-0954 Definitions for section -- Premium rate guidelines for employer-organized association plans.

- (1) For purposes of this section:
 - (a) "Base premium rate" has the meaning provided in KRS 304.17A-005;
 - (b) "Employer" means a person engaged in a trade or business who has two (2) or more employees within the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year;
 - (c) "Employer-organized association" means any of the following:
 1. Any entity which was qualified by the commissioner as an eligible association prior to April 10, 1998, and which has actively marketed a health insurance program to its members after September 8, 1996, and which is not insurer-controlled;
 2. An entity organized under KRS 247.240 to 247.370 that has actively marketed health insurance to its members and which is not insurer-controlled; or
 3. Any entity which is a bona fide association as defined in 42 U.S.C. sec. 300gg-91(d)(3), whose members consist principally of employers, and for which the entity's health insurance decisions are made by a board or committee the majority of which are representatives of employer members of the entity who obtain group health insurance coverage through the entity or through a trust or other mechanism established by the entity, and whose health insurance decisions are reflected in written minutes or other written documentation;
 - (d) "Index rate" has the meaning provided in KRS 304.17A-005.
- (2) Notwithstanding any other provision of this chapter, the amount or rate of premiums for an employer-organized association health plan may be determined, subject to the restrictions of subsection (3) of this section, based upon the experience or projected experience of the employer-organized associations whose employers obtain group coverage under the plan. Without the written consent of the employer-organized association filed with the commissioner, the index rate for the employer-organized association shall be calculated solely with respect to that employer-organized association and shall not be tied to, linked to, or otherwise adversely affected by any other index rate used by the issuing insurer.
- (3) The following restrictions shall be applied in calculating the permissible amount or rate of premiums for an employer-organized health insurance plan:
 - (a) The premium rates charged during a rating period to members of the employer-organized association with similar characteristics for the same or similar coverage, or the premium rates that could be charged to a member of the employer-organized association under the rating system for that class of business, shall not vary from its own index rate by more than fifty percent (50%) of its own index rate; and
 - (b) The percentage increase in the premium rate charged to an employer member of an employer-organized association for a new rating period shall not exceed

the sum of the following:

1. The percentage change in the new business premium rate for the employer-organized association measured from the first day of the prior rating period to the first day of the new rating period;
 2. Any adjustment, not to exceed twenty percent (20%) annually and adjusted pro rata for rating period of less than one (1) year, due to the claims experience, mental and physical condition, including medical condition, medical history, and health service utilization, or duration of coverage of the member as determined from the insurer's rate manual; and
 3. Any adjustment due to change in coverage or change in the case characteristics of the member as determined by the insurer's rate manual.
- (4) In utilizing case characteristics, the ratio of the highest rate factor to the lowest rate factor within a class of business shall not exceed five to one (5:1). For purpose of this limitation, case characteristics include age, gender, occupation or industry, and geographic area.
- (5) For the purpose of this section, a health insurance contract that utilizes a restricted provider network shall not be considered similar coverage to a health insurance contract that does not utilize a restricted provider network if utilization of the restricted provider network results in measurable differences in claims costs.

Effective: July 15, 2010

History: Amended 2010 Ky. Acts ch. 24, sec. 1214, effective July 15, 2010. -- Amended 2002 Ky. Acts ch. 351, sec. 16, effective July 15, 2002. -- Amended 2000 Ky. Acts ch. 476, sec. 27, effective January 1, 2001. -- Created 1998 Ky. Acts ch. 496, sec. 11, effective April 10, 1998.