

February 20, 2024

**Submitted Electronically Via Federal Rulemaking Portal: [www.regulations.gov](http://www.regulations.gov)**

Attention: Proposed Rescission of AHP Final Rule RIN 1210-AC16  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

***RE: Definition of “Employer” Under Section 3(5) of ERISA – Association Health Plans***

To Whom It May Concern:

The U.S. Chamber of Commerce (the “Chamber”) submits these comments to the Department of Labor (“DOL” and “the Department”) in response to the notice of proposed rulemaking (“NPRM”) which proposes to:

- Rescind in full the DOL’s 2018 rule entitled “Definition of Employer - Association Health Plans” (“2018 AHP Rule”);
- Reexamine the criteria for a group or association of employers 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 of the Employee Retirement Income Security Act of 1974 (“ERISA”).<sup>1</sup>

While the Chamber supported the issuance and defended the legality of the 2018 AHP Rule, we recognize that formally rescinding the 2018 Rule now merely clears away the regulatory remains of a no-longer viable alternative pathway which has long ceased to be an option for associations, employers and employees. Given the district court’s unfavorable decision, the Department’s request in 2021 to stay the appeal, and the court of appeals’ action to hold the case in abeyance, the Chamber is not surprised that the Biden Administration’s is proposing to rescind the 2018 AHP Rule at this time.

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<sup>1</sup> Proposed Rule, 88 Fed. Reg. 87,968 – 87,981 (December 20, 2023) (to be codified at 29 C.F.R. pt. 2510) [hereinafter referred to as the “Proposed Rule”]  
<https://www.govinfo.gov/content/pkg/FR-2023-12-20/pdf/2023-27510.pdf>

The Chamber strongly supports the employer-sponsored insurance coverage as the backbone of our country's healthcare system where over 150 million Americans obtain health coverage that individuals highly value and that employers want and benefit from offering. We have long advocated in favor of policies that allow more individuals to access health care coverage through this framework. We encourage policy makers to explore solutions to facilitate the ability of small businesses to offer affordable health coverage. Further, the Chamber strongly agrees with the Department's frequent references to the validity and legality of the historical guidance prior to the 2018 AHP Rule ("pre-rule guidance") which recognizes that a group or association of employers may sponsor a single "multiple employer" plan if certain criteria are met.<sup>2</sup> We urge the Department to preserve this coverage option and not take any further action which could inadvertently or intentionally disrupt the health coverage it allows.

### **The Value of Employer-Sponsored Coverage**

The Chamber supports opportunities for employers to provide coverage to their employees. The historical guidance issued prior to the 2018 AHP Rule has allowed more employers, employees, and dependents to access coverage through a group market health plan. Data show that employees highly value the health coverage they receive from their employers, and employers have a vested interest in supporting the health and welfare of employees and their families.

A survey conducted by Seven Letter Insight indicates consumer perceptions of and satisfaction with employer provided health coverage are exceedingly favorable<sup>3</sup>:

- Strong majorities believe that employer provided health care plans are extremely important and cite their health plan as the most important benefit provided by their employer.
  - 93% were satisfied with their employer sponsored coverage.
  - 94% agree that the health coverage from (their) employer gives (them) peace of mind.
- An overwhelming majority view their employer provided health care plan as "affordable," "convenient" and "worth what they pay for it."
- Respondents believe their employer provided health coverage is simpler, more affordable, and higher quality than plans they could find on the open markets or government provided coverage plans.

Not only do employees highly value employer-sponsored insurance, but businesses also see a value in providing coverage as well. By offering health coverage, businesses benefit with:

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<sup>2</sup> Proposed Rule, 88 Fed. Reg. at 87,969.

<sup>3</sup> <https://www.uschamber.com/assets/documents/Final-PACT-Public-Opinion-Survey.pdf>

- Reductions in direct medical costs,
- Improved productivity,
- Enhanced recruitment
- Greater retention, and
- Lower costs related to short- and long-term disability.

In 2023, employer-sponsored benefits were estimated to account for a return on investment of 47%; for every dollar invested in employer-sponsored coverage, business sees a benefit of \$1.47 in these measures. These benefits for employers are projected to continue to steadily increase to 52% in 2026.<sup>4</sup>

### **Reduce Barriers to Coverage for Small Businesses**

We also encourage federal policymakers to seek other ways to increase the affordability of small group coverage. In a 2023 survey commissioned by the National Federation of Independent Business (NFIB), results reveal that only 56% of small businesses with employees provide health insurance to their staff, while 44% do not. A significant disparity emerges based on business size: 89% of small businesses with 30 or more employees offer health insurance, whereas only 39% of those with fewer than 10 employees do so. Among the 44% of small businesses not offering health insurance, 65% cite cost as the primary barrier, deeming it too expensive to provide coverage. According to the Kaiser Family Foundation, the percentage of small employers offering coverage has dropped significantly from the turn of the century. In 2023, the annual Kaiser Family Foundation Employer Benefit Survey indicated only 50% of firms size 3-49 were offering health coverage, down from 63% in 1999.<sup>5</sup>

The Affordable Care Act included provisions for a tax credit for small employers. However, relatively few small employers were able to access the credit because of a complex set of regulatory criteria. We encourage federal policymakers to make subsidies for small employers available in a more streamlined fashion so that small employers can access subsidies outside of ACA exchanges as well as through SHOP exchanges.

### **Preserve Existing Pre-rule Guidance**

We support the policy which the pre-rule guidance, articulated in a collection of advisory opinions, advances to enable access to group health plans and agree with the affirming comments made by the Department in the NPRM.

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<sup>4</sup> [https://www.uschamber.com/assets/documents/20220622\\_Chamber-of-Commerce\\_ESI-White-Paper\\_Final.pdf](https://www.uschamber.com/assets/documents/20220622_Chamber-of-Commerce_ESI-White-Paper_Final.pdf)

<sup>5</sup> <https://www.nfib.com/content/press-release/healthcare/new-nfib-survey-health-insurance-costs-remain-a-significant-challenge-for-small-businesses/>

The long recognition that even absent the involvement of an employee organization a group or association of employers may sponsor a single multiple employer plan if certain criteria are satisfied.<sup>6</sup>

...no court has found, or even suggested, that the pre-rule guidance criteria too narrowly construe the meaning of acting “indirectly in the interest of an employer” under section 3(5) of ERISA.<sup>7</sup>

Beyond the federal sub-regulatory guidance, an extensive state regulatory infrastructure exists to support bona fide AHPs. Any change of state authority to regulate AHPs requires an act of Congress. Clear Congressional intent as part of the 1982 amendments to ERISA, allow state insurance departments to exercise oversight in this area, including registration requirements, solvency standards, mandated benefits, marketing standards, required contributions to guaranty funds, and other insurance market rules. States are well equipped to manage the health and solvency of their markets and are best situated to regulate traditional insurance products within their jurisdiction.

At this time, we believe that including affirming language, noted above, in the Department’s final rule is sufficient to supporting bona fide AHPs. We urge the Department to refrain from future rulemaking on AHPs and allow the existing pre-rule guidance to remain standing as is. We do not believe the Department should propose a new rule that codifies or replaces the pre-rule guidance.

**Conclusion**

We urge the DOL to continue to preserve access to valued, meaningful health coverage and not destabilize or create additional uncertainty or confusion regarding the coverage enjoyed by businesses and employees under Association Health Plans established under the pre-rule guidance.

Sincerely,



Katie Mahoney  
Vice President, Health Policy  
U.S. Chamber of Commerce

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<sup>6</sup> Proposed Rule, 88 Fed. Reg. at 87,969.

<sup>7</sup> Ibid.