



American Hospital  
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March 6, 2018

Preston Rutledge  
Assistant Secretary of Labor  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

***RE: Definition of Employer – Small Business Health Plans RIN 1210-AB85***

Dear Mr. Rutledge:

On behalf of the American Hospital Association's (AHA) nearly 5,000 member hospitals, health systems and other health care organizations, and our clinical partners – including more than 270,000 affiliated physicians, 2 million nurses and other caregivers – and the 43,000 health care leaders who belong to our professional membership groups, we thank you for the opportunity to comment on the proposed rule modifying the definition of “employer” under ERISA in order to expand access to association health plans (AHPs). **While we appreciate the Department of Labor's (DOL) efforts, we are concerned that this rule fails to protect against discriminatory insurance practices and could contribute to instability in the individual and small group market, ultimately decreasing access to affordable coverage.**

The AHA is committed to expanding affordable, high-quality coverage and looks forward to working with the DOL on this goal. However, we are concerned with broadening the availability of AHPs. In the past, AHPs lacked sufficient oversight, resulting in discriminatory practices intended to cherry-pick the healthiest enrollees, and some fraudulent behaviors leading to insolvency and unpaid claims. While the DOL attempts to address some of these concerns, particularly in regard to nondiscrimination policies, the proposed rule does not go far enough to prevent AHPs from targeting healthier individuals, which could in turn destabilize the marketplaces and threaten access to coverage for the millions of people who rely on them. In addition, the significant freedom in plan design could result in insufficient coverage that ultimately shifts financial burden to the consumer when unexpected illness or injury occurs. **Given these concerns, the AHA recommends that the DOL not finalize this proposed rule and instead work with stakeholders on ways to reduce costs and improve health plan choices for individuals and small businesses.**



Below we provide comments on specific provisions in the rule.

### **NONDISCRIMINATION MEASURES**

The proposed rule includes nondiscrimination language that would preclude AHPs from discriminating against an employer or a subset of employees based on any health factor (i.e., health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability). The nondiscrimination provision is intended to prevent AHPs from excluding particular employers because their employees could be unhealthy or denying certain employees of a member organization coverage because of their health status. In addition, AHPs would be required to offer groups of similar individuals across association members the same rates and benefits packages. However, AHPs would be able to set different rates and benefit packages across groups of similar individuals (e.g., full time vs. part time, different locations, different job title/occupation, length of service, current vs. former employee status).

In practice, this means that an AHP could not deny membership to an employer on the grounds that two out of four employees in the organization had chronic conditions, nor could the AHP charge those employees more based on their chronic conditions. However, an AHP could set higher rates for subsets of employees who are more likely to have expensive health needs. For example, an AHP could set higher rates for certain jobs that are riskier or more likely to be filled by older individuals, while setting lower rates for jobs more likely to be filled by younger individuals.

In addition, because the plans would be treated as large-employer plans, they would not be subject to many of the Affordable Care Act's consumer protection and comprehensive coverage requirements, such as the essential health benefits, rating rules, and the single risk pool. As a result, an AHP also could create less desirable benefit packages, such as not covering women's health services for an occupation primarily held by women, in order to dissuade particular groups of individuals from enrolling in the AHP without explicitly discriminating against them. Therefore, this policy would still leave populations at risk of having less access to coverage. The AHA shares the DOL's desire to expand choice and access to affordable health plan options, but cannot support a policy that would do this only for some, at the expense of others.

### **EFFECT ON THE INDIVIDUAL AND SMALL GROUP MARKET**

In the proposed rule, the DOL acknowledges that some leading organizations, including the National Association of Insurance Commissioners (NAIC) and the American Academy of Actuaries, have argued that expanding access to AHPs would result in the adverse selection discussed above – healthier individuals would choose AHP plans while sicker individuals would be left to access individual and small group market plans. If this were to occur, the price of individual and small group products would increase given the concentrated risk pool, ultimately harming the viability of the individual and small group market.

