

NMA Employers Insurance Consortium

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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,
83 Fed. Reg. 614 (Jan. 5, 2018)
RIN 1210-AB85

Dear Sir or Madam:

The NMA Employers Insurance Consortium (“NMAEIC”) provides the following comments on the Department of Labor’s (the “Department”) proposed regulation concerning the definition of “employer” under Section 3(5) of the Employee Retirement Income Security Act (“ERISA”). 83 Fed. Reg. 614 (Jan. 5, 2018) (the “Proposed Regulation”).

NMAEIC serves as the plan sponsor of the NMA Employers Insurance Consortium Group Health Plan, which is a fully insured plan providing health and dental coverage for eligible members of NMAEIC. NMAEIC constitutes an association or group of employers that meets the requisite requirements under existing Department guidance and legal interpretation to qualify as an “employer” under ERISA § 3(5). NMAEIC acts in the interests of its member employers and provides health coverage through a single ERISA-covered employee welfare benefit plan. NMAEIC’s group health plan currently provides coverage to approximately 1,930 employees, beneficiaries, and dependents of its members in Nebraska. Prior to NMAEIC’s sponsorship the group health plan, the Nebraska Medical Association provided a health plan benefit to its membership since the 1970’s. NMAEIC’s participating employers have realized significant benefits from this existing association health plan and endeavor to ensure its continued success.

NMAEIC submits the following comments on the Proposed Regulation based on its experience sponsoring and administering a successful association health plan on a long-term basis. NMAEIC advocates the following four points, which are discussed in detail below –

1. The final regulation should provide a grandfathered provision, allowing association health plans in existence as of a specific date to continue in their current form based on existing law, regulations, and related Department interpretation;

2. The final regulation should allow the use of rate bands in determining employer premiums or contributions, based on certain guidelines or parameters, in order to promote risk pool stability;
3. The final regulation should permit groups or associations to impose reasonable contractual and/or eligibility limitations on membership to promote stability; and
4. To ensure that a group or association acts in the interests of its employer members and those members' employees and dependents, the final regulation should require the employer members of an association have a genuine organizational relationship unrelated to the provision of benefits.

NMAEIC submits the following comments to clarify the Proposed Regulation's potential interaction with existing association health plans and in the interest of ensuring that association health plans continue to provide high-quality, affordable coverage.

1. The final regulation should provide a grandfathered provision, allowing association health plans in existence as of a specific date to continue in their current form based on existing law, regulations, and related Department interpretation.

The Proposed Regulation correctly states that its existing sub-regulatory guidance allows for associations or groups of employers to establish and maintain a single group health plan under ERISA. While the criteria may be narrow, associations of employers, such as NMAEIC, have utilized these parameters to establish successful plans that provide significant benefits to their members through the coverage offered. Given the success of association health plans, such as NMAEIC's plan, the consortium respectfully submits that the stated purpose of the Proposed Regulation – to expand access to affordable health coverage by providing additional opportunities for employer groups or associations to offer health coverage to members' employees – is not significantly furthered by requiring compliance by current employer associations and association health plans with the Proposed Regulation.

Certainly, much of the Proposed Regulation does not considerably hinder the continued existence of NMAEIC or its group health plan. In fact, NMAEIC easily qualifies or meets the majority of the requirements specified in Prop. Reg. § 2510.3-5(b), given the similarity of these requirements to current DOL guidance. However, the nondiscrimination requirements set out in Prop. Reg. § 2510.3-5(d) will likely require significant changes to the current structure of NMAEIC's plan and thereby threaten the continued viability of the association health plan and the coverage it provides. Correspondingly, the Department should include a "grandfathered" provision for existing association health plans operating under current guidance.

As set out in comments 2 and 3 of this letter, NMAEIC suggests revisions to these nondiscrimination provisions to restrict the potential for unintended and negative consequences to

current association health plans as well as proposed or developing association health plans. However, to protect the viability of current, successful association health plans and to prevent significant disruption in the small group market, NMAEIC strongly advocates for inclusion of a “grandfathered” provision for association health plans that are in existence as of the publication of the Proposed Regulation.

