



Submitted via Federal e-Rulemaking Portal: <http://www.regulations.gov>

The Honorable Julie Su

February 15, 2024

Acting Secretary, U.S. Department of Labor
Room N-5655
200 Constitution Avenue. NW
Washington, D.C. 20210

Re: Definition of “Employer” – Association Health Plans [RIN: 1210–AC16]

Acting Secretary Su,

Elevance Health appreciates this opportunity to comment on the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) proposed regulation “Definition of ‘Employer’ – Association Health Plans” (Proposed Rule) 88 Fed. Reg. 87968 (December 20, 2023).

Elevance Health is a lifetime, trusted health partner fueled by its purpose to improve the health of humanity. The company supports consumers, families, and communities across the entire care journey – connecting them to the care, support, and resources they need to lead healthier lives. Elevance Health’s companies serve more than 115 million people through a diverse portfolio of industry-leading medical, digital, pharmacy, behavioral, clinical, and complex care solutions, including approximately 47 million in its family of health plans. As a committed participant in the Individual and employer-sponsored healthcare markets, we look forward to working with the DOL to protect access to high-quality, affordable coverage for all consumers.

Executive Summary

Elevance Health has been a leading issuer in the employer-sponsored healthcare market, and we remain steadfast in our commitment to finding affordable healthcare solutions for small employers. To that end, we recommend the following to preserve existing Association Health Plan (AHP) arrangements that have provided stable, financially sound, affordable healthcare coverage for small employers for over 30 years.

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- **Rescind the 2018 AHP Rule.** Elevance Health supports the DOL’s proposal to rescind the 2018 rule, “Definition of Employer Under Section 3(5) of ERISA¹ —Association Health Plans²” (2018 AHP Rule) in its entirety to remove any uncertainty regarding the applicability of standards that were finalized in the rule, leaving in place the longstanding AHP guidance that predates the 2018 AHP Rule (pre-rule guidance). Since the DOL is not aware of any AHPs that currently exist in reliance on the 2018 AHP Rule, rescinding the rule should have little to no impact on existing AHPs, which were formed under pre-rule guidance.
- **Maintain the Existing AHP Regulatory Framework.** While Elevance Health supports the DOL’s proposal to rescind the 2018 AHP Rule, we do not believe that additional rulemaking or guidance codifying or clarifying the pre-rule guidance is necessary. Although the pre-rule guidance is mainly in the form of advisory opinions based on the facts and circumstances of a particular employer group or association, the opinions apply a consistent set of criteria to each case. Replacing or changing the pre-rule guidance by issuing additional guidance or engaging in future rulemaking would disrupt the current AHP regulatory framework that continues to provide a viable pathway to healthcare coverage for many small employers and their employees.
- **Do Not Propose Revised Alternative Criteria for AHPs.** Elevance Health strongly urges the DOL not to propose alternative criteria for multiple employer association-based group health plans. For decades, district and appellate courts have used the same set of criteria to determine whether a group or association of employers may sponsor an ERISA group health plan on behalf of its employer members. The criteria used in pre-rule guidance established a stable AHP regulatory framework under which many small employers have offered affordable health coverage to their employees. Revising the AHP criteria now could result in gaps in coverage for countless employees.

Details on these priority issues can be found below.

¹ Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 (1974).

² 29 CFR Part 2510 <https://www.govinfo.gov/content/pkg/FR-2018-06-21/pdf/2018-12992.pdf>

Detailed Comments

Proposal to Rescind the 2018 AHP Rule

Issue: The DOL proposes to rescind the 2018 AHP Rule in its entirety.

Recommendation: Elevance Health supports the DOL's proposal to rescind the 2018 AHP Rule and maintain the existing pre-rule guidance framework.

Rationale: We believe that rescinding the 2018 AHP Rule in its entirety would remove existing uncertainty regarding the applicability of standards finalized in the 2018 AHP Rule but subsequently challenged in court. In its 2019 decision in *New York v. U.S. Department of Labor*,³ the U.S. District Court for the District of Columbia vacated key provisions of the 2018 AHP Rule and remanded the rule back to the DOL to consider whether the vacated provisions were severable from the rule's remaining provisions. The agency determined that the remaining provisions do not provide any meaningful guidance and cannot be operationalized. The U.S. Court of Appeals for the District of Columbia Circuit (Circuit Court) subsequently granted the DOL's request to pause the agency's appeal of the District Court's decision, and the appeal remains paused today.

