



March 6, 2018

**Submitted Electronically Via Federal Rulemaking Portal: [www.regulations.gov](http://www.regulations.gov)**

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

Re: Association Health Plans - Definition of “Employer” Under Section 3(5) of ERISA

To Whom It May Concern:

The State Chamber of Oklahoma (the “Chamber”) submits these comments to the United States Department of Labor (“DOL”) in response to the DOL’s proposed regulation under Title I of the Employee Retirement Income Security Act (“ERISA”) that would broaden the criteria under ERISA section 3(5) for determining when employers may join together in an employer group or association that is treated as the “employer” sponsor of a single multiple-employer “employee welfare benefit plan” and “group health plan,” as those terms are defined in Title I of ERISA.<sup>1</sup>

The Chamber represents more than 1,500 Oklahoma businesses and 350,000 employees. Its employer members include sole proprietors, small businesses, large businesses, other chambers of commerce, economic development organizations, and not-for-profit organizations. Since 1926, the Chamber has functioned as a non-partisan organization that helps create an environment of opportunities and job growth in Oklahoma.

The Chamber supports the expansion of association health plans (“AHPs”) and is grateful for the DOL’s good work putting together the Proposed Rule. Small businesses and sole

---

<sup>1</sup> Proposed Rule, 83 Fed. Reg. 614-636 (January 5, 2018) (to be codified at 29 C.F.R. pt. 2510) (referred to herein as the “Proposed Rule”).

proprietors, in particular, need more freedom to band together to provide affordable, quality health insurance to their employees. The Proposed Rule would allow small businesses and sole proprietors to join together as a single group to purchase insurance in the large group market. The Chamber hopes that these improvements will in fact open health insurance coverage to thousands of Oklahomans and their families by making it more affordable for small businesses and sole proprietors in particular. The Chamber hopes that by joining together, Oklahoma employers will be able to reduce administrative costs through economies of scale, strengthen their bargaining position to obtain more favorable deals, enhance their ability to self-insure, and offer a wider array of insurance options.

The Chamber generally supports the structure of the Proposed Rule, but believes the Proposed Rule should provide some additional flexibility. The Chamber offers the following specific comments and recommendations:

1. Well-Established Associations Like the Chamber Should Not Be Subject to the New Bona-Fide Requirements.
2. The MEWA Rules Will Discourage Employers From Forming AHPs.
3. The Nondiscrimination Requirements Should Be Revised To Clarify They Do Not Prohibit Multiple Benefit Options.

The Chamber recognizes that the DOL will receive a number of comments regarding the Proposed Rule and that there are a number of difficult and competing policy considerations that must be taken into account. The Chamber has thus tried to succinctly focus on the issues that it deems to be the most important.

**1. Well-Established Associations Like the Chamber Should Not Be Subject to the New Bona-Fide Requirements**

Under the Proposed Rule, a bona fide group or association of employers capable of establishing a group health plan that is an employee welfare benefit plan will include a group or association of employers that meet eight specific requirements.<sup>2</sup> One of those requirements would require that “[t]he functions and activities of the group or association, including the establishment and maintenance of the group health plan, are controlled by its employer members, either directly or indirectly through the regular nomination and election of directors, officers, or other similar representatives that control the group or association and the establishment and maintenance of the plan.”<sup>3</sup>

The Chamber understands why this requirement is in the Proposed Rule and understands the DOL’s intent for the rule to satisfy the requirement in ERISA section 3(5) that the group or association must act “in the interest of” the direct employers in relation to the employee benefit

---

<sup>2</sup> Proposed Rule, 83 Fed. at 635.

