



COLORADO

Department of
Regulatory Agencies

Division of Insurance

Michael Conway
Commissioner of Insurance - Interim

March 6, 2018

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210
Attention: Definition of Employer – Small Business Health Plans RIN 1210-AB85

Dear Office of Regulations and Interpretations,

On January 4, 2018, the Department of Labor (Department) released proposed rule revisions to 29 CFR 2510 (83 FR 614) and requested comments by March 6, 2018. The purpose of the Notice of Proposed Rulemaking (“NPRM” or “proposed rule”) is to:

“...broaden the criteria under ERISA section 3(5) for determining when employers may join together in an employer group or association that is treated as the “employer” sponsor of a single multiple-employer “employee welfare benefit plan” and “group health plan” as those terms are defined in Title I of ERISA.”

This letter constitutes the comments from the Colorado Division of Insurance, submitted respectfully for your consideration. The comments and concerns contained in this letter fall into several categories, and each will be addressed in turn. Those categories are:

- Broad State Authority
- Financial Concerns
- Market Segmentation
- Interstate Sales
- Enrollment Concerns

Broad State Authority

Based upon the Division’s reading of the NPRM, it appears that states will continue to have broad authority to regulate Association Health Plans (AHPs) as they will continue to be Multiple Employer Welfare Arrangements (MEWAs). To that end, in Colorado the statutory requirements for fully insured and self-insured AHPs/MEWAs are found at § 10-3-903.5, C.R.S.



Under current law, if an AHP/MEWA is unable to meet the exemption requirements contained in statute, it must pursue licensure as an insurer in order to function and sell policies within the state.

The current statutory requirements that must be met in order for a MEWA to claim exemption from Colorado insurance law include:¹

- The AHP/MEWA shall have been in existence continuously since 1983 and maintain unallocated reserves of not less than five percent of the first two million dollars of annual contribution from the preceding year;
- The AHP/MEWA shall file an annual financial statement to demonstrate that the required reserves are being maintained;
- The MEWA shall file an actuarial opinion with the Division which states that the reserves and contribution and funding levels are adequate within a specified time frame;
- The AHP/MEWA shall provide benefits which are in substantial compliance with the mandated benefit provisions found at § 10-16-104, C.R.S., that are applicable to insurers offering health insurance coverage in the state;
- The AHP/MEWA shall be sponsored and maintained by an association which:
 - Has within its membership the employers who participate in and fund the arrangement;
 - Is engaged in substantial activities for its employer members, other than the sponsorship of an employee welfare benefit plan, and provides business or professional assistance and benefits to its members who share a common business interest and are primarily engaged in the same trade or business; and
 - Has been in existence for a period of at least 10 years.

It should be noted that even in the event an AHP/MEWA meets the requirements to be exempt from the insurance laws of Colorado, that exemption can be reversed if the AHP/MEWA is found by the Commissioner to present a hazard to the public or individuals receiving benefits through the AHP/MEWA. Further, the exemption from regulation does not eliminate the requirement to comply with the unfair or deceptive acts or practices state law.

As the Department is aware, AHPs/MEWAs have a history of being utilized by fraudulent actors to harm consumers. AHPs/MEWAs also historically suffered from financial instability and insolvencies. That was especially true when states lacked the ability to regulate the solvency of such companies.

Colorado's laws, as outlined above, were designed to protect Coloradans from these types of historical problems. As a result, we applaud the Department for stating in the preamble of the proposed rule that there is no intention to preempt existing state laws that regulate

¹ Colorado implemented a MEWA pilot program in 2003, via statute. That program lasted five years, and was ended by a sunset provision in 2008. No AHPs/MEWAs were created during the course of the pilot. AHPs/MEWAs were able to be formed from 1983 to 1993, but were prohibited from being formed between 1993 and the start of the pilot program in 2003 due to the number of insolvencies nationwide, and the high incidence of fraud and abuse.

AHPs/MEWAs. Furthermore, we ask the Department to confirm in the final rule that the Employee Retirement Income Security Act of 1974 (ERISA) savings clause applies to this proposed rule and that nothing in it "shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking or securities."

However, we are concerned with the language in the NPRM regarding the potential for the Department to provide exemptions, through rule, to non-fully insured MEWAs (individually or class-by-class), from certain state insurance regulations. Any such exemptions could put Colorado consumers at risk of being harmed.

The amendments made in 1983 to the Employee Retirement Income Security Act of 1974 (ERISA) made it clear that states have broad regulatory authority over AHPs/MEWAs. Those amendments were made due to the high incidences of fraud and financial instability of such arrangements and the consumer harm such fraud and instability caused. Continued oversight by states to regulate AHPs/MEWAs is needed. As a result, in the final regulation, I ask that the Department confirm that states will retain broad authority to regulate these plans.

Financial Concerns

As stated above, many AHPs/MEWAs have experienced solvency issues and bankruptcies. To ensure that these entities retained adequate reserves to pay claims, AHPs/MEWAs, including self-insured AHPs/MEWAs, were subject to the reserving requirements established in Colorado statute. Having insufficient reserves could result, not only in bankruptcy for the AHP/MEWA, but also in financial hardship for providers, with consumers potentially left liable for unpaid claims.

