



March 5, 2018

The Honorable Preston Rutledge
Assistant Secretary of Labor
Employee Benefits Security Office of Regulations and Interpretations
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Dear Secretary Rutledge:

The National Small Business Association (NSBA) is pleased to provide these comments with respect to the proposed rule issued in the Federal Register on January 5, 2018: “Definition of ‘Employer’ under Section 3(5) of ERISA—Association Health Plans (AHPs).”

The NSBA was founded in 1937 to advocate for the interests of small businesses in the U.S. It is the oldest small-business organization in the U.S., representing 65,000 small businesses throughout the country in virtually all industries and of widely varying sizes. In addition to representing individual small businesses in all industries in every corner of the country, NSBA is also a national federal umbrella group representing state, local, and regional small business associations across the country. Many of these organizations have long-standing and deep experience managing some of the most successful association health and benefit plans we have seen.

Overview

NSBA applauds the Department of Labor’s focus on developing tools that could be used to reduce regulatory burdens, lower premiums and increase competition in the health insurance marketplaces for small business. The small-business community needs substantial relief from health care costs and many of the burdens imposed by the Affordable Care Act. NSBA’s just-completed national survey of smaller firms ranks health insurance costs as the single greatest challenge facing smaller firms and their highest priority for federal action (*NSBA 2017 Year-End Economic Report*, www.nsba.biz/research/).

In general, the NSBA believes that the necessary level of cost relief can only be achieved through a broad reform of the current health care system with a goal of reducing the cost of coverage, providing universal access, focusing on individual responsibility and empowerment, creating of the right market-based incentives, and a relentless focus on improving quality while driving out unnecessary, wasteful

and harmful costs. However, some improvements can undoubtedly be made through administrative action, so the Department is to be commended for exploring potential reforms.

Our comments have a twin purpose. First, we hope to make suggestions that help to ensure that AHPs can meaningfully live up to their purpose, providing greater choice and access to smaller companies and their employees by driving down costs and creating more competitive choice. Second, our comments will be directed at ensuring that the millions of smaller companies not purchasing coverage through an AHP do not see their insurance costs further escalate as a result of selection issues that create price disparities based on health status rather the reduction of actual health care costs. This potential for “cherry-picking” has been the central conundrum throughout the long AHP debate, and it is crucial that these rules address this issue as fully as possible.

Forming an AHP

Under the proposed rule, employers participating in an AHP must have a “commonality of interest.” This requirement can be met if the businesses either are in the same trade or industry, or if they share a geographic region (to include an entire state), even if they are otherwise disparate.

The AHP itself must be operated by an association of member companies, and insurance issuers are explicitly and appropriately prohibited from forming an AHP. However, AHPs can be formed for the sole purpose of selling health coverage, not just by associations of tenure charged with promoting the overall health of their industries and economic sectors. Particularly when combined with other provisions of the proposed rule (exemptions from rating rules, coverage requirements, etc.) this change could open the door for the formation of groups based primarily upon risk profile. Such activity would drive up premiums for the rest of the market, potentially make “legitimate” associations uncompetitive, and fail to drive down actual health care costs.

Recommendation: AHPs formed solely for the purpose of offering health coverage should *not* be allowed, at least until it can be shown that associations formed for other (legitimate) purposes are unwilling or unable to form and operate health plans on behalf of their members. Further, the rule should establish that only *bona fide* non-profit associations that have been in operation for at least three years—prior to the formation of an AHP—for substantial purposes other than obtaining or offering health coverage would be eligible.

Recommendation: Prohibition against insurance carriers forming AHPs should be maintained. However, the language should be expanded to make clear that other entities, such as health systems, with a direct conflict of interest are also included in this prohibition.

Eligibility, Rating, and Risk

The proposed rule requires that any business eligible for association membership is also eligible for AHP participation. Further, the proposed rule has relatively strong nondiscrimination provisions that prevent health status or claims experience from being used to restrict membership in the association, limit eligibility for benefits, or set financial contributions and rates.

While health status cannot be used directly as a form of discrimination amongst members, AHPs would be allowed a range of rating tools not currently permitted in the small group context, such as employment classification. Further—and distinct from the small group market—there appears to be no limit in the proposal on the degree to which age and gender could be used to set rates across companies. Combined with the ability to set their own membership criteria, some associations could use the combination of rating rules, benefit offerings, and membership criteria to create a pool that is very beneficial from an actuarial perspective, to the detriment of other firms unable to gain similar access.

