



February 20, 2024

The Honorable Julie A. Su
Acting Secretary of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Submitted electronically via <http://www.regulations.gov>

Re: Proposed Rule: RIN 1210-AC16

Dear Secretary Su:

The Pennsylvania Insurance Department (the Department) appreciates the opportunity to submit these comments on the notice of proposed rulemaking titled “Definition of ‘Employer’ – Association Health Plans”, RIN 1210-AC16, 88 Fed.Reg. 87968 (December 20, 2023) (the 2023 Proposed AHP Rule).

The Department is pleased that the Department of Labor (DOL) is proposing to rescind the 2018 Association Health Plan (AHP) Rule¹. The 2018 AHP Rule, had it been fully implemented, could have permitted untold harm on consumers. As explained in our comments to the 2018 Proposed AHP Rule², because of solvency issues and the potential for consumer harm, Pennsylvania prohibits most self-funded Multiple Employer Welfare Arrangements (MEWAs). If a group of employers were to join together to self-fund the health care coverage without first securing a license, it would be considered unlicensed insurance activity and a violation of state law.³ This regulatory approach is for the benefit of the employees who would purportedly be covered by the self-funded scheme.

The Department has found that self-funded MEWAs have a history of fraud, abuse, and mismanagement. In the past, MEWA organizers have raised insufficient funds through employer contributions to pay claims and gone insolvent, without guaranty fund protection. This leaves covered employees unable to pay for healthcare services they received and leaves medical providers scrambling to collect payment. Whether these outcomes

¹ The 2018 AHP Rule was entitled “Definition of ‘Employer’ Under Section 3(5) of ERISA – Association Health Plans” and published at 83 Fed.Reg. 28912 (June 21, 2018). As proposed, it was published at 83 Fed.Reg. 614 (January 5, 2018) (the 2018 Proposed AHP Rule).

² Comment 551 Pennsylvania Insurance Department Altman 03062018 (Comment ID: EBSA-2018-0001-0542, Tracking No. 1k2-91v7-p7kt) (March 6, 2018) (PID 2018 Comment Letter).

³ See 40 P.S. §§ 46, 47.

are caused by a lack of expertise in managing health care coverage risk, inexpert mismanagement of funds, or intentional actions, the result is the same.

Because of those concerns, Pennsylvania requires any coverage offered through an association to be fully-insured. A fully-insured plan is offered by a licensed insurance company that is subject to regulatory oversight by the State, including oversight of financial solvency; management practices; and marketing, coverage, rating, and claims handling compliance. Moreover, there is guaranty fund protection if the company were to fail.

The Department encourages DOL to clearly articulate that states retain full authority to establish and enforce solvency standards for all MEWAs and comprehensive licensure requirements for non-fully insured MEWAs, including the authority to prohibit non-fully insured MEWAs altogether. This will allow for a better understanding of the regulatory framework overseeing MEWAs for all stakeholders. We also encourage the DOL to affirm that states retain full authority under ERISA's saving clause to regulate the terms of the insurance coverage that may be offered to fully-insured MEWAs.

In sum, the Department would welcome the rescission of the 2018 AHP Rule.

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In addition to seeking comment on whether the DOL should rescind the 2018 AHP Rule, the DOL requests comments on "whether the [DOL] should propose a rule for group health plans that codifies and replaces the pre-rule guidance, issue additional guidance ... propose revised alternative criteria... or pursue some combination of those or other alternative steps." 88 Fed.Reg. at 87978. The DOL also seeks input "regarding whether [States] see potential federalism implications that might arise from rescission of the 2018 AHP Rule." 88 Fed.Reg. at 87981.

Based on the Department's experience with associations, as explained in the PID 2018 Comment Letter cited above, as well as negotiations the Department has had since then with Pennsylvania stakeholders in a legislative context, the Department sees potential merit in additional federal regulatory guidance to provide a regulatory floor for the protection of consumers.

In the Department's discussions with Pennsylvania legislators and advocates for associations of small employers, the discussions have focused on an effort to find a solution that would permit small employers to reap the benefits of a large group, without discriminating among employers or employees. At the same time, the Department has sought in those discussions to assure that the covered individuals receive the robust coverage they would receive if they were to procure coverage in the individual market or if their employer were to procure coverage in the small group market. This alignment should mitigate against adverse selection, and also provide that if an individual or small business were to leave the AHP, the benefits the individual or employees would get in any other fully-insured arrangement, i.e., in the individual or small group market, would be comparable.

With that background, if the DOL pursues additional regulatory guidance, the Department urges the federal agencies to assure that an association that offers an AHP should exist for reasons other than offering insurance. For example, Pennsylvania has statutory criteria that an association must demonstrate before it is considered bona fide and eligible to offer coverage.⁴

⁴ 40 P.S. § 756.2(a)(2) (criteria for in-state associations; § 756.2(f)(3) (criteria for out-of-state associations).

In addition to criteria like those in Pennsylvania law, there should be a commonality of interest requirement that ties member employers together for business reasons other than health care coverage, and eligibility should be legitimately employment-based. Associations should not be permitted that “masquerad[e] as bona fide employer groups or associations merely to promote the commercial sale of insurance.” 88 Fed. Reg. at 87973. In the Department’s experience, these types of associations tend to (misleadingly) offer a collection of limited benefit policies and discounts, possibly a self-funded package, that do not add up to comprehensive ACA-compliant coverage. AHPs should be limited to legitimate business associations, with purposes primarily related to the common business interests of its members.

Moreover, any regulations should protect consumers against discrimination, in eligibility for an association and for its AHP, and in the benefits and rating of the coverage. Coverage should be guaranteed issue and guaranteed renewable, should provide comprehensive coverage, have an actuarial value that at least satisfies the ACA’s minimum value criteria, and comply with rating and premium requirements that do not discriminate among employer members of the association or among employees of those members. We urge DOL to consider requiring an AHP to be fully-insured and compliant with the small group market eligibility and coverage requirements.

Finally, in response to the request for input on the potential federalism concern, *see* 88 Fed.Reg. at 87981. The Department urges DOL and the Department of Health and Human Services, Center for Medicare & Medicaid Services (HHS/CMS) to recognize that states may have different solutions for their markets, and to avoid mandating approaches that might stymie a state from implementing a framework that robustly protects consumers while benefitting the states’ employers and markets. For example, if a state were to enact a law that explicitly requires that AHPs must provide small group eligibility and coverage protections, including essential health benefits, and the state law couples those requirements with large group efficiencies, such as a single risk pool for rating purposes, there may be federalism concerns if a future DOL and HHS/CMS regulatory approach would prevent implementation of that state law.

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In sum, the Department welcomes the repeal of the 2018 AHP Rule and encourages DOL and HHS/CMS to work together to facilitate AHPs that, if a state so chooses, would provide fully-insured coverage that is reasonably and predictably priced, with robust and non-discriminatory coverage of employer groups and their employees or their dependents.

Sincerely,



Michael Humphreys
Commissioner