February 20, 2024

The Honorable Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Submitted via regulations.gov.

Re: Definition of "Employer"—Association Health Plans; RIN 1210-AC16

Dear Assistant Secretary Gomez:

The American Federation of State, County & Municipal Employees (AFSCME) is pleased to respond to the Department of Labor (DOL) on its proposed rescission of the 2018 rule entitled "Definition of Employer—Association Health Plans"[1] (2018 rule) in light of the decision of the U.S. District Court for the District of Columbia setting aside core elements of the rule[2] and DOL's reconsideration of other aspects of it.

AFSCME members provide the vital services that make America happen. With 1.4 million members in communities across the nation, serving in hundreds of different occupations — from nurses to corrections officers, child care providers to sanitation workers — AFSCME advocates for fairness in the workplace, excellence in public services and freedom and opportunity for all working families. Approximately 200,000 AFSCME members work in the private sector, including for small employers that likely would be targets for promoters of mismanaged and inadequate association health plans (AHPs) were DOL not to rescind the 2018 rule.

The 2018 rule upended longstanding guidance (and largely ignored settled judicial precedent) on the criteria used to determine whether a group or association of employers constitutes an "employer" within the meaning of section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA) with respect to sponsorship of a group health plan and the provision of health benefits. By providing alternative criteria for making such a determination, the 2018 rule significantly expanded the scope of employer groups or associations eligible to establish a single, bona fide group health plan covered by ERISA, i.e., an AHP. The rule further expanded the scope of eligible

[1] 88 Fed. Reg. 87,968 (Dec. 20, 2023).
[2] *New York v. United States Department of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019).

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groups or associations by redefining employer and employee, for purposes of the rule, to include a "working owner of a trade or business without common law employees."

The 2018 rule is rooted in a fundamentally flawed policy objective that conflicts with the statutory framework of the Affordable Care Act (ACA) and therefore ought to be rescinded in its entirety. The rule was issued following President Trump's directive to the Secretary of Labor, via executive order, that the Department "shall consider proposing regulations or revising guidance, consistent with the law, to expand access to health coverage by allowing more employers to form AHPs."[3] President Trump explicitly linked this directive to the conclusion that "[e]xpanding access to AHPs will…allow more small businesses to avoid many of the [ACA's] costly requirements."[4] The so-called "costly requirements" to which President Trump referred, however, include statutorily mandated protections for individuals participating in nongrandfathered small group and individual insurance coverage, especially the requirement that these plans cover essential health benefits (EHBs).

A goal of small employers interested in forming AHPs, in addition to pooling risk and resources, is often to qualify as a large group health plan so as to avoid those very protections and benefits. As the Department notes in the preamble to the proposed rescission, newly allowed AHPs could, if they chose, offer "skinny" coverage, perhaps declining to cover maternity care, mental health services or prescription drugs.[5] This can open participants, including AFSCME members and their families, to catastrophically high out-of-pocket costs or prevent them from getting needed care. Further, participants in these plans may be unaware of such coverage exclusions or their potential consequences.

These are the harms Congress sought to address in imposing essential health benefits requirements on nongrandfathered small group and individual coverage. The 2018 rule, however, significantly undermines these protections by greatly expanding the scope of eligible employer groups or associations to include entities that resemble commercial entities far more than bona fide associations acting indirectly in the interest of the common law employer, and well beyond what Congress intended when enacting ERISA and the ACA. In promulgating the 2018 rule, the Department glossed over such concerns raised by commenters about the rule's legality, asserting that it was simply using its rulemaking authority to define a statutory term.[6]

In addition to subverting the ACA's EHB protections, the 2018 rule has threatened to inflict significant other harms. By removing individuals from the individual and small group markets, the rule has the potential to negatively impact the respective risk pools and premiums for these markets, thereby hindering access to affordable, comprehensive coverage. Further, as DOL details in the preamble to the proposed rescission, the rule's expansion of AHPs to include entities that closely resemble commercial entities threatens to promote the expansion of mismanaged multiple employer welfare arrangements (MEWAs), which have a long history of harming the health and financial security of working people and their families. Last, the rule's redefining of employer and employee to include a "working owner of a trade or business without common law employees"—

[3] Exec. Order No. 13,813, 82 Fed. Reg. 48,385, 48,386 (Oct. 17, 2017).
[4] Id. at 48,385.
[5] 88 Fed. Reg. 87,968, 87,974–87,975.
[6] 83 Fed. Reg. 28,912, 28,917 (June 21, 2018).

in addition to lacking any reasonable basis in the law—threatens to encourage further misclassification of workers as independent contractors. Platform companies, in particular, have long sought the ability to offer limited benefits to gig workers without providing the additional protections, rights and benefits that necessarily flow to employees.

Conclusion

Given this context, we strongly support DOL's proposal to rescind the 2018 rule in its entirety. Doing so and returning to the pre-2018 guidance is in the best interest of working people and their families. We look forward to working with the Department to pursue additional measures to improve health coverage access and affordability for working people.

Sincerely,

/s/ Dalia R. Thornton

Dalia R. Thornton
Director
Department of Research and
Collective Bargaining Services