



Susan Asmus
Senior Vice President, Regulatory Affairs
SAsmus@nahb.org

February 20, 2024

Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW Washington, DC 20210

RE: Comments on the Definition of “Employer”-Association Health Plans Notice of Proposed Rulemaking (Docket No. EBSA-2023-0020)

Dear Assistant Secretary Gomez:

On behalf of the more than 140,000 members of the National Association of Home Builders of the United States (“NAHB”), I am pleased to submit the following comments in response to the Department of Labor’s (DOL or the Department) Notice of Proposed Rulemaking (NPRM) to rescind the 2018 final rule entitled *Definition of Employer – Association Health Plans*.¹ As this rulemaking may impact NAHB’s affiliated state or local home building associations that provide health coverage through association health plans (AHPs), NAHB urges the agency to consider the following recommendations as it proceeds through the rulemaking process.

NAHB is a Washington, D.C.-based trade association whose members are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB is affiliated with more than 600 state and local home builders’ associations around the country. Several of these associations offer AHPs.

I. Background

Under the previous administration, DOL issued a final rulemaking in 2018 that established additional criteria under section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA) for determining when employers may join together in a group or association of employers that will be treated as the “employer” sponsor of a single multiple-employer “employee welfare benefit plan” and “group health plan.”² Specifically, the rule revised the “commonality of interest” test, with the ultimate goal to remove restrictions on the establishment and maintenance of AHPs under ERISA. Further, the rulemaking expanded coverage to allow certain working owners of an incorporated or unincorporated trade or business to qualify as employers for the purposes of participating in a bona fide group or association of employers sponsoring an AHP.³

¹ 88 Fed. Reg. 87,968 (Dec. 20, 2023).

² 83 Fed. Reg. 28,912 (June 21, 2018).

³ *Id.*

Employee Benefits Security Administration

National Association of Home Builders (NAHB) *Comments on Notice of Proposed Rulemaking: Docket No. EBSA-2023-0020 – Definition of “Employer”- Association Health Plans (RIN 1210-AC16)*

Page 2

NAHB commended the Department when the 2018 rule was first proposed for better enabling associations to provide affordable quality health benefits to their members and providing a regulatory framework for treating AHPs as large group health coverage for purposes of federal and state health care laws.⁴ NAHB was supportive because associations, such as NAHB, are uniquely suited to provide comprehensive, affordable health care for their members through a single large group health plan by leveraging economies of scale and administrative efficiency.

At the same time, NAHB expressed concerns over certain aspects of the 2018 proposal, namely the expanded definition of a “bona fide” association and the commonality of interest test that allowed the formation of a bona fide association simply based on geographic location. Additionally, NAHB communicated its mixed reaction regarding the agency’s proposed expansion of coverage under an AHP to working owners. NAHB supported this expansion but acknowledged the need to change the way in which the term “working owner” would be defined in the final rulemaking, among other issues.

Shortly following its issuance, the final rule was challenged in Federal district court, where 11 states and the District of Columbia argued the rule violated the Administrative Procedure Act. In March 2019, the U.S. District Court for the District of Columbia ruled against DOL, vacating the provisions concerning the revised commonality test and the expanded coverage to working owners without employees.⁵

With the issuance of this latest NPRM, DOL intends to rescind the 2018 rule in its entirety and return to the pre-rule guidance. While DOL considered revising the 2018 rule to remove the provisions that were vacated by the District Court, the Department argues the rule could not be applied in any meaningful way without those provisions and, according to DOL, there are no AHPs that currently exist that rely on the 2018 rule to remain in place.⁶

II. NAHB’s Response to the 2023 Proposed Rulemaking

Despite concerns with the 2018 rule, NAHB supported its intent to expand affordable health care coverage through AHPs. Even though the District Court’s decision may be viewed as a setback, DOL must continue to reduce the barriers to coverage and NAHB believes it can look to elements of the 2018 rule to achieve that goal.

A. DOL Should Reconsider Access to Working Owners

Like other workers, working owners need coverage. To do so, the Department should consider expanding coverage under an AHP to working owners. NAHB recommends defining “working owner” in a way that eliminates the requirement from the 2018 rule that the individual must not be eligible for other subsidized group health plan coverage under a group health plan sponsored by any other employer of the individual or the spouse’s employer. This requirement unfairly penalized working owners and their spouses who have access to other employer sponsored health care and was also administratively cumbersome for AHPs to monitor. Further, coverage through a spouse’s or other employer’s health plan may not be the most

⁴ <https://www.regulations.gov/comment/EBSA-2018-0001-0407>.