Because the 2018 AHP Rule no longer provides a viable pathway for employer groups or associations to establish AHPs, and the DOL is not aware of any AHPs that currently operate in reliance on the 2018 AHP Rule, we support the DOL's proposal to rescind the rule in its entirety. Removing the ambiguity surrounding the applicability of the standards finalized in the 2018 AHP Rule would allow the DOL to maintain the longstanding AHP framework established through decades of pre-rule guidance.

Requests for Public Comments

In addition to seeking comments from interested parties on all aspects of the agency's proposal to rescind the 2018 AHP Rule, the DOL also seeks feedback on whether the agency should issue additional rulemaking and/or subregulatory guidance related to AHPs.

³ *New York v. United States Department of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019).

Issue #1: The DOL requests feedback on whether it should engage in future rulemaking and/or issue additional guidance to clarify or codify existing AHP pre-rule guidance.

Recommendation: Elevance Health strongly urges the DOL not to issue additional guidance or rulemaking on AHPs, but instead to leave in place the existing pre-rule guidance.

Rationale: ERISA establishes requirements which apply to “employee welfare benefit plans” established or maintained by an employer or an employee organization for the purpose of providing healthcare benefits. ERISA section 3(5) defines “employer” as any person acting directly as an employer, or indirectly in the interest of an employer. This definition includes a group or association of employers acting for an employer in relation to an employee benefit plan.

The interpretation of “employer” is critical to defining “employee welfare benefit plan” because a group or association may establish such a benefit plan only when it is acting as an “employer.” The DOL, through the EBSA, maintains authority for the administration and enforcement of ERISA, including for interpreting the definition of “employer.” Prior to the 2018 AHP Rule, the DOL applied consistent criteria to determine when a group or association of employers is acting “indirectly in the interest of an employer” under ERISA section 3(5) for purposes of establishing an AHP. If a group or association satisfies the criteria, the pre-rule guidance generally refers to these entities as “bona fide” employer groups or associations. Under pre-rule guidance, health coverage sponsored by a bona fide employer group or association may be structured as a single, multiple employer plan covered by ERISA.

The existing regulatory framework for bona fide AHPs includes DOL advisory opinions, U.S. Department of Health and Human Services (HHS) rules, state law, and judicial precedent. Legislators, regulators, and the courts have effectively refined this framework over several decades to strike an appropriate balance between protecting against adverse selection in the Individual and Small Group markets and enabling access to coverage through legitimate associations. Bona fide associations, their employer members, and health insurers substantially rely upon longstanding DOL policy.⁴ Disrupting this policy by issuing new rulemaking or guidance may result in litigation or lead to the enactment of state laws with unintended consequences that could threaten the existing balance and disrupt coverage for small employers.

⁴ The U.S. Supreme Court has previously ruled that an agency must give adequate reasons for its decisions. An agency is free to change its existing policies, “but in explaining its changed position, an agency must be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502

Codifying into regulation the existing collection of DOL advisory opinions and other guidance would be a complicated exercise, which would likely result in gaps and ambiguities, creating confusion for small employers. The pre-rule guidance has been effectively used to identify bona fide associations for decades prior to the 2018 AHP Rule, and maintaining the existing regulatory framework is the best path to ensuring continued certainty for small employers seeking to offer their employees access to affordable coverage through AHPs.

Issue #2: The DOL requests feedback on whether it should engage in future rulemaking to propose revised alternative criteria for multiple employer association-based group health plans.

Recommendation: Elevance Health strongly urges the DOL not to propose alternative criteria for determining if an employer group or association is acting “indirectly in the interest of an employer” under ERISA section 3(5) for purposes of establishing an AHP.

