



March 2, 2018

ATTN: RIN 1210-AB85
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor, Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210

RE: Definition of “Employer” under Section 3(5) of ERISA – Association Health Plans

The National Association of Electrical Distributors appreciates the opportunity to comment in response to the referenced Proposed Rule published in the January 6, 2018 Federal Register. NAED is a trade association for the \$70+ billion electrical distribution industry. Through networking, education, research, and benchmarking, NAED helps electrical distributors increase profitability and improve the channel. Our membership operates in more than 5,100 locations internationally.

Background:

AHP's have existed under a narrow definition for several decades, typically comprised of self-employed individuals, and small to medium sized businesses using local chambers of commerce or farm bureaus to provide the group insurance purchaser. These groups are able to act as an “employer” under the Employee Retirement Income Security Act (ERISA), which allows the associations to preempt state insurance regulations. The Affordable Care Act (ACA), by not creating a special class for AHP's, only defines three types of healthcare plans: individual, small group, and large group plans. This allows any association with more than 50 people to qualify for large group plans, which do not have as many restrictions or requirements as individual or small group plans. In addition to regulations under the ACA, AHP's must meet requirements established by ERISA and HIPAA laws. By qualifying as an employer offering insurance to more than 50 individuals, an AHP may be considered a large group health plan, which preempts it from most state regulation and exempts it from compliance with key parts of the ACA such as essential health benefit requirements.

Currently, an AHP can be offered by a “bona fide” association which meets the following requirements:

- The association is bound together by a “commonality of interest”
 - The interest cannot be providing a healthcare plan
 - General business groups do not qualify
 - Trade Associations would meet this requirement
- The employers must have one or more employees in addition to the business owner and spouse.
- The employers must have control over the AHP and the association.

NAED Priorities

Expands the definition of employer to allow more associations to provide AHP's

- The proposed rule by the Department of Labor would expand the definition of employer to include a broader definition of association and allow an owner to serve simultaneously as employer and employee for the purposes of ERISA.
- NAED agrees that the standards in the Proposed Rule should be workable for most employers and welcomes the flexibility the criteria options would provide for a working owner to establish his or her status as an employee of the business. As to elements of those criteria, NAED believes its employer members would find certain clarifications helpful to enable working owners to predict whether they would properly meet the earned income and hours worked requirements.
 - While working at least 30 hours per week or at least 120 hours per month providing personal services to the trade or business is a reasonable standard as it relates to other definitions of “full-time employee,” it would be useful to recognize that many employers currently offer coverage to employees that satisfy other criteria. In addition to those employers providing coverage to part-time employees, the standard for “full-time employee” under the Patient Protection and Affordable Care Act (PPACA) includes concessions for variable employees, defined as employees for whom the employee cannot reasonably determine whether their hours will be at least 30 hours per week. This type of standard would recognize that any working owner’s time can often vary due to industry, seasonal, and other business and market factors. It would be particularly useful to owners of start-up businesses and other newly-formed entities who may not initially meet the objective hours worked standards set forth in the agency’s proposal but whose engagement in the business may fairly be assessed as an employment relationship.
 - The income a working owner earns from his or her business will often, but not always, equal or exceed the cost of providing coverage to employees. For example, the owner of a start-up company may operate at a loss in the business early going. NAED suggests that the agency consider providing a reasonable time period for a new start-up entity to meet the earned income from the business standard.

Removes the strong “commonality of interest” requirements for associations.

- The proposed changes would allow an association to show commonality of interest by either being in the same trade or industry, or being in the same geographical place (either a state or smaller legal boundary, or a metropolitan area such as Kansas City including both Missouri and Kansas areas). In the case of NAED, all employers would participate in the electrical distribution industry and therefore have no geographical restrictions. The proposed rule also does not limit associations to currently existing ones. A new association within a single industry can be formed to provide an AHP. Acknowledging that the current restrictions are too arduous, NAED believes that the proposed rule may expose the system to abuse by fraudulent AHPs specifically designed to provide group health coverage. The rule should maintain the objective of Title I of ERISA by distinguishing employment-based plans from commercial insurance programs and administrative service arrangements.

Eligibility for another subsidized group health plan

- Under the Proposed Rule, a working owner who is eligible to participate in any other “subsidized group health plan” would be ineligible to participate in the AHP offered to his or her employees. NAED believes that this standard is too restrictive considering the reality of the variability of “subsidies” offered to employees and their spouses and dependents. NAED recommends that owners who are also employees of the business not be held to a different standard than other employees with respect to what amounts to a working spouse rule, and that this condition for eligibility be eliminated.

Limits participation in an AHP to individuals in an employer/employee relationship with a member of the association, or individual self-employed members of the association

- The Proposed Rule limits enrollment to individuals with an employer/employee relationship to a member company and allows for “dual treatment” of employers. This definition prevents an association from offering health coverage to individuals who are not current employees, former employees, or their families and beneficiaries of member companies. While the definition is meant to prevent individuals from joining an AHP, the “dual treatment” of employers also allows self-employed individuals to be treated as an employee within their own company to qualify for the AHP, if their company meets one of the two requirements to join the association. These self-employed individuals and any employers must meet the working employer definition to qualify for coverage through an AHP: the owner cannot qualify for coverage through another employer, works at least 30 hours per week, and has earned income that equals the cost of coverage. NAED believes that a distinction should be made for working owners who may be transitioning out of the business by establishing alternate requirements such as history of work instead of using current work hours as the sole criteria.

Clarification and simplification of regulatory structure

While the Proposed Rule provides additional flexibility to allow groups of employers to join together to purchase health coverage for their employees through AHPs, it does not address many of the difficulties faced by existing national associations. We acknowledge the value in the ability to offer quality health coverage to their member employers, but current legal requirements not addressed in the Proposed Rule have and will continue to create barriers to entry for our association and others. NAED has active members in all 50 states. Under the current state regulatory system, it would be impractical for NAED to design and implement a single AHP plan design that would comply with the requirements in all of them. Use of the Secretary’s exemption authority in ERISA section 514(b)(6)(B) could remove many of these obstacles.

Thank you for your consideration of NAED’s positions on the Proposed Rule.

Respectfully submitted,

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