



February 20, 2024

The Honorable Julie Su, Acting Secretary
Department of Labor
Employee Benefits Security Administration
Room N-5655
200 Independence Avenue NW
Washington, DC 20201

Submitted electronically via www.regulations.gov

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

Dear Secretary Su:

Kaiser Permanente appreciates the opportunity to provide comments to the Department of Labor in response to the Proposed Rule referenced above.¹ Kaiser Permanente is the largest private integrated health care delivery system in the United States, delivering health care to over 12.6 million members in eight states and the District of Columbia.² Our mission is to provide high-quality, affordable health care services and to improve the health of our members and the communities we serve.

Proposal to Rescind 2018 Association Health Plans (AHP) Rule

The Department proposes to rescind in full the 2018 rule entitled “Definition of Employer – Association Health Plans” (the “2018 AHP Rule”)³ in order to resolve and mitigate uncertainty regarding the status of the standards that were set under that rule, allow for a reexamination of the criteria for a group or association to be able to sponsor an AHP, and ensure that guidance being provided to the regulated community is in alignment with the text, purposes and policies under the Employee Retirement Income Security Act (ERISA). For reasons discussed below, Kaiser Permanente strongly supports the Department’s proposal.

Kaiser Permanente believes that all people – healthy or sick and regardless of employment status – should have access to high-quality, affordable health care. This belief is central to the intent of the Affordable Care Act (ACA), which established the regulatory framework for healthy, robust and competitive insurance markets through which individuals and small groups could obtain coverage that is comprehensive while remaining affordable. To balance these key factors – comprehensiveness and affordability – the ACA established rules that ensure coverage options

¹ 88 Fed. Reg. 87968 (Dec. 20, 2023).

² Kaiser Permanente comprises Kaiser Foundation Health Plan, Inc., one of the nation’s largest not-for-profit health plans, and its health plan subsidiaries outside California and Hawaii; the not-for-profit Kaiser Foundation Hospitals, which operates 40 hospitals and over 600 other clinical facilities; and the Permanente Medical Groups, self-governed physician group practices that exclusively contract with Kaiser Foundation Health Plan and its health plan subsidiaries to meet the health needs of Kaiser Permanente’s members.

³ 83 Fed. Reg. 28912 (June 21, 2018).

operate on a level playing field, with consistent enrollment opportunities, benefits and community-rated premiums across health plans and geographic markets, so that risk pools remain balanced.

While Kaiser Permanente believes there can be different pathways to accessing health insurance, we are concerned that alternative coverage arrangements, such as AHPs, are being increasingly marketed as a way for small groups to circumvent the ACA requirements by banding together and enrolling in medically underwritten large group coverage. Such coverage is not required to cover the 10 essential health benefits, can use age and health status to establish premiums, and does not participate in a risk adjustment program. As a result, these plans are often able to offer groups lower premiums, but at a significant downstream cost – as the Department acknowledges in the preamble to the Proposed Rule, these alternative arrangements have a history of leaving consumers without access to care or financially exposed due to unpaid medical claims.⁴

Furthermore, alternative coverage arrangements like AHPs destabilize and increase costs for the small group markets. Because these plans are medically underwritten and use health status rating, they are especially attractive to groups with lower risk enrollees. As healthier enrollees are siphoned from the fully insured market pools, the fully insured pools become overall higher risk and more costly on a per-member basis. Based on our experience in several markets where Kaiser Permanente operates, the fully insured small group markets have become very unstable as more and more agents convince small employers to join alternative coverage arrangements, which in turn contributing to rising premiums for fully insured small group coverage.

Given the threat these alternative coverage arrangements pose to stable health insurance markets, we appreciate the Department’s commitment to establishing a clear regulatory framework for AHPs and we strongly support the proposal to rescind the 2018 AHP Rule in its entirety. Although the 2018 AHP Rule was vacated by a federal court in 2019,⁵ the rule would have significantly expanded access to AHPs by loosening the business purpose standard, permitting geographic proximity to satisfy the commonality of interest standard, and allowing working owners (such as sole proprietors) to join AHPs, serving as both the “employee” and “employer” under ERISA definitions. We raised concerns with these changes when proposed⁶ and we continue to believe broadening access to AHPs is not good public policy because these arrangements typically provide relatively less comprehensive coverage without critical consumer protections and make the ACA insurance markets less competitive.

Requests for Public Comments

The Department also requests comments on whether it should conduct additional rulemaking or issue additional guidance. We support the Department conducting additional rulemaking to codify existing core principles from sub-regulatory guidance into regulation to streamline accessing and citing to applicable rules. We also encourage the Department to consider new policies that would strengthen enforcement of existing rules and make determinations of whether a group or association is “bone fide” more transparent.

⁴ See, e.g., 88 Fed. Reg. at 87973.

⁵ *New York v. U.S. Dep’t of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019).

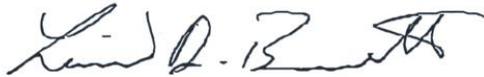
⁶ See KP Comments on 2018 AHP Proposed Rule (March 6, 2018), available at <https://www.regulations.gov/comment/EBSA-2018-0001-0674>.

Finally, we support the Department collaborating with the Department of Health and Human Services to consider additional restrictions on alternative coverage arrangements that undermine and threaten the progress made under the ACA – particularly for the fully insured small group markets – including AHPs, professional employer organizations and level-funding arrangements.⁷ We encourage the Department to consider the following policies specific to AHPs: (1) stronger enforcement mechanisms to ensure existing standards for establishing bona fide associations are uniformly applied; (2) more robust verification standards for association membership (e.g., proof of solvency or minimum duration of incorporation); (3) consumer notification requirements for AHP coverage lacking access to ACA protections (similar to the notices required for short-term, limited-duration insurance coverage); and (4) mandatory and transparent enrollment and financial performance reporting requirements.

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Kaiser Permanente supports proposals like this Proposed Rule that foster a more stable, predictable and affordable health insurance market for small employers, their employees and dependents. We appreciate the Department’s consideration of our comments. Please contact me at Laird.Burnett@kp.org or Jessica Fjerstad at Jessica.L.Fjerstad@kp.org if we may provide additional information or answer any questions.

Sincerely,



Laird D. Burnett
Vice President
Government Relations

⁷ For Kaiser Permanente’s perspective on level-funding arrangements, see KP Comments on Short-term, Limited-Duration Insurance Proposed Rule (Sept. 11, 2023), available at <https://www.regulations.gov/comment/CMS-2023-0116-12749>.