



# Oregon

Kate Brown, Governor

Department of Consumer and Business Services

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**Submitted Electronically Only ([www.regulations.gov](http://www.regulations.gov))**

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

To Whom It May Concern:

We write this letter on behalf of the State of Oregon Department of Consumer and Business Services (“DCBS” or “we”) to comment on the proposed *Definition of “Employer” Under Section 3(5) of ERISA – Association Health Plans* regulation that was published in the Federal Register on January 5, 2018.

Thank you for the opportunity to provide comments on the proposed rules on Association Health Plans (AHPs). DCBS is Oregon’s largest consumer protection and business regulatory agency and also serves as the state’s insurance regulator. We provide the following comments.

### **General Comments**

If adopted, the proposed rules will allow employers, including sole proprietors, to form associations based solely on participation in a common industry or having a principal place of business in the same state or metropolitan area. The proposed rules further provide that, once such an association is formed, group health insurance plans sponsored by the association (AHPs) would be considered large employer coverage. This would be the case even if the employers forming the association would otherwise be considered small employers under federal law.

The proposed rules present two key concerns for DCBS. First, we are concerned that expanding the availability of AHPs could reduce the number of enrollees in Oregon’s individual and small employer markets, possibly with adverse affects for enrollees who remain in those markets. Second, we are concerned that the proposed rules could be interpreted to preempt state insurance laws, thus limiting Oregon and other state’s ability to address consumer issues that may arise with AHPs. DCBS believes that states are in the best position to regulate their insurance markets. As such, we believe the final rules should preserve the states’ existing authority to regulate AHPs wherever possible.



**Request for comments on “commonality of interest” based on geographic location (83 FR 620)**

The proposed regulations would allow an AHP to satisfy the commonality of interest requirement so long as the AHP members have a principal place of business within the same state or metropolitan area, including metropolitan areas that include more than one state.

Oregon law currently requires that group insurance coverage issued to Oregon residents (through an employer or otherwise) must comply with the Oregon Insurance Code, including standards for benefit design and state mandated benefits. These laws apply regardless of where the group insurance policy was issued and regardless of whether the coverage was offered through an association or directly to an employer. DCBS asks that the final rules clarify that these laws, and similar laws of other states, may continue to apply to AHPs.

DCBS is also concerned that AHPs could manipulate geographic classifications to avoid offering coverage to employers expected to incur more health claims. Our experience has shown that insurer claim costs are generally higher in rural areas compared to metropolitan areas. Allowing AHPs to limit membership to metropolitan areas could create disparities between AHPs that limit membership in this way and insurers that maintain larger service areas. We ask that the final rules allow states to retain authority to address these disparities, including the ability for states to require AHPs to accept all employers doing business within a state.

In the alternative, DCBS would not oppose the adoption of a clearly defined standard for the scope of metropolitan areas. Establishing an objective standard for the size of metropolitan areas is fundamental to meaningful enforcement of the geographic criteria. We believe that the designations used by the U.S. Census or the Office of Management and Budget, or a similar objective definition that delineates metropolitan statistical areas according to published standards would be appropriate.

**Request for comments on defining and identifying “working owners” for purposes of AHP membership (83 FR 622)**

The proposed rule requests comment on several issues related to the criteria that an individual must satisfy to qualify as a “working owner,” and how these criteria should be enforced.

Generally speaking, we believe the proposed standards for working owners present countervailing concerns for state regulators. First, we are concerned that lenient enforcement of the working owner criteria could cause large numbers of individuals who are not truly working owners to leave the individual market in favor of AHP coverage. At the same time, we are concerned that embedding strict criteria in the final regulation could impose undue administrative burdens on AHPs and create unnecessary barriers for working owners who wish to enroll in AHPs.

Because the full impacts of the new AHP standards cannot be known, we cannot yet say which of the above concerns is paramount. Instead, Oregon recommends that the final rules provide flexibility to states to enact statutes and rules on working owners. Regardless of any provisions

of the final rule, we do not believe that states should be prevented from adopting state laws to address this issue.

