Feb. 27, 2018

Mr. Preston Rutedge
Assistant Secretary of Labor
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Definition of Employer – Small Business Health Plans RIN 1210-AB85

Dear Mr. Rutledge:

On behalf of the New Jersey Hospital Association (NJHA) and our 400 members, which includes acute care hospitals, inpatient rehabilitation facilities, long term care hospitals, skilled nursing facilities, home health and hospice agencies, we appreciate the opportunity to comment on the U.S. Department of Labor's (DOL) proposed rule amending the definition of "employer" under Section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA). (See Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 614 (Jan. 5, 2018)).

The summary of the proposed rule notes that DOL's goal is to expand access to affordable health coverage, particularly among small employers and self-employed individuals, by removing certain restrictions on the establishment and maintenance of association health plans (AHPs) under ERISA. **While we appreciate the Department's efforts to expand access to care, we have several concerns regarding oversight and adverse selection this proposed rule raises.**

Below are specific comments for your consideration:

New Jersey and NJHA has a long history of commitment to expanding affordable, high-quality coverage to our citizens. In fact, New Jersey was a national leader in implementing consumer protections that led to increased coverage including an individual market which allowed for guaranteed availability as well as the passage of legislation in 2002 authorizing the formation of Multiple Employer Welfare Arrangements (MEWAs). Similar to AHPs, MEWAs allow small employers to come together as associations and offer self-insured health plans to association members' employees. Unlike MEWAs, however, the broad language in DOL's proposed rule allows AHPs to include individuals, encourage larger group plans which are beyond the reach of state oversight and lead to the erosion of several consumer protections.

While AHPs and MEWAs are preempted from most state requirements because of ERISA, states have oversight over certain areas. For example, in New Jersey, N.J.S.A. 17B:27C-2 states the purpose of the MEWA statute is to:

> **a.** provide for the registration of self-funded or partially self-funded multiple employer welfare arrangements;
> **b.** regulate self-funded or partially self-funded multiple employer welfare arrangements in order to ensure the financial integrity of the arrangements;
> **c.** provide reporting requirements for self-funded or partially self-funded multiple employer welfare arrangements; and
> **d.** provide for sanctions against self-funded or partially self-funded multiple employer welfare arrangements that do not comply with the provisions of this act [17B:27C-1 et seq.].

This statute clearly provides a measure of state oversight that enables state regulators to review MEWAs to ensure financial integrity and compliance with various requirements that will protect consumers. New Jersey also developed regulations that address registration, nondiscrimination, reporting, notices and other matters. (See N.J.A.C. 11:4).

NJHA's primary concern with DOL's proposed rule is its detrimental impact on a state's ability to ensure insurance products offered in the state are based on that state's unique market. There are several areas where the proposed rule could negatively impact a state's ability to ensure appropriate oversight of its markets. These areas of concern are outlined below.

NON-DISCRIMINATION

The proposed rule includes nondiscrimination language that would preclude AHPs from discriminating against an employer or a subset of employees based on any health factor (i.e., health status, medical condition, claims experience, receipt of healthcare, medical history, genetic information, evidence of insurability or disability). The nondiscrimination provision is intended to prevent AHPs from excluding particular employers because their employees are not healthy or denying certain employees of a member organization coverage because of their health status. In addition, AHPs would be required to offer groups of similar individuals across members the same rates and benefits packages. However, AHPs would be able to set different rates and benefit packages across groups of similar individuals (e.g., full time vs. part time, different locations, different job title/occupation, length of service, current vs. former employee status).

Therefore, AHPs could not deny membership to an employer on the grounds that three out of five employees in the company had chronic conditions, nor could AHPs charge those employees more based on their chronic conditions. However, AHPs could set higher rates for subsets of employees who are more likely to have expensive health needs. For example, an AHP could set higher rates for certain jobs that are riskier or more likely to be filled by older individuals, while setting lower rates for jobs more likely to be filled by younger, presumably healthier individuals.

Additionally, the proposed rule would allow for groups within a metropolitan area to form an AHP. However, it is unclear which state within the metropolitan area would have oversight of the AHP. Because of this uncertainty, adverse selection could be further negatively impacted.

