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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

State of Alaska, Division of Insurance Comments on Proposed Revision of Federal Regulations Defining
“Employer” under Section 3(5) of ERISA – Association Health Plans
29 CFR Part 2510
RIN 1210-AB85

The State of Alaska appreciates federal efforts to improve accessibility to affordable health care coverage. Alaska has among the highest health insurance costs in the nation and beginning in 2017, only one insurer provides access to healthcare coverage in Alaska’s individual market. We recognize the importance of encouraging market conditions aimed at increasing competition and improving consumer options for affordable health care coverage across all market segments (individual, small group, and large group). However, efforts to increase competition should not sacrifice or deteriorate market stability.

Adjustments to federal health care insurance regulations must be carefully advanced to avoid significant risks for employers and individual citizens and their families. Expanding opportunities for the purchase of health insurance across state lines through associations or groups of employers will create significant risks unless adequate safeguards are in place to ensure that consumers are not exposed to deceptive practices and that benefits are delivered as promised. Many states, including Alaska, currently exert authority over fully-insured association health plans (AHPs) and self-insured multiple employer welfare arrangements (MEWAs). The proposed regulations could destabilize state regulation and create opportunities for unscrupulous operators to take advantage of employees and employer groups through increased jurisdictional confusion between federal and state authorities.

Alaska has long-established state laws governing AHPs and MEWAs. Some of these provisions are misaligned or in conflict with elements of the proposed federal regulations, which raises concerns that operators of MEWAs or AHPs may have an increased propensity to make federal preemption arguments without additional clarity. To avoid potential confusion and legal action, we recommend that the U.S. Department of Labor (DOL) affirm in the proposed regulations, “Defining ‘Employer’ Under Section 3(5) of ERISA – Association Health Plans” (83 Fed. Reg. 614 (Jan. 5, 2018)) (AHP Proposed Rule) that these changes in no way limit state regulation of AHPs or MEWAs.

“a. Employers Could Band Together for the Single Purpose of Obtaining Health Coverage.” (P. 21)

Elements of this proposed regulation are in direct conflict with Alaska Statute AS 21.97.900(7)(B), which requires an AHP to be “formed and maintained in good faith for purposes other than obtaining insurance.” Furthermore AS 21.85.010 requires MEWAs to obtain a certificate of authority from the Division of Insurance before soliciting members or operating in Alaska and AS 21.97.900(7)(A) requires that the association has been actively in existence for five years. It is unclear if the intent of the proposed regulations is to preempt state requirements such as these, and we recommend that DOL clearly addresses this question.

The State of Alaska is opposed to federal regulations that either preempt or create ambiguity regarding preemption of Alaska’s authority over an AHP or a MEWA soliciting or providing health care plans to employers located in Alaska. While the proposal aims to establish a suitable nexus between members of an association, Alaska contends that establishment of such provisions should rest with the state. As discussed in the proposal’s preamble on Page 13, Congress recognized the need for state oversight of MEWAs in 1983 through Erlenborn-Burton Amendment to the Employee Retirement Income Security Act (ERISA), which expressly removed federal preemption of state regulatory authority over MEWAs. The proposed regulations would further obfuscate state and federal jurisdictional and preemption issues by establishing federal standards designed to increase access to MEWAs. We contend that initiatives to increase access to healthcare coverage through MEWAs and AHPs should be left to individual states, as federal action could be detrimental to state capacity and authority to provide consumer protection regulation, including solvency, benefit, rating, and certificate of authority standards.

The historical problems associated with past MEWA expansion efforts cannot be understated. According to a March 1992 General Accountability Office (GAO) report¹, MEWA expansion in the 1980’s resulted in “at least 398,000 participants and their beneficiaries with over \$123 million in unpaid claims and many other participants without insurance” from January of 1988 through June of 1991. The following reasons for MEWA expansion more than three decades ago are eerily similar to those described in the current proposed regulations: “Rising health care costs during the last decade have made it difficult for many small businesses to obtain affordable health insurance coverage for their employees. In their search for alternatives to traditional insurance, some businesses have pooled funds as a way to pay for benefits or buy group insurance.” While some of these MEWAs worked out, many failed; the most notable insolvencies were due to deception and fraud, but many insolvencies were caused by innocent, internal pressures to keep premium costs low for members.