If the Department would choose not to include a “grandfathered” provision in the final rule and, thus, require existing association health plans to comply with the final rule, NMAEIC requests and recommends that the Department provide for an appropriate transition period and effective date for existing association health plans.

2. The final regulation should allow the use of rate bands in determining employer premiums or contributions, based on certain guidelines or parameters, in order to promote risk pool stability.

In the preamble to the Proposed Regulation, the Department notes the intrinsic value of stability of an association health plan’s risk pool. 83 Fed. Reg. at 623. The preamble also notes that actuarially appropriate pricing, where premiums match risk, incentivizes people to buy an efficient amount of coverage and reduces the probability that insurance markets deteriorate into adverse selection spirals. *Id.* Yet, the Proposed Regulation seemingly prohibits the use of experience bands amongst employer members and calls into question the use of age bands to determine premiums or contributions for participants and beneficiaries under an association health plan.

As noted by the Department in the preamble, the issue with the current language of Prop. Reg. § 2510.3-5(d)(4) is the potential to destabilize the association health plan market and hamper employers’ ability to create flexible and affordable coverage options for their employees. If the Department is advocating for a prohibition on either experience bands or age bands, this requirement would deprive association health plans of a tool vital to risk pool stability. One of the most significant challenges facing association health plans is ensuring risk pool stability by encouraging continuous participation by employer members on a long-term basis, regardless of the fluctuation in claims of any particular employer member from year to year. Association health plans use experience bands and age bands to remain an attractive option to employer members with good claims history and/or a younger workforce, which might otherwise be able to obtain more favorable premiums elsewhere.

The Proposed Regulation requires an association health plan to comply with DOL Regulation Section 2590.702(c) with respect to nondiscrimination in premiums or contributions required by any participant or beneficiary for coverage under the plan. Prop. Reg. § 2510.3-5(d)(3). It further provides that a group or association may not treat different employer members of the group or association as distinct groups of similarly-situated individuals. Prop. Reg. § 2510.3-5(d)(4). Example 4, set out in the Proposed Regulation, emphasizes that an association could not treat a single employer member as a separate group of similarly situated individuals from other employer members and, correspondingly,

charge a higher premium for coverage based on the fact that the single employer member employs several individuals with chronic diseases.

DOL Regulation Section 2590.702(c), the cross-referenced provision, generally prohibits group health plans and health insurance issuers from requiring an *individual* to pay a premium greater than the premium or contribution for a similarly situated individual based on any health factor. A “health factor” means health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. DOL Reg. § 2590.702(b)(1)(ii).

Experience Bands. NMAEIC is concerned that the prohibition on treating employer members as a distinct group of similarly-situated individuals in the Proposed Regulation together with the cross-reference to DOL Regulation Section 2590.702(c), will be interpreted to prevent an association from utilizing reasonable experience bands to determine an employer member’s required premiums.

Notably, DOL Regulation Section 2590.702(c) generally prohibits health plans and health insurance issuers from requiring an *individual* to pay a premium greater than the premium or contribution for a similarly situated individual based on any health factor. However, a plan or issuer can take health status factors into account, for purposes of determining the amount the *employer* must pay. DOL Reg. § 2590.702(c)(2)(i). Presumably, the Department proposes to extend the individual requirement to employer members within an association, effectively treating the employer member as an individual and overriding DOL Reg. § 2590.702(c)(2)(i).

The Department indicates one of the bases for the nondiscrimination requirements is its concern that association health plans that discriminate *among* employer members in ways that would violate the proposed nondiscrimination provision may not reflect the common employer interests that characterize an employee benefit plan. The Department further explains that treatment as a single “employer” under ERISA § 3(5) is undermined by treating different employer members as different groups based on the health factors of individuals within that employer member.

While NMAEIC strongly supports the underlying value of ensuring that a robust nexus and significant cohesion is present amongst the association’s employer members, it respectfully disagrees for several reasons that experience bands automatically defeat the commonality of interest intrinsic to an employee benefit plan.

