

## **Washington Health Benefit Exchange Comments: Proposed Recission of 2018 Federal Rule – Definition of Employer – Association Health Plans Under Section 3(5) of the Employee Retirement Income Security Act of 1974**

The Washington State Health Benefit Exchange (Washington or the Exchange) submits comments about the proposed recission of the 2018 rule entitled “Definition of Employer—Association Health Plans,” published by the United States Department of Labor (DOL).

The Exchange strongly supports the proposed recission of the 2018 Association Health Plan (AHP) rule. When the 2018 AHP rule was proposed, the Exchange shared concerns with DOL that the proposed changes were likely to harm consumers in regulated health insurance markets by segmenting risk and destabilizing the individual and small group markets.

The 2018 AHP rule established an alternative set of criteria for determining when a group or association of employers is acting “indirectly in the interest of an employer” under section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA) for purposes of establishing an AHP as a multiple employer group plan. Though the impact of the 2018 rule was limited by the US District Court for the District of Columbia, which set aside the alternative criteria in *New York v. United States Department of Labor*, the Exchange believes rescinding this rule will reduce any remaining uncertainty regarding the standards that were set under the 2018 rule.

As the Exchange noted in its comment on the 2018 AHP proposed rule, AHPs are not subject to essential health benefit requirements or to the rating rules that apply in small group and individual markets. Thus, they can use benefit design and association eligibility rules to “cherry pick” healthier individuals. Healthy individuals will have an incentive to take AHP coverage since it will be less expensive and provide narrower benefits than individual market coverage, endangering individual market stability as the risk pool becomes less healthy.

The Exchange also opposed the provisions in the 2018 rule related to “working owners,” the purpose test, and the commonality of interest test, all of which served to loosen regulations on AHPs to the detriment of individual and small group market stability.

- The “working owner” provisions in the rule would have allowed self-employed individuals to access AHP coverage based solely on self-attestation that they are “working owners.” This would have opened the door to fraud and abuse that would further destabilize the individual market through further risk-segmentation.
- The change to the purpose test would have allowed employer associations to exist solely for the purpose of offering an AHP, eliminating a necessary safeguard that ensures associations are bona fide employer organizations created for the purpose of providing real benefits to members.
- The change to the commonality of interest test would have allowed employers in the same geographic area to offer an AHP to their members without any requirement that the employers are in the same trade, industry, or line of business. There is no assurance that a geographic-based association will represent the interest of employers. Further, the formation of AHPs based solely

on geography is likely to exacerbate risk segmentation to the detriment of non-AHP markets. The Exchange was also concerned about the regulatory challenges associated with allowing AHPs to be offered across state lines; AHPs should comply with the insurance rules of all states in which they are offered.

Finally, the Exchange encourages DOL to continue to preserve the federal safeguards that have become a central feature of the regulated health insurance markets and continue to be circumspect about making federal changes that will undermine stability in those markets.