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February 20, 2024

The Honorable Lisa Gomez
Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

**RE: Definition of “Employer” – Association Health Plans (RIN 1210–AC16) –
AHIP Comments**

Dear Assistant Secretary Gomez:

AHIP appreciates the opportunity to provide comments in response to the Notice of Proposed Rulemaking (NPRM) from the Department of Labor (DOL) entitled “Definition of Employer-Association Health Plans” published December 20, 2023 in the *Federal Register*. AHIP is the national association whose members provide health care coverage, services, and solutions to hundreds of millions of Americans every day.

We appreciate DOL revisiting the regulatory treatment of Association Health Plans (AHPs), which provide an opportunity for many small businesses to offer affordable health coverage to their employees. When administered by licensed health insurers and third-party administrators in a regulated market, AHPs can be a viable option for small businesses to offer health benefits and for consumers to enroll in comprehensive health insurance coverage. The “Pathway 1” option that existed for AHPs prior to the 2018 Final Rule fosters such a regulatory environment. Many AHIP members offer AHP coverage to *bona fide* associations under Pathway 1 rules, which empower small businesses to access affordable health coverage with strong consumer protections. **AHIP supports the proposed regulatory change to rescind the 2018 AHP Final Rule and preserve pre-2018 guidance for Pathway 1 AHPs.**

Pathway 1 AHPs operate under longstanding guidance that has been consistently applied to determine whether an association of employers may enroll in a multi-employer welfare arrangement (MEWA) that meets the requirements of an AHP. Prior to 2018, DOL had clearly established through guidance and affirmed through litigation a three-part test for whether a group of employers constituted a *bona fide* association:

The Department had three criteria that had to be met for a group or association of employers to be considered a single employer group, evaluated through a “facts and circumstances” analysis:

- *Business purpose standard*: Whether the group or association has purposes and functions unrelated to the provision of health benefits.

- *Commonality of interest standard*: Whether the employers share common interests or a genuine organizational relationship separate from the provision of health benefits.
- *Control standard*: Whether the employers exercise control over the group health plan, both in form and substance.

These criteria, which effectively enabled associations to establish a Pathway 1 AHP, struck an appropriate balance of facilitating access to health benefits through associations while ensuring AHPs did not become a loophole through which consumer protections and market regulations could be avoided. AHIP agrees with the Department's interpretation that rescinding the 2018 Final Rule and returning to these standards for AHPs fosters a sufficient employer-employee nexus and proper regulatory oversight by states, while remaining consistent with both ERISA and the Affordable Care Act.

In contrast, the 2018 Final Rule, which effectively created "Pathway 2" AHPs, likely would have eroded those protections by extending the definition of "employer" to include "working owners," expanding the list of eligible participants to include former employees and extended family members, applying a broad "commonality of interest" test to determine association membership, deteriorating the definition of "*bona fide* association" by allowing associations to form with the sole purpose of offering health coverage, and failing to apply uniform market requirements. AHIP expressed concern about many aspects of the AHP rule as proposed in 2017 to create a "Pathway 2," given the effect these plans could have had on the stability of health insurance markets nationwide and what potentially increased costs and reduced consumer protections could mean for consumers. As a result of a 2019 U.S. District Court decision, Pathway 2 AHPs had little opportunity to exist and therefore there is little real-world evidence of the effect Pathway 2 AHPs had on the market. We agree with the reasoning of the court in *New York v. United States Department of Labor*, CV 18-1714 (D.D.C. Mar. 28, 2019), which effectively prohibited adoption of Pathway 2 AHPs while allowing for Pathway 1 AHPs to continue.

AHIP shares the goals of expanding access and increasing competition and choice in health care, as well as providing more affordable coverage options for all Americans. Small businesses in particular need more options to enroll their workforce in affordable, comprehensive health coverage, and we support market-based policy solutions to achieve that. However, we believe that Pathway 2 AHPs are the wrong way to achieve these goals due to the risks of fraud and insolvency they pose to consumers. The 2018 Final Rule also established a different set of rules for different market actors, creating an "uneven playing field" that would encourage market fragmentation and adverse selection, undermining DOL's objectives and making it more difficult to offer coverage that appeals to those with greater health needs in the individual and small group markets. Given the ongoing vacatur of key provisions of the 2018 Final Rule, rescinding those regulations would effectively codify the status quo. AHIP therefore supports rescinding the 2018 Final Rule.

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Rescinding the 2018 Final Rule and maintaining the status quo means regulated AHPs will continue to be a viable option for many employers participating in an association. The employees and plan beneficiaries of those employers deserve clear consumer protections when they enroll in coverage through a group health plan. We believe the existing regulations and sub-regulatory guidance are clear, adequate, and protect consumers through robust state oversight. AHIP therefore urges the Department to retain existing regulations and sub-regulatory guidance that protect consumers who enroll in health insurance coverage through an AHP.

AHIP supports the proposal to remove and reserve 29 CFR 2510.3-5. This will protect existing market stability for insurance markets, maintain consumer protections, and ensure small businesses continue to have the option of enrolling in coverage through Association Health Plans.

Sincerely,



Adam Beck
Senior Vice President
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