First, for existing association health plans, current guidance requires the association to reflect an organizational relationship beyond providing group health coverage. Thus, for example, the group or association of employers must not only be engaged in the same industry, but also, all participating employers must be members of a separate association that collaborates on a variety of other issues central to that industry for an extended period of time, in some cases, for decades. The history of organized cooperation amongst the employer members supports and fulfills the necessary

requirement for a protective nexus between the association and the individuals who benefit from the plan. See, e.g., Advisory Opinion 94-07A; Advisory Opinion 2001-04A.

Second, experience bands could certainly lead to higher premiums for a particular employer member. Significantly, however, one of the primary benefits of the association and the association health plan for its membership is the mitigation of risk tied to poor experience. As part of the association, an employer member enjoys a greater reduction in risk than is possible if the employer member was seeking insured coverage on its own.

For example, an employer seeking coverage on the open market for its employees is subject to underwriting by insurance companies (and related premium rates) based on the employer's experience and medical risk alone. The use of rate bands within the association does not change the current, intrinsic nature of discrimination in premiums tied to experience amongst employer members. Instead, within an association health plan, rate bands may be structured so that the fluctuation or movement between the rate bands is limited in degree (e.g., employer member can only be moved up or down one or two bands on an annual basis). So long as a group or association health plan applies rate bands uniformly among its employer members, and discloses the fact that it does so, NMAEIC respectfully submits that employer members are in the best position to determine whether the practice serves their interests. In addition, under this structure, the association balances maintaining the attractiveness of the coverage for employer members with good claims history and/or a younger workforce, with the interests of maintaining a stable risk pool for all members.

Age Bands. NMAEIC is also concerned that the prohibition on treating employer members as a distinct group of similarly-situated individuals in the Proposed Regulation together with the cross-reference to DOL Regulation Section 2590.702(c), will be interpreted to prevent an association from determining an employer member's required premiums or other contributions using age bands.

As noted above, DOL Regulation Section 2590.702(c), the cross-referenced provision, generally prohibits group health plans and health insurance issuers from requiring an *individual* to pay a premium greater than the premium or contribution for a similarly situated individual based on any health factor. A "health factor" means health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. DOL Reg. § 2590.702(b)(1)(ii). Although the list of health factors in DOL Regulation Section 2590.702(c) does not expressly include age, other portions of the regulation suggest bona fide-employment based classifications (for example, full-time or part-time status) constitute the only permissible basis for distinguishing between employees. DOL Reg. § 2590.702(d)(1). With respect to beneficiaries, the regulation lists age as a permissible basis for distinction only with respect to a participant's children. DOL Reg. § 2590.702(d)(2)(i).

Again, if the Department's intent is to preclude the use of age bands, this prohibition would deprive association health plans of a tool vital to risk pool stability. Association health plans use age-banded rating systems to remain an attractive option to employers with younger workforces, which

might otherwise be able to obtain more favorable premiums elsewhere. The Affordable Care Act uses the same mechanism in the small group and individual markets. 42 U.S.C. § 300gg.

So long as a group or association health plan applies age banding uniformly among its employer members, and discloses the fact that it does so, NMAEIC respectfully submits that employer members are in the best position to determine whether the practice serves their interests. In addition, the risk pool stability promoted by age banding outweighs the risk that age banding would be used as a pretext for discrimination based on health status. In this regard, NMAEIC notes that the cross-referenced HIPAA regulations prohibit using health factors to determine an *individual's* required premiums or contributions. However, a plan or issuer can take health status factors into account for purposes of determining the amount the *employer* must pay. DOL Reg. § 2590.702(c)(2)(i). Thus, as drafted, the Proposed Regulations could be construed to prohibit the employer-by-employer assessments that HIPAA *expressly* allows. Consistent with existing HIPAA regulations, NMAEIC respectfully submits that, when uniformly applied to determine employer contributions, age banding is unlikely to serve as a pretext for discrimination against individuals based on health status.

