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CALIFORNIA INSURANCE COMMISSIONER

Submitted via www.regulations.gov

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave
NW, Washington, DC, 20210
Attention: Proposed Rescission of AHP Final Rule RIN 1210-AC16

SUBJECT: *Comments on Notice of Proposed Rulemaking to Rescind the Department of Labor's 2018 rule entitled Definition of "Employer"---Association Health Plans*

Dear Assistant Secretary Gomez:

I would like to thank you for the opportunity to comment on the proposed regulation published by the U.S. Department of Labor's Employee Benefits Security Administration (Department) on December 20, 2023 entitled "Definition of 'Employer'---Association Health Plans" (2018 AHP Rule).

As California's Insurance Commissioner, a fair insurance market, protecting consumers, and increasing access to affordable, equitable, and comprehensive health insurance coverage are major priorities for me and my department, the California Department of Insurance. This is why I support rescinding the 2018 AHP Rule.

Like many states, California has a complicated history with Multiple Employer Welfare Arrangements (MEWAs), including Association Health Plans (AHPs). During the 1990s and 2000s, the collapse of a number of mismanaged and sham MEWAs left hundreds of residents with millions in unpaid medical bills.¹ In the years since, California has taken steps to regulate self-funded and partially self-funded MEWAs to prevent this from happening again. In addition, to guarantee that small employers and their employees are afforded the consumer protections and comprehensive coverage required by law, California generally determines an employer's group size at the employer, and not the association, level.²

¹ [Cal. Health Care Foundation, Group Purchasing Arrangements: Implications of MEWAS \(July 2023\)](#).

² Cal. Ins. Code §§ 10753.02 & 10753.05(b)(8)(A).

These steps were taken to prevent unscrupulous actors from injecting themselves into our market, to ensure that all carriers are on a level playing field, and that consumers have the full protections afforded to them by state and federal law, including with passage of the Affordable Care Act (ACA). And these steps show why it is imperative that states retain their authority to regulate their commercial health insurance markets in order to protect their residents. This is why I join with my National Association of Insurance Commissioner (NAIC) colleagues in supporting the Department's rescission of the 2018 AHP Rule, and support preserving the authority of states to regulate MEWAs and AHPs.³

With this in mind, I write to express my support for the proposed rule which would rescind the 2018 AHP Rule:

1. Definition of "Employer" Under ERISA

I strongly support the Department's proposal to rescind the 2018 AHP Rule, which would have significantly loosened the criteria for AHPs to satisfy the definition of an "employer" under ERISA. The 2018 AHP Rule blurred the line between genuine employment-based relationships, and commercial arrangements, allowing the latter to be marketed as employee benefit plans, and evade requirements set forth in state law and the ACA. I also share the Department's concern that the 2018 AHP Rule would interfere with the goal of increasing affordable, quality, and equitable coverage for all.

Under the 2018 AHP Rule, AHPs that constitute a large group would not be required to offer essential health benefits (EHBs). As a result, participants in these AHPs may become underinsured because the AHP only offers "skinny coverage" as well as subject to high out of pocket costs and denials of needed benefits and medical services. This is of particular concern during the ongoing Medicaid unwinding. Specifically, I fear that low-income adults, many from historically disadvantaged communities who no longer qualify for Medicaid and have limited other coverage options will seek this coverage because it's cheaper.

In addition, given that these AHPs wouldn't have to comply with EHBs, the 2018 AHP Rule increased the risk of adverse selection against the individual and small group markets. Specifically, healthier younger people will join the less-robust AHP plans, while individuals with substantial and complex health conditions will seek health coverage through the individual and small group markets, resulting in increased premiums for those markets. As a result, I applaud and commend the Department for taking steps to not only protect these vulnerable individuals, but to prohibit the expansion of AHPs during this critical period in order to help provide a stable, accessible, and fair insurance marketplace.

2. Definition of "Working Owners" Under ERISA

The 2018 AHP Rule would have allowed "working owners" without any common law employees to participate in AHPs on the grounds that "working owners" could be both an employer and employee. The 2018 AHP Rule's definition of "working owner" conflicts

³ National Association of Insurance Commissioners., Comment Letter on Proposed Rescission of 2018 AHP Final Rule RIN 1210-AC16 (Feb. 15, 2024).

with both federal and state law involving the regulation of employment relationships.⁴ The long-standing standard in ERISA focuses on the genuine employer-employee nexus. Under this standard, “working owners” without common-law employees could not be both an employer and employee, and thus are ineligible to participate in an ERISA-covered plan. Lowering or removing this standard *via* the 2018 AHP Rule weakens one of the greatest tools that regulators have to reduce deception and mismanagement in MEWAs and AHPs. Thus, I fully support rescinding the 2018 AHP Rule as it would re-establish this original standard, which is essential for protecting our residents. Moreover, I want to applaud the Department for recognizing the need and importance of the employer-employee nexus under ERISA in regulating and preventing fraudulent behavior in MEWAs and AHPs.

Conclusion

Thank you for the opportunity to comment on this proposed rule. I share your commitment to increasing access to affordable, equitable, and quality coverage. I look forward to working with you on improving access to health care for all. If you have any follow-up questions or wish for additional information, please contact my staff Stesha Hodges, Chief of my Health Equity and Access Office, at Stesha.Hodges@insurance.ca.gov

Thank you again for your consideration,

A handwritten signature in black ink, appearing to read "Ricardo Lara". The signature is fluid and cursive, with a long horizontal stroke at the bottom.

RICARDO LARA
Insurance Commissioner

⁴ 29 CFR § 2510.3, *et. seq*; Cal. Ins. Code § 10965.02.