Center on Budget and Policy Priorities

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February 20, 2024

To: Employee Benefits Security Administration, Department of Labor

RE: Definition of "Employer" — Association Health Plans, RIN 1210–AC16

To Whom it May Concern:

The Center on Budget and Policy Priorities (CBPP) is a nonpartisan research and policy organization based in Washington, D.C. Founded in 1981, the Center conducts research and analysis to inform public debates and policymakers about a range of budget, tax and programmatic issues affecting individuals and families with low or moderate incomes. We appreciate the opportunity to comment on the proposed rule.

We strongly support finalizing the proposed rule, which would rescind the 2018 association health plan (AHP) rule. We opposed the 2018 rule because of the impact it would have had on people, small businesses, and states' ability to protect their residents and insurance markets from harm. Thankfully, the U.S. District Court ruling in *New York v. United States Department of Labor* struck down the 2018 rule and the Department of Labor, as noted in the proposed rule, is not aware of any AHPs in operation that rely on its provisions. Rescinding the rule promptly is the right next step.

The 2018 rule lowered the bar for forming an AHP, thus expanding the opportunity for bad-actor or financially irresponsible AHPs to replay a history of fraud, abuse, and financial mismanagement that leaves individuals and health care providers with unpaid claims. The 2018 rule also exempted AHPs from many standards and consumer protections that would apply if the coverage were offered in the traditional insurance markets that serve individuals and small groups. While the 2018 rule included provisions intended to protect people from discrimination based on health status, it would have permitted AHPs ample room to structure eligibility rules, benefit designs, rating rules, and marketing practices in ways that encourage enrollment by healthier individuals and groups while discouraging less healthy people and groups from participating. In addition, allowing weaker standards to apply to small businesses and individual "working owners" enrolling in an AHP would segment insurance markets, resulting in higher premiums for Affordable Care Act (ACA)-compliant plans compared to those in the small-group and individual markets.[1] As with pre-ACA market practices, individuals and small groups could find themselves at a disadvantage if they have chronic health conditions, are female, are older, or work in jobs or live in neighborhoods deemed high risk or high cost.

[1]American Academy of Actuaries, "Considerations Related to Modeling the Potential Impact of Association Health Plans," letter to EBSA, February 9, 2018.

We agree with the preamble of this proposed rule that key elements of the 2018 AHP rule — the business purpose standard and its viability safe harbor, the geography-based commonality standards, and the working owner provision — do not align with the best reading of the text and statutory purpose of the Employee Retirement Income Security Act of 1974 (ERISA). The 2018 rule fails to ensure the genuine employment relationship needed to sponsor an AHP.

Since ERISA was enacted, it has been widely understood that an association does not act "in the interest of an employer" if the association is formed principally for the purpose of selling health insurance.[2] The provisions of the 2018 rule would allow an association to be based on member employers' line of business or trade, or on geography regardless of industry. This test is so broad that employers with no common interest could offer an AHP, making these entities indistinguishable from commercial insurance arrangements. We agree that geography is not a sufficient standard to establish a commonality of interest, and the 2018 rule didn't articulate why it should or could be. Offering an association plan to individuals and small businesses in a given geographic area is very much like offering commercial insurance, with the main difference envisioned by the 2018 rule being the absence of protective insurance market rules commercial insurance is required to provide.

The 2018 rule also allowed self-employed individuals without any common law employees to participate in AHPs as "working owners," meaning they would be considered as participating in an employer-employee relationship even though they were neither employer nor employee. We agree with the District Court ruling in *New York v. United States Department of Labor* that the working owner provision is contrary to ERISA and the Administrative Procedure Act. In addition to the legal considerations, there are strong policy reasons to rescind the working owner provision. The ACA provided numerous special protections to individuals enrolling in individual market coverage. Pretending that they are employers and/or employees and part of a large group plan deprives them of many of these protections, as noted, and places them outside of the ACA's single risk pool requirement and risk adjustment program — segmenting insurance markets and raising the risk that self-employed individuals will face gaps in benefits or higher costs if they get sick.

Looking ahead, we recommend that after this proposed rule is finalized, future federal regulations should be developed to provide additional clarity about the standards for AHPs. Regulations should codify the "look through" requirement, clarify that AHPs and employer members are subject to the administrative requirements of Title I (including those related to claims and appeals, Summary Plan Descriptions, and other notices), clarify that AHPs are regulated by both DOL and the states where the employer members are located, and expand on non-discrimination requirements. The federal government and states should vigorously enforce the look through requirement and ensure that plans offered to individuals, small businesses, and large employers are satisfying the respective standards and consumer protections for each market. And the standardized disclosures tied to Multiple Employer Welfare Arrangement benefits should be updated. None of these important changes, however, should delay the Department's rescission of the 2018 rule.

Sincerely,

Claire Heyison, Senior Policy Analyst

Sarah Lueck, Vice President for Health Policy

[2] U.S. Department of Labor, Opinion 80-42A, July 11, 1980, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/1980-42a.pdf