LEUKEMIA & LYMPHOMA SOCIETY®

February 20, 2024

Julie Su
Acting Secretary
Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: Definition of "Employer"-Association Health Plans (EBSA-2023-0020)

The Leukemia & Lymphoma Society (LLS) appreciates the opportunity to provide comment on this proposed rule. LLS's mission is to cure leukemia, lymphoma, Hodgkin's disease, and myeloma, and to improve the quality of life of patients and their families. We advance that mission by advocating that blood cancer patients have sustainable access to quality, affordable, coordinated healthcare, regardless of the source of their coverage.

LLS applauds the Department of Labor (Department) for its decision to fully rescind the Department's prior 2018 rule entitled "Definition of Employer—Association Health Plans" (the 2018 Rule). As we stated in comments on that rule when proposed, we believe that the rule only served to cause the proliferation of low-quality coverage options - potentially destabilizing the individual market risk pool.[1]

The 2018 Rule

The prior administration's rule created a new type of employer association that was allowed to offer coverage – to both individuals and small businesses – that is exempt from the Affordable Care Act (ACA) consumer protections that apply to individual and small-group coverage. This outcome was achieved by redefining the term "employer" under the Employee Retirement Income Security Act of 1974 (ERISA) to mean something far broader than ever previously understood. The Department's definition of "employer" codified in the 2018 Rule is at odds with both the text and purpose of ERISA and, before it was invalidated by a federal court on these very grounds, jeopardized consumers' access to affordable, comprehensive coverage.[2]

The 2018 Rule expanded the definition of "employer" under ERISA in an additional way by asserting that a sole proprietor without any employees could nevertheless be classified as an employer. We disagree. You cannot be in an employment relationship with yourself. The previous rule, when implemented, would have encouraged the growth of coverage products that could siphon individuals out of the ACA-regulated individual market. This was inconsistent with the text and purpose of ERISA and the ACA and with common sense. The Department is right to reexamine this aspect of the 2018 Rule, and, for the many reasons it provides in the proposed rule, wholly justified in rescinding it.

[1] LLS Comments, Definition of "Employer" – RIN 1210-AB85, March 6, 2018 https://downloads.regulations.gov/EBSA-2018-0001-0560/attachment_1.pdf
[2] *New York* v. *United States Department of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019).

Association Health Plans Don't Work for Patients

Association health plans (AHPs) are allowed to charge high premiums to consumers based on a range of factors that, in practice, facilitate discrimination against the patients we represent. Though AHPs may not vary plan premiums based on health factors, these arrangements may hike premiums for groups of enrollees based on gender, age, employee classification, location, and other non-health criteria that could stratify the beneficiary population. This wide discretion enables AHPs to offer products that effectively exclude entire classes of beneficiaries with higher rates of illness and disease.

AHPs also have broad flexibility to structure their benefit designs in ways that could harm patients with pre-existing conditions. AHPs can design plans that exclude coverage for medically necessary prescription drugs, certain specialists who treat high-cost conditions like blood cancer, or other medically necessary care for individuals with chronic conditions and serious illnesses. Furthermore, AHPs are also not subject to network adequacy requirements applicable to marketplace coverage. These limitations are particularly concerning for our patients as they are often the most in need of access to outpatient care and specialty physicians. The physicians and services blood cancer patients rely on could be excluded from AHP provider networks altogether or only include facilities or specialists in the network that are far too distant from beneficiaries to be accessible. Such flexibilities allow AHPs to provide coverage-in-name-only for people with pre-existing conditions.

Fraudulent and mismanaged multiple employer welfare arrangements (MEWAs), including AHPs, have continued to require oversight to protect consumers. Since 2018, the Department has undertaken civil and criminal enforcement action against 21 MEWAs to protect beneficiaries from fraud or mismanagement. In total, the Department has recovered over $95 million from mismanaged or fraudulent MEWAs in the last five years alone.[3] Many of these cases involved failure to follow plan terms, provide plan benefits, or follow applicable healthcare laws.

The 2018 Rule Should be Rescinded and Pre-2018 Guidance Should be Codified

Against this backdrop of fraud and insolvency, we support re-limiting the use of AHPs to narrowly defined, exceptional circumstances. In most cases, regulators should disregard the existence of an association (the "look-through" doctrine) in determining whether the coverage offered is considered individual, small-group, or large-group coverage. This is consistent with regulatory definitions of the terms "health insurance issuer or issuer" adopted by the Department.[4] Additionally, the Centers for Medicare & Medicaid Services has clarified that coverage provided to associations, but not related to employment, and sold to individuals is not considered group

[3] EBSA National Enforcement Project—Health Enforcement Initiatives at *www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement#national-enforcement-projects*; U.S. Department of Labor Files Complaint to protect Participants and Beneficiaries of failing Medova MEWA operating in 38 states, available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20201218*; Federal Court Appoints Independent Fiduciary as Claims Administrator of Medova Arrangement, available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20210412*; Federal Court Orders Kentucky Bankers Association to Pay $1,561,818 In Losses to Benefits Plan After U.S. Department of Labor Finds Violations, available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20201015*; MEWA Enforcement Fact Sheet, available at *https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/mewa-enforcement.pdf*

[4] 5 CFR § 890.114,

health coverage but rather individual coverage subject to Affordable Care Act marketplace reforms.[5]

However, while we appreciate the Department's restatement of pre-2018 guidance regarding the narrow circumstances under which coverage sold through an association is treated as group health coverage, **we urge the Department to codify the three-part test established in pre-2018 guidance determining when coverage is sold through a "bone-fide" association**:

1. Whether the group or association has true business or organizational purposes and functions unrelated to the provision of health insurance and benefits (the "business purpose" standard);
2. Whether the employers share some commonality of interest and genuine organizational relationship unrelated to the provision of health insurance and benefits (the "commonality" standard); and
3. Whether the employers that participate in a benefit program, either directly or indirectly, exercise control in both form and substance of the benefits provided (the "control" standard)

In addition to formally codifying this test to determine whether coverage sold through an association qualifies as large-group coverage, we suggest that the Departments provide illustrative examples of what will be considered as meeting each of the three standards. Providing additional specificity will remove ambiguity and carefully bound the narrow circumstances in which the "look-through" doctrine will not apply.

Conclusion

LLS thanks the Department again for its leadership in this important area. We look forward to future rulemaking on this issue. If you have any questions or would like to discuss our comments further, please contact Phil Waters, Director, Federal Public Policy at The Leukemia & Lymphoma Society at phil.waters@lls.org.

Sincerely,

Bethany Lilly
Executive Director, Public Policy

[5] 45 CFR § 144.102(c).