The DOL maintains that while this proposal may lead to adverse selection, the benefits of providing additional insurance options to some individuals outweigh the costs. Tens of millions of people rely on the individual and small group markets – both on and off the Health Insurance Marketplaces. While many receive subsidies to help with the cost of coverage sold on the marketplaces, those who do not would be adversely impacted by the higher rates without an alternative. A recent analysis by Covered California found that, nationally, rates on the marketplaces could increase by 0.3-1.3 percent due to this policy change.<sup>1</sup>

We are concerned that the proposed rule will weaken the individual and small group markets, ultimately reducing consumer choice and increasing costs for individuals and small business who rely on them.

### **OVERSIGHT OF AHPs**

Unlike individual and small group products, states would have little oversight over the new AHPs beyond solvency and other financial and licensure issues. In today's regulatory environment, there is often insufficient clarity with regard to federal and state jurisdiction in the oversight of ERISA plans. Oversight authority could become even more complicated as the proposed rule would increase the number of health plans regulated under ERISA. In addition the DOL requests comments on potential waivers of state regulation which could further erode the states' role. Finally, the potential for growth in health plans sold across state lines will raise questions about oversight jurisdiction *between states*, such as which state is responsible for overseeing consumer complaints and appeals.

The DOL acknowledges a history of fraudulent behaviors by some AHPs, leaving both consumers and providers vulnerable to unpaid claims. Less attention is given to the risk to consumers of potential gaps in protections that could emerge when states lose their authority to regulate these plans, such as network adequacy, the consumer appeals processes, mandatory benefits and fraud prevention. In order to prevent bad actors and ensure AHPs are genuinely representing their members, the proposed rule would require that these organizations have a formal organizational structure and that the members have control of the organization's functions and activities. The DOL indicates that it would need to expand its capacity to monitor AHPs and intervene when necessary. Taken together, the DOL contends that these measures would be sufficient to prevent bad behaviors and fraudulent activities by AHPs. However, given that past abuses occurred under the DOL's authority, we oppose an approach that actually weakens state authority. A number of leading national organizations, including the NAIC and the National Governors' Association, have raised similar concerns on previous AHP proposals.<sup>2</sup>

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<sup>1</sup> Covered California, "The Roller Coaster Continues — The Prospect for Individual Health Insurance Markets Nationally for 2019: Risk Factors, Uncertainty and Potential Benefits of Stabilizing Policies," Jan. 18, 2018. Accessed at: [http://board.coveredca.com/meetings/2018/01-18/CoveredCA-Roller\\_Coaster\\_Continues\\_1-18-18.pdf](http://board.coveredca.com/meetings/2018/01-18/CoveredCA-Roller_Coaster_Continues_1-18-18.pdf)

<sup>2</sup> National Association of Insurance Commissioners, "Letter to Committee on Education and the Workforce Leadership on HR 1101," Feb. 28, 2017. Accessed at: [http://www.naic.org/documents/health\\_archive\\_naic\\_opposes\\_small\\_business\\_fairness\\_act.pdf](http://www.naic.org/documents/health_archive_naic_opposes_small_business_fairness_act.pdf)

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Hospitals and health systems are committed to ensuring access to coverage and care. We appreciate the DOL's attention to the issue of health plan choice and affordability. However, the approach proposed puts coverage for too many at risk. Instead of finalizing this proposal, we encourage the DOL, along with the Department of Health and Human Services, to work with stakeholders on other ways to achieve these shared goals while ensuring that critical consumer protections remain in place.

Thank you for the opportunity to comment. Please contact me if you have questions, or feel free to have a member of your team contact Ariel Levin, senior associate director of policy, at (202) 626-2335 or [alevin@aha.org](mailto:alevin@aha.org).

Sincerely,

/s/

Thomas P. Nickels  
Executive Vice President  
Government Relations and Public Policy

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National Governors Association, "Governors Oppose Association Health Plans," May 10, 2004. Accessed at: [https://www.nga.org/cms/home/news-room/news-releases/page\\_2004/col2-content/main-content-list/governors-oppose-association-hea.html](https://www.nga.org/cms/home/news-room/news-releases/page_2004/col2-content/main-content-list/governors-oppose-association-hea.html)

National Association of Insurance Commissioners, "Consumer Alert: Association Health Plans are Bad for Consumers," 2001. Access at: [http://www.naic.org/documents/consumer\\_alert\\_ahps.pdf](http://www.naic.org/documents/consumer_alert_ahps.pdf).