EFFECT ON THE INDIVIDUAL AND SMALL GROUP MARKET

The proposed rule allows the sale of plans that cover several states by permitting metropolitan areas to be used in defining groups. This could negatively impact one or more of the states in the metropolitan area. For example, if an AHP decides to offer a plan in a particular metropolitan area and the plan is only required to follow the rules of *one of the states* in which it operates, the plan could choose to establish itself in the state with the fewest or least stringent regulatory requirements. This would enable the plan to offer a lower premium product by choosing a state that has fewer consumer protections and requirements. In New Jersey, this could result in New Jersey small employers that are members of the AHP that is operating across state lines to migrate away from plans available in New Jersey's small employer market. This raises the possibility that carriers would need to charge more for New Jersey's small employer products due to the reduction in the risk pool. This in turn would lead to more small employers being unable to afford coverage.

NJHA has additional concerns beyond adverse selection. By allowing AHPs to be considered employers based on the commonality test, the proposed rule appears to weaken the exclusion of individuals from the definition of an employer. See proposed language at 83 Fed. Reg. 635 (to be codified at 29 C.F.R. § 2510.3-5(c)). The proposed language allows an owner to be both an employer and employee; therefore, a sole proprietor would be eligible to join an association to obtain coverage. See proposed language at 83 Fed. Reg. 635 (to be codified at 29 C.F.R. § 2510.3-5(e)). This could lead to a negative impact not only on the small group market but on the individual market as well.

The Department maintains that while the proposed rule may lead to adverse selection, the benefits of providing additional insurance options to some individuals outweigh the costs. Tens of millions of people rely on the individual and small group markets – both on and off the Health Insurance Marketplaces. While many receive subsidies to help with the cost of coverage sold on the marketplaces, those who do not receive subsidies would be adversely impacted by the higher rates without an alternative. These potential "costs" do not outweigh the benefits of AHPs.

OVERSIGHT OF AHPS

The proposed rule would increase the number of health plans regulated under ERISA. Unlike individual and small group products, states would have little oversight over the new AHPs beyond solvency and other financial and licensure issues. However, this oversimplifies what is likely to occur in practice. Today, there is a lack of clarity regarding federal and state jurisdiction pertaining to oversight of ERISA plans. Under this proposed rule, oversight authority would become more complicated given the potential for growth in health plans sold across state lines that will raise jurisdictional questions between states.

The Department acknowledges a history of fraudulent behaviors by some AHPs, leaving both consumers and providers vulnerable to unpaid claims. Less attention is given to the risk to consumers of potential gaps in protections that could emerge when states lose their authority to regulate these plans including network adequacy, the consumer appeals processes, mandatory benefits and fraud prevention. To prevent bad actors from entering the market and ensure AHPs are genuinely representing their members, the proposed rule would require organizations to have a formal organizational structure and for members to control the organization's functions and activities. The Department indicates that it would need to expand its capacity to monitor AHPs and intervene when necessary. The Department contends that these measures would be sufficient to prevent a return of past bad behaviors and fraudulent activities by AHPs. Given that prior abuses occurred under the Department's authority, however, we would oppose any approach that weakens state authority. Several leading national organizations, including the NAIC and the National Governors' Association, have raised similar concerns regarding prior AHP proposals.[1*]

NJHA's members are committed to ensuring access to affordable, quality coverage. We appreciate the Department's efforts to foster options by which consumers can access coverage. However, the proposed rule's approach is so broad that it fails to consider the unique characteristics of each state's market. **Therefore, NJHA respectfully recommends the Department of Labor not adopt this proposed rule and instead allow states to continue to identify appropriate mechanisms to meet the needs of small employer markets.**

Thank you for the opportunity to provide comments on this proposal. Please contact Theresa Edelstein, vice president, Post-Acute Care Policy & Special Initiatives, 609-275-4102, tedelstein@njha.com for additional information.

Sincerely,

Cathleen D. Bennett
President & CEO

[*] National Association of Insurance Commissioners, "Letter to Committee on Education and the Workforce Leadership on HR 1101," February 28, 2017. Accessed at: http://www.naic.org/documents/health_archive_naic_opposes_small_business_fairness_act.pdf; National Governors Association, "Governors Oppose Association Health Plans," May 10, 2004. Accessed at: https://www.nga.org/cms/home/news-room/news-releases/page_2004/col2-content/main-content-list/governors-oppose-association-hea.html; National Association of Insurance Commissioners, "Consumer Alert: Association Health Plans are Bad for Consumers," 2001. Accessed at: http://www.naic.org/documents/consumer_alert_ahps.pdf.