Rationale: We support the goal of expanding access to high-quality, affordable healthcare for small employers; however, employers who utilize AHPs to provide their employees quality, affordable coverage that meets their healthcare needs should be able to continue offering that coverage without disruption. Existing AHPs in compliance with current state and federal laws may comprise a substantial portion of the insurance market in certain states. In a number of states, a large number of employers of varying sizes have chosen to join bona fide associations, to avail themselves of the affordable healthcare coverage offered as one of the benefits of joining the association.

Since 1996, the Public Health Services Act has required bona fide associations to provide their employer members with membership benefits, such as informational seminars, webinars and training, compliance assistance, government relations resources, and insurance benefits for health, life, property, and mortgage. Many existing bona fide associations have had stable membership – and have sponsored group health benefit plans for their members for 30 to 40 years, operating under specific frameworks established through federal and state law and regulation.

Moreover, although large group plans are not required to comply with the coverage requirements and consumer protections under the Affordable Care Act (ACA), many of them do offer the same level of benefits as are offered under Individual and Small Group market plans. In addition, all Large Group plans, including AHPs, are required to comply with many ACA consumer protections including, but not limited to, the following:

- Prohibition of discrimination based on health factor;⁵
- Employer shared responsibility provisions;⁶
- Guaranteed availability;⁷
- Guaranteed renewability;⁸
- Prohibition on retroactive rescission of coverage;⁹
- Maximum waiting period limit;¹⁰
- Dependent coverage to age 26;¹¹
- Prohibition on pre-existing condition exclusions;¹²
- Prohibition on lifetime and annual limits for any covered essential health benefits;¹³
- Internal appeals process; and,¹⁴
- Annual limitation on cost-sharing protections.¹⁵

In addition to the federal AHP subregulatory guidance, an extensive state regulatory infrastructure exists to support bona fide AHPs. Congress clearly intended for states to regulate AHPs as part of the 1982 amendments to ERISA,¹⁶ allowing state insurance departments to exercise broad authority over AHPs, including registration requirements, solvency standards, mandated benefits, marketing standards, required contributions to guaranty funds, and other insurance market rules and oversight authorities. As such, states are well equipped to manage the health and solvency of their markets and they have proven to be best situated to regulate traditional insurance products and association plans within their jurisdiction.

The existing federal pre-rule guidance, coupled with the state AHP regulatory framework ensures adequate oversight of health plans offered to small employers and stability of the existing Small Group market. It has also significantly mitigated the less scrupulous operations that previously existed in the market. Modifying AHP criteria is not only unnecessary; it could

⁵ 45 CFR 147.110

⁶ 26 USC § 4980H (applies to employer groups of 50 or more employees)

⁷ 45 CFR 147.104 (not applicable to self-insured groups)

⁸ 45 CFR 147.106 (not applicable to self-insured groups)

⁹ 45 CFR 147.128

¹⁰ 45 CFR 147.116

¹¹ 45 CFR 147.120

¹² 45 CFR 147.108

¹³ 45 CFR 147.126

¹⁴ 45 CFR 147.136

¹⁵ 42 USC § 300gg-6

¹⁶ ERISA 514(b)(6) was added as part of amendments in 1982 “to protect employee benefit plan participants and beneficiaries by ensuring state regulation” of Multiple Employer Welfare Arrangements (MEWAs), which include AHPs.



also increase the number of uninsured if small employers are no longer able to access affordable coverage through existing AHPs.

We value the partnership that we have developed with the DOL and welcome the opportunity to discuss our recommendations that will help small employers and their employees access affordable high-quality coverage that meets their unique healthcare needs. Should you have any questions or wish to discuss our comments further, please contact Gina Boscarino at (703) 785-3192, or Gina.Boscarino@elevancehealth.com.

Sincerely,

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About Elevance Health, Inc.

Elevance Health is a lifetime, trusted health partner fueled by its purpose to improve the health of humanity. The company supports consumers, families, and communities across the entire care journey – connecting them to the care, support, and resources they need to lead healthier lives. Elevance Health’s companies serve more than 115 million people through a diverse portfolio of industry-leading medical, digital, pharmacy, behavioral, clinical, and complex care solutions. For more information, please visit www.elevancehealth.com or follow us @ElevanceHealth on Twitter and Elevance Health on LinkedIn.