⁵ 88 Fed. Reg. at 87,971.

⁶ 88 Fed. Reg. at 87,972.

Employee Benefits Security Administration

National Association of Home Builders (NAHB) *Comments on Notice of Proposed Rulemaking: Docket No. EBSA-2023-0020 – Definition of “Employer”- Association Health Plans (RIN 1210-AC16)*

Page 3

affordable or appropriate option for a working owner and his or her family and may cause undue hardship to an individual who is unnecessarily precluded from electing preferable AHP coverage on this basis.

In addition, the definition of a "working owner" should allow interns and apprentices of trades, such as the building trades, to qualify for health coverage under an AHP sponsored by an association of which they are members. Participation criteria could be based on hours worked performing services for a trade even if such individuals are not working a full-time schedule or paid for their work.

Finally, NAHB supports the provision from the 2018 rule that would permit a group or association sponsoring an AHP to reasonably rely on a written representation from an individual that he or she meets the eligibility criteria for participation in the AHP as a working owner. A written representation will greatly relieve the administrative burden on the plan sponsor to request proof and verify eligibility and is consistent with other forms of written representations used in concert with group health plan administration.

B. Any Additional Changes Must Go Through Substantial Public Feedback Gathering Efforts

Should the Department proceed with a complete rescission of the 2018 rulemaking, NAHB strongly recommends DOL simply return to the policies under the pre-rule guidance. Considering some state and local home building associations offer coverage through AHPs, DOL should not use this rulemaking to implement additional changes that could negatively affect these existing bona fide plans. Any changes under Section 3(5) of ERISA that have no grounding in the 2018 rule, such as the revised definitions of “working owner,” and/or veers from the pre-rule guidance must be the result of meaningful public engagement and feedback efforts, along with a notice and comment period.

C. Other Issues That Should be Addressed in Future Rulemakings or Agency Guidance

The collection and analysis of additional feedback is a necessary component of any future work concerning AHPs and any potential substantive changes to section 3(5) of ERISA outside of the proposed rescission. NAHB recommends the agency consider the following provisions as part of any future rulemaking or effort to implement these policies in subregulatory guidance.

First, NAHB supports broad ERISA preemption of state insurance laws as they may apply to AHPs. Subjecting AHPs to the myriad of state insurance laws will significantly hamper their adoption by legitimate associations. The organizational structure, participation and governance requirements applicable to AHPs, in connection with the additional requirements for sponsorship by, or affiliation with, bona fide associations or groups of associations discussed in these comments, will put AHPs on the same strong structural and financial footing as single employer plans which enjoy broad ERISA preemption.

Second, NAHB believes it is important for the Department to introduce a safe harbor to clarify that an employer's participation in an AHP with other unrelated employers may not be used as indicia of joint employment status for purposes of other sections of ERISA, such as Section 510, or other federal or state labor laws, or common law. The independent nature of small businesses and working owners must be preserved. The final rules should also clarify that the sponsor of the AHP cannot be sued as an "employer" under Section 510 of ERISA and should be treated as an "employer" solely for purposes of Section 3(5) to enable an AHP to be treated as a large group health plan.

Employee Benefits Security Administration

National Association of Home Builders (NAHB) *Comments on Notice of Proposed Rulemaking: Docket No. EBSA-2023-0020 – Definition of “Employer”- Association Health Plans (RIN 1210-AC16)*

Page 4

III. Conclusion

The agency has an opportunity to carry on the intent of the 2018 rule in expanding access to health care coverage, and now within the context of the District Court decision striking down key elements of the rule. NAHB believes that AHPs, if properly structured, will result in lower costs and provide greater access to comprehensive health care for small employers and individuals through membership in an association, and NAHB welcomes the opportunity to collaborate with the agency to find sensible solutions that streamline the procedures and remove or reduce barriers to accessing high-quality, affordable health care.

Sincerely,



Susan Asmus

Senior Vice President, Regulatory Affairs
National Association of Home Builders
of the United States