**Request for comments on the application of HIPAA/ACA nondiscrimination rules to AHPs (83 FR 624)**

DCBS strongly supports the provisions of the proposed rules that would apply HIPAA/ACA nondiscrimination requirements to AHPs. These provisions establish a minimum level of discrimination protection, but we encourage the Department to consider other ways to ensure fairness within the AHP market. We are concerned that the HIPAA/ACA framework may not be sufficient to prevent AHPs from being designed to “cherry pick” healthier employer groups and steer less healthy groups into the individual and small group markets. To avoid this result, we believe that states should retain authority under the final rules to adopt additional requirements relating to the treatment of “similarly situated” employer-members of an AHP. We believe this is necessary in order to maintain stability of the commercial market.

With regard to whether the nondiscrimination rules could result in cross-subsidization across member firms, we believe that cross-subsidization across member firms is exactly what should be expected of AHPs in order to spread the risk across all members of the large group. We do not believe application of this traditional insurance concept to AHPs should discourage formation of or innovation in the development of AHPs. Many employers will find AHPs attractive, despite any effects of cross-subsidization.

DCBS strongly supports proposed paragraph (d)(4). Because AHPs will be treated as a single large employer, AHP coverage will not be subject to state and federal requirements that apply to small group and individual coverage. We do not believe that an AHP should be exempted from those laws based on its status a large employer only to then treat member-groups as separate entities for purposes of defining “similarly situated” employees.

**Request for comments on AHP pricing flexibility and of age factors (83 FR 629)**

DCBS is also quite concerned that, because AHPs will enjoy greater pricing flexibility to set premiums, some AHPs might offer lower prices to healthier groups and higher prices to less healthy group using non-health factors, such as age. Allowing for AHPs to rate members based on age could allow AHPs to effectively discriminate on health status and adversely impact the individual and small employer markets.

The HIPAA/ACA nondiscrimination regulations discussed above do not consider age to be a “health factor” and thus allow for employers to be treated as different groups based on age. Allowing AHPs to provide higher composite rates to groups of older participants, who are likely to have greater health care needs resulting in greater claim expense, could steer them out of the AHP and back to the individual or small group commercial markets based on the cost of coverage. Allowing states to require composite group rates based on the entire AHP membership that are not segmented based on age should help to resolve this issue. We ask that the final rules allow states this flexibility.

**Request for input on the possible exemption of self-insured MEWAs from State Insurance Regulation under ERISA Section 514 (83 FR 625)**

The proposed rules request comment on whether the Department of Labor should exercise its authority under ERISA Section 514(b)(6)(B) to exempt self-insured MEWA plans from State insurance regulation. As noted above, DCBS believes that states are in the best position to proactively regulate their insurance markets, including health insurance coverage offered by self-insured MEWAs. Like many states, Oregon currently regulates self-insured MEWAs in a manner to similar to traditional health insurance companies. We believe regulation of these entities, and the plans they offer, is essential to ensuring fair treatment for employer-members of self-insured MEWAs and the consumers who receive coverage through these arrangements.

Oregon is strongly opposed to any exemptions of self-insured MEWA plans from State insurance regulation. Rather than promoting consumer choice, we feel any such exemptions would only serve to erode long standing consumer protections and create disparities between state-regulated insurance products and plans offered through self-funded MEWAs.

### **Request for comment on the need for additional guidance on the proposed standards (83 FR 625)**

As discussed above, DCBS is concerned that the final rules may preempt state regulation of AHPs. DCBS asks that, where ever possible, any such state preemption be specifically identified in the final rules. We also ask the Department to identify areas where state regulation is specifically not preempted under the final rules.

With respect to notice requirements for AHPs, DCBS recommends that states be allowed to impose notice requirements upon AHPs offering coverage within their jurisdiction. We believe this approach will allow states to ensure that employer members of associations, as well as participants and beneficiaries of AHPs, are adequately informed of their rights and responsibilities.

### **Effective Date of Final Regulation**

Given the scope of the proposed changes, DCBS recommends that the effective date of the final rules be delayed until at least 2020. This additional lead time will give states time to conform their existing laws and procedures to the provisions of the final rules. A later effective date will also give health insurers time to fully consider the impacts of the final rules and to incorporate those findings into their 2020 plan and rate filings.

### **Closing Remarks**

DCBS appreciates the opportunity to provide feedback to the Department of Labor. For further clarification on our comments, please contact:

Richard Blackwell, Policy Manager  
(503) 947-7056

Thank you,



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Cameron Smith, Director  
State of Oregon Department of Consumer and Business Services