This risk selection scenario would be made more acute by the allowance of “illegitimate” associations (see section above) to form for the sole purpose of providing health coverage. It appears likely to us that such organizations would have many fewer compunctions against using all of these tools to “game” the system for the benefit only of their member companies and to the detriment of the larger market. More tenured associations formed for broader purposes are more likely to consider the interests of the larger industry and region.

Another factor that could increase the chances for negative risk selection is the inclusion of individual “working owners” as eligible for AHP participation—it is well known that individual coverage poses the most difficult risk selection issues. Under the proposed rule, only associations that permit self-employed individuals as members are required to admit them for coverage. Again, this issue creates a significant distinction between traditional associations and those created simply to sell coverage. Single-purpose associations would exclude the self-employed from membership if they had reason to believe their risk profile would be negative; conversely, they would welcome them if they believed they could establish rating criteria that ensured better-than-average risks. Multi-purpose associations, on the other hand, are likely to consider many factors in setting their membership criteria, which could lead to them being selected against in the health insurance marketplace.

Finally, AHPs could find themselves selected against by becoming the insurer of “last resort” for larger companies unable to secure fully insured coverage and unwilling to self-insure because of their negative risk profile. While it is important that smaller companies that otherwise would participate in the small group market be protected from health underwriting, the market for larger companies is very different.

Recommendation: The rating rules that generally apply in the small group market should also be used in the AHP marketplace. AHPs are primarily promoted as a tool to help smaller employers, which are expected to form the majority of AHP participation. Creating a degree of rating parity between the AHP and non-AHP markets would help to ensure that competition occurs around the ability to drive down administrative and claims costs and not simply the ability to avoid risk. While NSBA believes that the gender and age ratios should be greater than the current 3:1 standard, it is important that all small business markets share common rules.

Recommendation: NSBA generally supports the non-discrimination rules included in the proposal, and believes they should be maintained.

Recommendation: Despite the foregoing, NSBA believes that AHPs should have the ability to underwrite larger firms (otherwise ineligible for the small group market) applying for access to the plan. Such an ability may be vital for some AHPs to maintain viable coverage for their many other members.

Recommendation: The Department should consider creating more uniform rules and standards for the eligibility of the self-employed. Requiring/allowing AHPs to show greater proof of self-employment and length in business could be an important tool for ensuring market stability, both for the AHP and the individual insurance market. A defined open enrollment period for the self-employed could also help to ameliorate potential selection issue in this market.

It is also important to have a “bright-line”, easy-to-apply, but sensible test for the eligibility of business owners, both to identify those legitimately in business and those part-owners who are not truly active in the business.

Pre-emption for Self-Insured AHPs

The proposal wisely avoids preemption of state law regarding self-insured AHPs and Multi-Employer Welfare Arrangements (MEWAs). Significant issues—such as insolvency and non-payment of claims—arose before state oversight of MEWAs was clearly established. Particularly if single-purpose self-insured AHPs were allowed to exist, we would expect similar issues to arise. The Department plainly does not have the resources to provide meaningful oversight of this sector, leaving the state regulatory bodies as the only potential guarantors that coverage purchased through self-insured AHPs by smaller businesses for the benefit of their employees will remain viable.

Recommendation: The final rule should move beyond the assumption of the status quo and explicitly state that state authority to regulate in the self-insured AHPs and MEWAs arena remains intact under the rule. Also, any multi-state AHP should be governed by each of the states in which it operates.

Conclusion

The National Small Business Association thanks the Department for focusing on the urgent need for cost containment and expanded choice in the markets for small employer health insurance. As you move forward, we hope these comments can help you develop policy that addresses the needs of a broad cross-section of the small business community, whether they are purchasing coverage in the traditional small group market, a newly reformed and created AHP market, existing association plans, or other arrangements.

To maximize this potential, NSBA believes that proposals to create AHPs should focus on their potential to reduce regulatory burdens and increase choice, but avoid creating scenarios where the AHPs are merely given tools to manage (and reduce) their risk. Shifting risk is a zero-sum game where one company wins because another loses. However, lifting unnecessary and

burdensome regulations, inducing competition around real health care costs and creating greater transparency and access through competition can create a virtuous cycle where the entire small employer market can benefit. As you address these rules, we urge you to do everything you can to avoid simple risk-shifting, and to create that virtuous cycle.

Thank you for the opportunity to offer comments on these proposed regulations. If we can provide further information or perspective from our members, we would be pleased to do so.

Yours truly,

A handwritten signature in black ink, appearing to read "Todd O. McCracken", with a long horizontal line extending to the right.

Todd O. McCracken
President and CEO
National Small Business Association