February 18, 2024

Submitted via http://www.regulations.gov

Julie Su
Secretary, Department of Labor

Lisa M. Gomez
Assistant Secretary, Employee Benefits Security Administration

U.S. Department of Labor
Attention: Proposed Rescission of AHP Final Rule RIN 1210–AC16
Room N–5655, 200 Constitution Ave. NW
Washington, D.C. 20210

Re: Definition of "Employer" – Association Health Plans (RIN 1210 – AC 16)

Dear Secretary Su and Assistant Secretary Gomez:

Thank you for the opportunity to comment on the proposed regulation referenced above issued by the U.S. Department of Labor ("DOL") on December 20, 2023.

The primary purpose of the proposed regulation is to rescind the 2018 association health plan ("AHP") rule. We are not opposed to the repeal of the 2018 AHP rule. Our organizations did not advocate for the expansion of the definition of "employer" under section 3(5) of the Employee Retirement Income Security Act of 1974 ("ERISA").

However, we are writing to express our concern that this rulemaking process may be used to undermine the integrity of pre-rule sub-regulatory guidance relating to "Pathway 1" industry-based multiple employer welfare arrangements ("MEWA"). Specifically, the proposed regulation states:

> *In addition to the comments on rescission of the 2018 AHP Rule, the Department also seeks comments on whether the Department should propose a rule for group health plans that codifies and replaces the pre-rule guidance, issues additional guidance clarifying the application of the Department's pre-rule guidance as it relates to group health plans (including for example, the HIPAA nondiscrimination rules applicable to AHPs).*

As the DOL is well aware, the pre-rule guidance spans decades. It is important to emphasize that these advisory opinions, which were issued to specific parties based upon the facts and circumstances of each case, are not entirely consistent. For example, in 2001, the DOL issued a

favorable advisory opinion to the Wisconsin Automobile and Truck Dealers Association, Inc. Insurance Trust ("Trust").[1] Specifically, the DOL concluded that the Trust is a single employer welfare benefit plan maintained by a "bona fide employer group or association" within the meaning of section 3(5) of ERISA. More recently, the Department issued an Advisory Opinion approving a "Pathway 1" MEWA established through the creation of a consortium.[2] While on its face, Advisory Opinion 2017-02AC does not specifically opine that all "Pathway 1" MEWAs must be established through a consortium, and no other entity but a consortium (which would be inconsistent with the Department's long-standing guidance spanning the last thirty years). We have learned from legal counsel, who engaged in multiple conversations with the DOL's Office of Regulations and Interpretations, that the DOL previously threatened MEWAs established by trusts with substantial penalties under ERISA unless they restructured to be sponsored by a consortium.

Based upon a review of Form M-1 filings available at https://www.askebsa.dol.gov/epds/, there are more than two hundred MEWAs that filed a Form M-1 in 2022 that include the term "trust" in the name of the MEWA. Given the large number of MEWAs likely sponsored by trusts, and not consortia, in accordance with the Department's long-standing guidance, we are reasonably concerned that any rulemaking efforts by the DOL related to "Pathway 1" may include arbitrary new requirements which may require expensive restructuring of MEWAs that have existed for decades. The juxtaposition of a "trust" versus a "consortium" is simply one example. Therefore, we politely ask that any rulemaking related to "Pathway 1" respect the structure of existing MEWAs that were set up in good faith in accordance with prior DOL advisory opinions.

We believe that the DOL is also aware that many, and perhaps most, of existing "Pathway 1" MEWAs utilize experience rating. The HIPAA nondiscrimination rules provide that a plan may treat employees or former employees as distinct groups of similarly situated individuals, so long as the distinction is based on a bona fide employment-based classification consistent with the employer's usual business practice. The regulations specifically list the following classifications as those that may reflect bona fide business practices: (a) full-time versus part-time status; (b) different geographic location; (c) membership in a collective bargaining agreement; (d) date of hire; (e) length of service; (f) current employee versus former employee status; and (g) different occupations.[3]

MEWAs, which include unrelated employers often located in different geographic locations, have appropriately relied on the HIPAA nondiscrimination rules to experience rate groups for decades. It would be illogical that the DOL would permit a single employer to separate its own workforce into distinct groups of similarly situated individuals, but would then prohibit MEWAs from differentiating between the employees of completely separate employers. Any prohibition or restrictions on experience rating may result in significant cost increases for thousands of employers throughout the United States that currently participate in MEWAs.

Industry-based MEWAs provide affordable, comprehensive medical coverage to millions of Americans. On behalf of insurance trusts representing the banking industry, we ask the DOL to preserve the integrity of industry-based MEWAs by (a) keeping intact pre-rule guidance, (b)

[1] DOL Advisory Opinion 2001-04A.
[2] DOL Advisory Opinion 2017-02AC.
[3] Treasury Reg. § 54.9802-1(d).

clarifying that both consortia and trusts are permissible methods of establishing Pathway 1 MEWAs and (c) preserving Pathway 1 MEWAs' ability to utilize experience rating of its employer members. We are supportive of the DOL's efforts to strengthen and reaffirm this important option for our members.

Sincerely,

DocuSigned by:
Amber Van Til
DC3A70490D98457...

Amber Van Til, President & CEO
Indiana Bankers Association

DocuSigned by:
Randy Hultgren
E174EBD94944407...

Randy Hultgren, President & CEO
Illinois Bankers Association

DocuSigned by:
Katy Wolf Bode
8219B6BBDB3042C...

Katy Wolf Bode, Chair
Board of Trustees of the Nebraska Bankers Association Voluntary Employees' Beneficiary Association

DocuSigned by:
Kristy Merrill
8F4D91B790E34DF...

Kristy Merrill, President
New Hampshire Bankers Association