<sup>3</sup> Ibid.

plan. This makes good sense for new associations that have not yet been formed and/or that are formed for the purpose of sponsoring a health plan. But as to well-established associations like the Chamber – which represents more than 1,500 employers – the idea that all 1,500+ employers (if they participated in a Chamber association health plan) would be required to somehow directly or indirectly control the health plan makes little sense and is not practical. Well-established associations like the Chamber already exist to act “in the interest of” their employer members and could certainly help establish an association health plan that the Chamber’s board of directors, or a designated committee, could manage and maintain within the rules very efficiently and effectively. Perhaps the rule could be revised to exempt (from proposed § 2510.3-5(b)(4)) pre-existing associations that (a) have existed for at least three years prior to the effective date of the final rule, and (b) exist for purposes other than offering health coverage.

## **2. The MEWA Rules Will Discourage Employers From Forming AHPs**

On October 12, 2017, President Trump issued Executive Order 13813 directing the Secretary of Labor to, in relevant part, consider expanding access to health coverage by allowing more employers to form AHPs. The DOL has worked hard to carefully construct the Proposed Rule to achieve that purpose. As mentioned previously, the Chamber is grateful for the DOL’s good work and hopes that the final rule will help Oklahoma employers have better access to health care.

That said, the DOL states the Proposed Rule “would not alter existing ERISA statutory provisions governing MEWAs.”<sup>4</sup> This is unfortunate because many employers are afraid of participating in MEWAs. This is largely because the DOL has made it very clear that MEWAs are an enforcement priority<sup>5</sup> and has even published an article on its website highlighting the significant monetary awards resulting from the DOL’s MEWA enforcement efforts.<sup>6</sup> The AHP structure in the Proposed Rule has the potential to significantly help small businesses and sole proprietors in particular, but it might be all for nothing if the MEWA rules remain in tact as they exist now.

While beyond the scope of the current proposed rulemaking, the DOL did state that it is nonetheless interested in receiving input regarding the impacted MEWA considerations.<sup>7</sup> The existing MEWA rules, including the ability of states to adopt rules that restrict the flexibility that self-funded AHPs may enjoy under the Proposed Rule, will serve as a barrier to entry for

---

<sup>4</sup> Proposed Rule, 83 Fed. at 625. A “MEWA” is of course a multiple employer welfare arrangement, as defined in ERISA section 3(40).

<sup>5</sup> <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement> (highlighting National Enforcement Projects including the Health Benefits Security Project) (last visited March 4, 2018).

<sup>6</sup> <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/mewa-enforcement.pdf> (last visited March 4, 2018).

<sup>7</sup> Proposed Rule, 83 Fed. at 625.

employers seeking to take advantage of the new AHP rules. Additionally, where an AHP crosses over state lines, the differing patchwork quilt of state laws will make AHPs even less attractive.

The Chamber acknowledges the DOL's authority under ERISA section 514(b)(6)(B) to exempt self-insured MEWAs is limited, but the Chamber nonetheless encourages the DOL to implement such an exemption to provide some limited relief from the burdensome MEWA rules. If the DOL implemented such an exemption, self-insured MEWAs would nonetheless remain subject to state insurance laws that provide standards requiring the maintenance of specified levels of reserves and contributions, which would ensure the payment of promised benefits.

**3. The Nondiscrimination Requirements Should Be Revised To Clarify They Do Not Prohibit Multiple Benefit Options.**

The Chamber has concerns about the nondiscrimination requirements<sup>8</sup> but nonetheless understands why the DOL has included them in the Proposed Rule and why they might be necessary. What is not clear, however, is whether an AHP could offer multiple benefit options to all participating employer members and their employees, with different premium costs for the various options, without any consideration to a health factor. It appears that such a structure would be permitted under the Proposed Rule, but the nondiscrimination provisions should be revised to make this clear. An AHP should be able to offer its employer members and their employees various options depending on their needs and what they can afford.

Respectfully,

A handwritten signature in black ink, appearing to read "Fred Morgan", followed by a horizontal line.

Fred Morgan  
President & Chief Executive Officer

---

<sup>8</sup> Proposed Rule, 83 Fed. at 635-36.