ALSTON & BIRD

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404-881-7000 | Fax: 404-881-7777

John R. Hickman Direct Dial: 404-881-7885 Email: john.hickman@alston.com

March 5, 2018

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
Department of Labor

Submitted electronically at www.regulations.gov

Re: RIN 1210-AB85 Definition of "Employer" Under Section 3(5) of ERISA-Association Health Plans: Proposed Rule

Dear Assistant Secretary Rutledge:

We appreciate the opportunity to provide comments on the above referenced Proposed Rule on association health plans (AHPs) published in the Federal Register on January 5, 2018. Alston & Bird, a national law firm, represents a variety of different types of plan sponsor clients and entities that provide health benefits coverage and services. We are submitting these comments on behalf of interested clients.

Summary of Comments

Our comments relate to the provisions of the Proposed Rule regarding "working owners" and the requirement that, in order to participate in an AHP, a working owner cannot be eligible to participate in any subsidized group health plan maintained by any other employer of the individual or their spouse. As currently drafted, the proposal would unduly restrict access to comprehensive health coverage through an AHP by excluding working owners merely because they are eligible for other non-comprehensive, limited coverage (such as vision coverage, dental coverage, or an employee assistance program (EAP)). If the prohibition on other subsidized coverage remains in the final regulations, it should be clarified to reflect that the availability of health plan coverage consisting solely of excepted benefits does not preclude a working owner from participating in an AHP. Our suggested approach would avoid an unfair result and is consistent with the purposes underlying the Proposed Rule and Executive Order 13813.

Discussion

The Proposed Rule would expressly provide that, if certain criteria set forth in the Proposed Rule are satisfied, then working owners, including sole proprietors and other self-employed individuals, may elect to act as employers for purposes of participating in an employer group or association and also be treated as employees of their businesses for purposes of being covered

by the group or association's health plan. One of the requirements for this "dual treatment" is that the owner-employee is not eligible to participate in any subsidized group health plan maintained by any other employer of the individual or their spouse. Prop. Reg. 29 CFR § 2510.3-5(e)(2)(iii). The preamble provides generally that the requirements relating to working owners are intended to ensure that a legitimate trade or business exists and to effectively draw a distinction between offering and maintaining employment-based ERISA covered plans on the one hand and the mere marketing of insurance to individuals outside the employment context on the other, but there is no stated rationale for this specific aspect of the working owner requirements.[1]

As currently drafted, the proposed requirement would exclude from AHP participation working owners who have access to any subsidized group health coverage, regardless of how limited that coverage may be. In particular, the Proposed Rule omits the statutory role of excepted benefits coverage and the distinction between such coverage and comprehensive medical coverage and minimum essential coverage (MEC).

Excepted benefits have been defined in federal law for over 20 years, with statutory provisions that have remained unchanged since first enacted in 1996 as part of the Health Insurance Portability and Accountability Act (HIPAA).[2] These benefits were "excepted" from the HIPAA health care mandates in recognition of the limited benefits provided under such plans. Excepted benefits do not provide primary medical coverage and are restricted to plans that provide very limited health benefits, such as dental and vision care, as well as plans that are more in the nature of income replacement and financial protection, such as hospital indemnity and other fixed indemnity plans. Specific statutory requirements apply for benefits to qualify as excepted benefits, depending on the type of benefit. For example, hospital indemnity and other fixed indemnity plans and plans providing specified disease or illness coverage are excepted benefits only if they are offered as independent non-coordinated coverage. The recognition of the limited nature of such "excepted benefits" and separate treatment from primary health coverage was carried over under the Affordable Care Act (ACA); as under HIPAA, excepted benefits are not subject to the ACA health insurance mandates.

Prohibiting working owners who are eligible for subsidized group health plan coverage consisting only of excepted benefits from participating in an AHP runs counter to the stated goals of Executive Order 13813 and the Proposed Rule to provide more flexibility to expand access to more affordable health coverage and to provide more freedom for businesses to join together in organizations that could offer group health plan coverage regulated under the ACA as large group coverage. Excepted benefit coverage, by definition, is very limited coverage and

[1] The preamble does state that the requirement that the working owner not be eligible for subsidized group health plan coverage is drawn from the income tax rules that provide a deduction for the health insurance costs of self-employed individuals under Internal Revenue Code section 162(l). This deduction was added to the Code by the Tax Reform Act of 1986. The legislative history does not indicate the purpose for this provision under 162(l). Further, as noted in the preamble, the ERISA rules at issue and these Code requirements are completely separate. Thus, any requirements in the tax rules are not necessarily informative as to whether it is relevant in the AHP context.

[2] These benefits are defined the same way in ERISA § 733(c), Code § 9832(c), and Public Health Service Act (PHSA) § 2791(c).

is not intended to be comprehensive medical coverage. Thus, the availability of excepted benefit coverage should not preclude participation in an AHP.

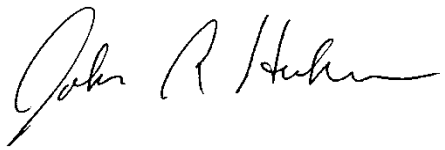
Inappropriate and odd results could follow from the Proposed Rule. For example, a working owner whose spouse was eligible for a subsidized excepted benefit employee assistance plan, dental plan, or plan paying a cash benefit in the event of a diagnosis for a specific disease (and not other coverage), would be precluded from participating in an AHP, even though the subsidized coverage would not offer comprehensive coverage or MEC. This result would clearly undermine the purposes of the Proposed Rule and the executive order on which it is based.

Conclusion

In order to fulfill the purposes of the Proposed Rule as well as Executive Order 13813, eligibility for coverage consisting solely of excepted benefit coverage (as defined in ERISA section 733(c)) should not preclude a working owner from participating in an AHP.

I would be happy to answer any questions you may have.

Sincerely,



John R. Hickman