“b. The Group or Association Must Have an Organizational Structure and Be Functionally Controlled by its Employer Members.” (P. 24)

Alaska law currently addresses requirements for control of MEWAs under AS 21.85.030(a)(2), which requires that employers participating in the MEWA have the right to elect at least 75 percent of the individuals having organizational and operational control over the MEWA. The proposed regulations do not specify a particular percentage, but could be interpreted to mean that member employers must either directly act in leadership roles or elect 100 percent of the individuals who control the MEWA’s functions and activities. Alaska agrees with proposed standards to ensure members maintain control over MEWA operations to reduce potential

¹ See at <https://www.gao.gov/assets/220/215647.pdf>

risks of insolvency or financial exploitation. However, this is another example of expanded federal regulatory oversight that may increase jurisdictional confusion regarding state authority.

“c. Group or Association Plan Coverage Must Be Limited to Employees of Employer Members and Treatment of Working Owners” (P. 25)

Alaska law currently prohibits participation in an association health plan for an “individual other than in connection with a member of the association” under AS 21.97.900(7)(I). Alaska law also currently contemplates participation in association health plans by a group of employers, a group of self-employed individuals, or a combination of employers and self-employed individuals under AS 21.54.060(a)(6) and that association members must share a “common enterprise or economic social affinity or relationship” under AS 21.97.900(7)(D).

Alaska agrees with removing regulatory restrictions under ERISA for sole proprietors and other self-employed individuals to participate as employees in an association health plan. Many of these individuals do not qualify for individual market subsidies and should have alternatives to find affordable coverage through a bona fide association in accordance with state standards. However, Alaska contends that the methodologies for determining association membership qualification for sole proprietors and other self-employed individuals should be left to individual states.

“d. Health Nondiscrimination Protections” (P. 34)

Alaska law currently prohibits unfair discrimination by insurers for an individual in the group market based on health status; medical condition, including physical and mental illnesses; claims experience; receipt of health care; medical history; genetic information; evidence of insurability, including conditions arising from acts of domestic violence; or a disability (see AS 21.54.100). In addition, AS 21.97.900(7) prohibits associations from using health status of individuals to deny coverage. Non-discrimination provisions are important to avoid adverse selection scenarios that could harm individual and employer access to affordable coverage and to maintain the overall strength of the market for all participants. While we firmly believe that discrimination must be prohibited to ensure access to affordable coverage, we are concerned that unfair discrimination regulations applicable to association health plans under ERISA could lead to increased jurisdictional impediments for state enforcement.

Other Comments

Alaska’s requirements for MEWAs go well beyond the proposed regulations in several fundamental areas, such as requirements that the association must be a nonprofit organization, make a deposit, and establish requirements for member participation in sharing liabilities to help ensure solvency and protect consumers. Other standards such as for minimum reserves (AS 21.85.050); investment standards to ensure liquidity for claims payment (AS 21.85.060); contribution rates that are properly filed and not inadequate, excessive, or unfairly discriminatory (AS 21.85.070); reporting requirements (AS 21.85.080); consumer information notices (AS 21.85.090); and numerous ancillary standards. Without express language to clarify the state’s authority, the proposed regulations create uncertainty regarding the enforceability of the state-based standards.

We do not agree with the concept that MEWAs or AHPs should be excluded from state insurance regulation as a way of promoting consumer choice across state lines. Doing so would increase federal costs associated

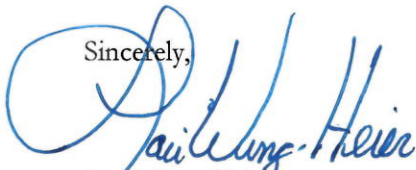
with regulation and oversight functions to ensure that these associations are operated in a financially sound manner to avoid detrimental impacts to employers, individuals, and the health care market. We believe that states are in the best position to efficiently regulate health care insurance delivery systems.

There are clear benefits for small employers to participate in association health plans, but history has illustrated the need to ensure regulatory safeguards, such as commonality, transparency, control, and solvency to protect individuals and employers who participate. As an alternative to the current proposal, the federal government could consider providing low-cost technical assistance to assist employers and groups with the formation of associations that meet state requirements. States could also be encouraged to adjust regulatory requirements to be more consistent and to promote interstate compacts under Section 1333 of the ACA permitting insurers to sell insurance in participating states.

ACA restrictions related to Title XXVII of the Public Health Service Act and Centers for Medicare and Medicaid guidance have impacted the ability of association groups to pool health insurance for their members. Alaska welcomes changes to these requirements to allow more flexibility for association groups, provided they do not preempt or create ambiguity regarding preemption of state laws.

To maximize the chances of a successful expansion of association health plans, the U.S. Department of Labor should work closely with the Alaska Division of Insurance and other state insurance departments. A coordinated approach will help ensure that an expansion of association health plans maintains critical consumer protections and industry oversight. An extended implementation timeline to 2020 would help allow states ample opportunities to address concerns and implement regulations and policies to complement national priorities.

Sincerely,



Lori Wing-Heier
Director