As stated above, we urge the Department to clarify that states continue to have broad authority to regulate AHPs/MEWAs, including the solvency requirements for these plans. States are better positioned to protect consumers from fraud and insolvencies than the federal government. Any movement to weaken state authority to regulate the solvency of AHPs/MEWAs will put consumers at risk.

Market Segmentation

The proposed regulation will likely segment insurance markets and increase health insurance premiums over the long term for consumers that need or want comprehensive health coverage. At some point in our lives, that is likely to be all of us.

In order for AHPs/MEWAs to be appealing to consumers, it is likely that they will create plans with limited benefits in order to reduce premiums. These types of plans are typically only appealing to consumers until a comprehensive health care need arises. However, if the only consumers in the individual and small group fully insured markets are those with comprehensive health care needs, market forces will necessitate potentially rapidly increasing premiums.

That is a concern that should be shared by the federal government. As premiums rise, the amount the federal government pays in Advance Premium Tax Credits (APTC) also rises. If

AHPs/MEWAs cause the risk pool in the individual and small group markets to become less healthy, premiums will go up, and APTC payments will increase as well.

There is also concern that AHPs/MEWAs would attempt to use the proposed regulation to circumvent anti-discrimination requirements in state law and further segment insurance markets by doing so. For example, it is unclear in the proposed regulation if AHPs/MEWAs would be free to increase premiums for women simply because they are women or if an AHP/MEWA could exclude maternity coverage.²

In Colorado we have previously addressed these concerns through legislation. Pursuant to state law, AHPs/MEWAs are required to provide benefits that are in substantial compliance with the mandated benefits in Colorado. Furthermore, Colorado's unfair trade practice act specifically applies to all AHPs/MEWAs. As such, we ask once again that the Department confirm that states have broad authority to regulate AHPs/MEWAs so that Colorado can continue to protect consumers.

Interstate sales

The Division also would like to respectfully express concern about the possible ability of AHPs/MEWAs, pursuant to § 2910.3-5(c) of the NPRM, to cross state lines as long as the employer members of a group or association possess a commonality of interest. It appears that employers being in the same trade, industry, or line of business or profession are able to participate in an AHP/MEWA established according to the regulatory requirements of one state, but that welfare arrangement can then be sold in another state with different regulatory requirements, circumventing the regulatory authority of the state in which the welfare arrangement is sold. This raises questions as to which state would have regulatory authority over that AHP/MEWA: the state in which the plan was created, or the state in which the plan is sold.

The final regulation should clarify that AHPs/MEWAs may sell plans across state lines but that they must comply with the requirements of the state in which the consumer resides that is purchasing the plan. Without that clarification, AHPs/MEWAs may seek to organize in the state with the most permissive regulatory framework and the leanest benefits package, creating a "race to the bottom" within the industry.

Enrollment Concerns

Pursuant to § 2510.3(b) of the NPRM, group or association plan coverage must be limited to employees of employer members and working owners. Current Colorado law does not recognize sole-proprietors or working owners as valid employers (see § 10-16-102(61)(b), C.R.S.), and in order to be considered a small employer under Colorado insurance law, there must be at least one employee who is not the owner of the business. Therefore, the Division requests that a clear definition of "self-employed" be provided in the final rule to ensure that such an employer is actually a recognized and legitimate business.

² Colorado statute currently requires maternity coverage at § 10-16-104(3), C.R.S., and that mandate predates the passage of the Affordable Care Act.

The NPRM also establishes that the working owner cannot be eligible for subsidized group coverage through another employer, or their spouse, in order to qualify for participation in the AHP/MEWA (§ 2510.3-5(e)). Under the language at § 2510.3-5(e)(3), the AHP/MEWA is able to accept attestations of compliance, though there is no mention of where oversight of these attestations would lie. The Division would recommend that requirements be established in the final rule for AHPs/MEWAs to maintain records of enrollees and their attestations, as well as audit provisions to help ensure that only valid working owners or employees are participating in an AHP/MEWA.

It is also requested that additional guidance be provided concerning AHP/MEWA fees and dues. If a member of the AHP/MEWA continues to pay premium, but fails to pay their fees and/or dues, does that result in a termination of coverage, as the member will no longer be a part of the AHP/MEWA?

Of course, the concerns raised in this section would be alleviated if the Department clarified in the final regulation that states retain broad authority over AHPs/MEWAs to address these types of issues.

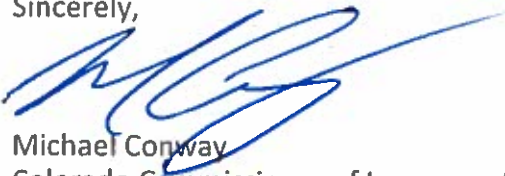
Conclusion

There are issues - such as the advertising of AHPs/MEWAs or disclosure and notification requirements - that were not addressed in our comments. However, as we hope is evident, we believe that AHPs/MEWAs are best regulated at the state level and that those issues should be left to the states to address.

The underlying theme of our comments is that it is imperative that the final regulation does not allow mistakes from the past to be repeated. The primary way to avoid that possibility is for the Department to confirm that states retain broad authority to regulate AHPs/MEWAs in the final regulation.

Thank you very much for your attention to these comments. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Michael Conway', is written over the typed name.

Michael Conway
Colorado Commissioner of Insurance (Interim)