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February 26, 2018

Alexander Acosta, JD
Secretary
US Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Submitted electronically

Re: Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans

Dear Secretary Acosta:

On behalf of our more than 100,000 member physical therapists, physical therapist assistants, and students of physical therapy, the American Physical Therapy Association (APTA) respectfully submits comments to the Employee Benefits Security Administration of the Department of Labor (DOL) regarding the Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans. The mission of APTA is to further the profession’s role in the prevention, diagnosis, and treatment of movement dysfunctions and the enhancement of the physical health and functional abilities of members of the public. Physical therapy is an integral service to all patient populations across health care settings, and therefore we are very interested in the proposed changes and their impact on patient access to medically necessary therapy services and comprehensive health coverage.

While APTA appreciates DOL’s commitment to provide employees with high-quality care at affordable prices, we have concerns that the proposed changes to the Employee Retirement Income Security Act (ERISA) will undermine the department’s own goals. Currently, association health plans (AHPs) must comply with the Affordable Care Act’s (ACA) protections for individuals with preexisting conditions, cover essential health benefits (EHBs), and meet other benefit standards. Unfortunately, the proposed rule, by allowing AHPs to bypass requirements to cover EHBs, will severely hinder patient access to comprehensive coverage for the most basic health care needs. Moreover, the proposed rule, if finalized, will encourage consumers to seek lower-cost health plans with insufficient health benefits, which will skew the health insurance marketplace’s risk pools and, in turn, lead to higher premiums for individuals with preexisting conditions.

Finally, we have concerns that as a result of the proposed changes, many consumers will be ineligible for premium tax credits, thus hindering their ability to access robust coverage options through the health insurance marketplace.

APTA's Recommendations

- 1. APTA urges DOL not to broaden the flexibility of AHPs in designing benefits that bypass the protections of existing laws, including standards related to the coverage of EHBs.**
- 2. If DOL does proceed with expanding access to AHPs, APTA recommends that it institute specific safeguards and patient protections to prevent destabilization of the traditional health insurance marketplace.**
- 3. APTA recommends that DOL establish protections to ensure that employees who qualify for coverage under AHPs do not lose their eligibility for cost-sharing subsidies in the health insurance marketplace.**

We respectfully request that you consider our comments in greater detail below:

Protection of EHBs

APTA has serious concerns that this proposed rule, if finalized, will lead to unintended consequences that will adversely affect consumers and providers in the marketplace. In its proposed rule, DOL seeks to expand the definition of “employer” under ERISA to give employers greater flexibility to sponsor in small business health plans, which, according to the proposed rule, will remove restrictions on the establishment and maintenance of AHPs. While APTA believes health coverage should be comprehensive and accessible to all consumers, we have concerns with the method by which the department proposes to achieve this goal. By changing the definition of “employer” under section 3(5) of ERISA and relaxing current AHP limitations, DOL will free employers from complying with the patient protections established under ACA. Specifically, these health plans would be permitted to unreasonably raise health care premiums, implement lifetime limits on patient benefits, and exclude basic health needs from benefits. Thus, this rule sets a dangerous precedent of allowing more health plans to circumvent ACA and subject consumers to substandard health coverage.

If the proposal is finalized, employers who meet the broad “commonality of interest” requirements for forming an AHP will no longer have any incentive or mandate to offer plans that cover, at minimum, the 10 EHBs. These EHBs were Congress’ assurance to consumers of access to a baseline of coverage, benefits, and services, and protection from substandard health coverage. However, DOL’s proposed rule stands to wipe away those protections by allowing AHPs to circumvent current requirements, pick and choose which benefits to cover, and ignore the basic services to which all patients should have unrestricted access.

Therefore, APTA recommends that the department establish an oversight board dedicated to reviewing and approving the benefit designs for AHPs. Such entity would ensure that

the AHPs include necessary patient protections and adequate coverage for employees. In addition, this board could provide consistent oversight of AHPs, in instances where state oversight is uncertain or insufficient.

We suggest that the board be charged to establish standards that require, at a minimum, that AHPs satisfy all of the following:

- Offer coverage of the 10 essential health benefits required under the current law;
- Provide sufficient notice of changes to health coverage to beneficiaries; and
- Establish a preapproved cap on annual rate increases to protect patients from unreasonable spikes in their rates.

In keeping with DOL's goals of affordable and high-quality health coverage for more individuals, we urge the department to establish a body of oversight *prior to* enacting any changes to the ERISA language. Further, to avoid imposing higher health insurance costs on consumers, leaving consumers without sufficient protections, and reducing access, APTA recommends that AHPs be required to offer a minimum baseline of coverage in accordance with ACA standards.

Nondiscrimination Rules Are Insufficient to Deter Plans From Appealing to Healthiest Patients

The department states in its proposal, "the HIPAA/ACA health nondiscrimination rules apply within groups of similarly-situated individuals." Therefore, ACA and the Health Insurance Portability and Accountability Act (HIPAA) would be applicable to AHPs because, as proposed, "the group or association may not treat member employers as distinct groups of similarly-situated individuals." While APTA agrees with the department's interpretation of the ACA and HIPAA nondiscrimination rules, we do not believe these rules are sufficient, without additional oversight and regulation by states, to prevent employers from creating benefit plans that appeal only to young and healthy consumers. Even with the nondiscrimination rules, adoption of the proposed regulations will only lead to increased health care costs and reduced patient access.

APTA recommends that the department institute safeguards and impose additional requirements to ensure that AHPs are not incentivized to offer only benefits that would appeal to the healthiest and youngest consumers or impose rates based on sex and age. We share the same goals as DOL: to keep health care costs affordable for *all* patients, regardless of their health status. Therefore, it is imperative that specific safeguards be outlined before any changes to the ERISA law take effect, to maintain access and protect consumers from financial hardship resulting from inequitable plan designs.

Employees Who Qualify for Coverage Under AHPs Should Retain Eligibility for Premium Tax Credits

Under ACA, individuals who are eligible for employer-sponsored coverage that meets the minimum value test and is considered adequate are not eligible for premium tax credits if they turn down their employer's coverage and opt for a marketplace plan. However, it is unclear whether AHPs are likely to satisfy the minimum standards for employer-

sponsored coverage. We request that DOL clarify its expectations surrounding AHPs and consumer eligibility for premium tax credits, should the proposed changes to the ERISA definition of “employer” be finalized. We have serious concerns that if AHPs are deemed to satisfy the minimum value and coverage adequacy tests, individuals who require financial assistance will be disproportionately impacted, as they will be forced to choose between insufficient health coverage from their employer or a marketplace plan that they are unable to afford.

Conclusion

APTA is committed to advancing the safety and quality of health care, and we encourage DOL to redraft its rule in a way that preserves and promotes patient access to care. APTA thanks the department for the opportunity to comment on the proposed changes to the ERISA language in Section 3(5). We look forward to working with the department to ensure that patients of large and small employers have equal access to affordable and high-quality coverage, which includes the patient protections afforded to all individuals under the current law. If you have any questions regarding our comments, please contact Kara Gainer, director of regulatory affairs, at 703/706-8547 or karagainer@apta.org.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Sharon L. Dunn". The signature is written in a cursive, flowing style.

Sharon L. Dunn PT, PhD
Board-Certified Orthopaedic Clinical Specialist
President