



North Dakota
Insurance Department
Jon Godfread, Commissioner

March 6, 2018

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

RE: Definition of Employer – Small Business Health Plans RIN 1210-AB85

The North Dakota Insurance Department submits the following comments in response to the U.S. Department of Labor (DOL)'s proposed rule "Definition of 'Employer' Under Section 3(5) of ERISA—Association Health Plans," proposed Jan. 5, 2018.

We recognize the desire and appreciate the effort put forth to allow small groups and sole proprietors in North Dakota, and across the country, to access the benefits of purchasing health insurance as a large group. In our opinion, it is critical for those individuals and groups to be afforded the opportunity to offer health insurance coverage that works for their employees.

This rule seeks to address the gap created by the Affordable Care Act (ACA) in the individual market. North Dakotans who earn too much to receive a federal subsidy and earn that income from a farm, ranch or small business continue to take on the brunt of the rate increases that have come with the ACA's individual market.

We have continued to see a shift in the individual market. Those who receive the subsidy continue to purchase their insurance on the Exchange where the federal government absorbs most, if not all, of the increasing costs of health insurance through an increased subsidy. However, those who do not qualify for a federal subsidy have been forced to either purchase their insurance off the Exchange and directly experience the full burden of the rate increases or have foregone insurance altogether. This pattern is likely to continue and we appreciate that this rule is an attempt to address this alarming trend.

We understand the long, and at times, troubled past of Multiple Employer Welfare Arrangements (MEWA), however, here in North Dakota, we have recently undertaken a comprehensive rewrite of our MEWA rules and regulations. We completed this process in 2017 and effectively closed the regulatory gaps that previously existed with MEWAs. Our new regulations have strengthened

licensing requirements, improved our ability to impose solvency standards and regulate a non-fully insured MEWA's solvency, and have reinforced the consumer protection laws in our state. These changes have been supported by industry and consumers alike, as they provide clarity, consistency and authority to the Insurance Commissioner to regulate what was a vague area of insurance regulation.

Given the changes we have experienced in North Dakota and the continued pressure being applied to our individual off-Exchange market, we are cautiously optimistic of the draft Rule's intentions and want to offer some clarifying comments that would solidify our support of the proposed rule:

1. As you know, states are the primary regulator of the business of insurance. While we do not believe the intention of the draft Rule is to supersede that regulatory authority, we would ask that the DOL expressly affirm that state regulators are the primary regulators of both Association Health Plans and MEWAs.
2. In North Dakota, we have a number of MEWAs and/or AHPs that are already operating and have done so through a tremendous effort on their part. These groups have found a creative solution to providing meaningful coverage to their employee groups. Given the work they have undertaken and the service they provide, we would ask that the DOL expressly affirm that these plans, which were in existence prior to the writing of this rule, are not subject to the changes within this rule. We believe these new rules apply only to those associations that are created under this modified definition of employer. Affirmation of this principle from the DOL would provide much needed clarity.
3. When applied prospectively, the nondiscrimination requirements will help prevent the adverse selection that may occur under this new rule. These provisions are critical to healthy market operation under the changing environment.
4. Consumer notification is imperative to this rule. Educating our consumers to ensure they know what they can or cannot expect from an AHP will go a long way toward the success or failure of those plans and this rule. We ask that you continue to coordinate with insurance regulators from across the country in developing standards and requirements surrounding notice to consumers and regulators.
5. Solvency and reserving are fundamental to any healthy insurance market; the adoption of those requirements for AHPs is fundamental to the vitality and viability of this market. We have already adopted such requirements in North Dakota.

Finally, we ask that the DOL continue to coordinate with state insurance departments and other state regulators. State regulators and the DOL have a long history of working together to coordinate the use of state and federal tools to prevent consumer harm. I hope that relationship will continue. Our goal remains the same: to provide meaningful and affordable health insurance options to our consumers, while protecting them and the market from fraud, abuse and insolvencies.

The North Dakota Insurance Department will continue to advocate for state-based, market-principled solutions for our consumers. We share the goal of improving affordability, increasing access and providing a stable market for our carriers and consumers.

Thank you for the opportunity to comment on this proposed Rule. We look forward to continuing this discussion, particularly around the timing of implementation of this Rule.

Sincerely,

A handwritten signature in black ink, appearing to read "J Godfread". The signature is fluid and cursive, with the first letter "J" being particularly large and stylized.

Jon Godfread
Insurance Commissioner

CC: Doug Burgum, Governor
Senator John Hoeven
Senator Heidi Heitkamp
Congressman Kevin Cramer