In order to encourage the formation and use of association health plans and to promote stability within an association plan risk pool, the associations must have some flexibility in ensuring that the cost associated with the coverage remains competitive. Correspondingly, the Proposed Regulation should clarify that using rate bands, such as experience or age bands, which are disclosed in writing, to determine employer members' required premiums does not constitute a prohibited employer member distinction under Proposed Regulation Section 2510.3-5(d)(4).

NMAEIC suggests the revision italicized below:

(4) In applying the nondiscrimination provisions of paragraphs (d)(2) and (3) of this section, the group or association may not treat different employer members of a group or association as distinct groups of similarly-situated individuals; *provided that a group or association may determine an employer member's total required premium or contribution by reference to a uniformly applied, written schedule setting forth contributions for each employer member based on two or more rate bands, which written schedule is disclosed to employer members in advance.*

3. The final regulation should permit an association health plan to use reasonable contractual and/or eligibility limitations to promote stability.

The preamble to the Proposed Regulation correctly identifies association health plan stability as an important concern. However, the preamble's discussion could be read to prohibit certain contractual and/or eligibility limitations that associations commonly use to ensure stability. For the reasons that follow, the Department should ensure that the final regulation permits association health plans to impose reasonable contractual and/or eligibility limitations on terminating and resuming coverage.

The Proposed Regulation prohibits a group or association from conditioning employer membership based on any health factor of an employee or employees, former employee or former employees, or their respective family members or other beneficiaries. Prop. Reg. § 2510.3-5(d)(3). In addition, the preamble contains the following statement:

Coupled with the control requirement, also requiring AHPs to accept all employers who fit their geographic, industry, or any other non-health-based selection criteria that each AHP chooses, the nondiscrimination provisions ensure a level of cohesion and commonality among entities acting on behalf of common law employers . . .

83 Fed. Reg. at 624 (col. 3). The quoted statement could be read to mean that, in addition to nondiscrimination based on health factors, a group or association could not impose reasonable contractual and/or eligibility limitations on membership (and, thus, eligibility for coverage) for employer members who drop and resume coverage. This seems at odds with the HIPAA regulation cross-referenced in Proposed Regulation Section 2510.3-5(d), which provides that the election of prior coverage is not, itself, within the scope of any health factor. DOL Reg. § 2590.702(a)(3).

Association health plans impose contractual and/or eligibility limitations on a member's ability to discontinue and resume coverage in order to incentivize long-term membership. This in turn promotes a stable risk pool. As an example, an association might impose a waiting period of two years, during which a member who drops association coverage cannot resume coverage under the association plan.

These contractual and/or eligibility tools address a market reality: insurers and other coverage providers recruit the healthier members of associations, and sometimes offer artificially low premium or contribution rates for the first year of coverage, knowing that the employer's existing plan will cover "tail claims" for services performed but not yet billed before the change in coverage, leading to favorable claims experience in the first year. The same employer will likely find that rates increase in a subsequent year, and may seek to rejoin the association plan to avoid the increase. Such changes in a risk pool can destabilize an association plan. To promote stability, associations currently use contractual and/or eligibility limitations to make short-term changes in coverage (and membership) less appealing.

NMAEIC respectfully submits that so long as an association health plan discloses any contractual and/or eligibility limitations on reentry clearly and in advance, they do not present a policy or enforcement concern. Applied uniformly over all members, such limitations do not present a risk of discrimination based on health factors. The Department should therefore revise the statement in the preamble, relating to the purported requirement to accept all employers meeting non-health-based criteria, to clarify that a group or association may use reasonable contractual and/or eligibility limitations on discontinuing and recommencing group or association membership.

4. To ensure that a group or association acts in the interests of its employer members and those members' employees and dependents, the final regulation should require the employer members of an association to have a genuine organizational relationship unrelated to the provision of benefits.

To qualify as a bona fide group or association of employers under the Proposed Regulation Section 2510.3-5(b), a group or association must only “(exist) for the purpose, in whole or in part, of sponsoring a group health plan that it offers its employer members.” With this language, the Department proposes to remove the condition that is in effect under current DOL sub-regulatory guidance, requiring an employer association have a purpose other than offering health coverage. 83 Fed. Reg. at 619. The impetus for this change is to allow for expanded opportunities for employers to band together to provide group health coverage. Id.

NMAEIC cautions against a standard that completely rejects the current guidance for several reasons. First, current Department guidance does not preclude formation of a bona fide group or association of employers as is evidenced by existing association health plans. In addition, in reviewing requests for advisory opinions on this issue, the Department has indicated that a sub-group of employer members of a trade or industry association may constitute a bona fide group or association of employers acting as an “employer” within the meaning of ERISA § 3(5). See, e.g., Advisory Opinions 2017-02A, 2003-13A, 2005-25A, 2005-24A.¹ Thus, the condition that a group or association of employers has a purpose other than offering health coverage does not preclude new bona fide associations from forming, but requires that the employer members have some type of pre-existing organizational relationship. As this letter discusses, these pre-existing organizational relationships provide numerous benefits to association health plans.

Second, NMAEIC asserts that the condition of a genuine organizational relationship unrelated to the provision of benefits provides the better method of achieving the common employer interests that characterize an employee benefit plan than the proposed nondiscrimination provisions in the Proposed Regulations. The value of this type of preexisting relationship amongst employers is tied directly to the common economic and representational interest that the Department and the courts have found vital in creating the protective nexus employees rely on to represent their interests relating to the provision of benefits. The existing relationships and networks born out of a prior organizational connection provide for a significant degree of accountability as well as assisting with the development and longevity of the association health plan. For example, a legitimate membership organization, like the Nebraska Medical Association, will not risk its goodwill and reputation with its members by associating with a substandard association health plan. NMAEIC expresses its concern that

¹ In its advisory opinions, the Department emphasizes that the pre-existing relationships between the employers – membership in a trade or industry association – satisfies the requirement that the sub-group of employers have a genuine organizational relationship unrelated to the provision of benefits. Advisory Opinions 2017-02A, 2003-13A, 2005-25A, 2005-24A.

Comment - RIN 1210-AB85
Employee Benefits Security Administration
March 6, 2018
Page 9

eliminating this condition may in fact lead to a proliferation of association health plans that do not have the requisite cohesion and protective nexus integral to the success of the association and the protection of employees.

Third, and practically, requiring new bona fide groups or associations of employers to abide by the condition of a genuine organizational relationship unrelated to the provision of benefits will facilitate the development of successful, new association health plans. Association health plans whose employer member have access to the communication systems, networks, and history of cooperative ventures of an existing association will have a significant advantage as to the formation, development, and communication of a plan.

Based on the foregoing reasoning, NMAEIC urges the Department to consider revising Proposed Regulation Section 2510.3-5(b)(1) to include the revision italicized below:

(1) The group or association exists for the purpose, in whole or in part, of sponsoring a group health plan that it offers to its employer members; *provided that the employer members share some business or organizational purposes and functions unrelated to the provision of benefits;*

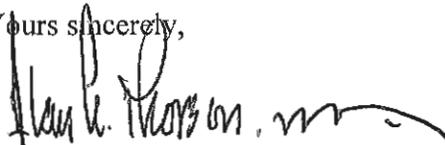
Alternatively, the Department could exempt associations and association health plans that establish a membership nexus to an existing association from all or a portion of the nondiscrimination requirements in Proposed Regulation Section 2510.3-5(d).

Conclusion

NMAEIC appreciates the Department's work to clarify the definition of "employer" under ERISA and to provide further opportunity to other associations of employers to develop affordable health coverage options. The consortium requests that its comments set out above be considered carefully and seriously in consideration of the interests of existing association health plans and their continued success as the Department finalizes the Proposed Regulation. NMAEIC respectfully submits that its recommendations will help to ensure continued stability for current association health plans and to allow new associations to develop and flourish.

If you have questions, please contact legal counsel for the NMAEIC, Michelle L. Sitorius, at either (402) 474-6900 or msitorius@clinewilliams.com.

Yours sincerely,



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