March 6, 2018

The Honorable R. Alexander Acosta
Secretary, U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Mr. Preston Rutledge
Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Definition of "Employer" under Section 3(5) of ERISA – Association Health Plans (RIN 1210-AB85)

Dear Secretary Acosta and Assistant Secretary Rutledge,

Thank you for the opportunity to comment on the Department of Labor's (DOL) proposed rule, Definition of "Employer" under Section 3(5) of ERISA – Association Health Plans. As the leading nonprofit working to ensure women and children everywhere have the healthiest first 1,000 days—from a woman's pregnancy through her child's 2nd birthday—we are writing today to express our strong support for comprehensive health insurance for women and infants during the 1,000-day window and across the lifespan. This includes coverage of pre-conception, prenatal, and maternity services, as well as all the services that newborns, infants, and young children need to thrive during this foundational time period. These services are critical for all women and children, no matter where they live or their income.

We have serious concerns about the provisions of the proposed rule, which will allow bare-bones insurance products to be sold. Women and children covered by these plans will no longer be guaranteed coverage for all the services they need to be healthy and thrive.

The Department of Labor (the Department) should rescind this proposal and instead require that all health insurance products maintain strong consumer protections with the existing, comprehensive benefit package as the minimum requirements for <u>all</u> health insurance products.

An analysis of health insurance plans *before* 2010 shows that few women had access to maternity coverage through the individual market—in 2009 just 13 percent of individual plans available to a 30-year-old woman living in a state capital offered maternity benefits[i]. However, since 2010, anyone purchasing new health insurance is guaranteed to receive coverage that includes a benefit package that will cover her needs - improving access to covered services needed for the health and well-being of women and children.

The proposed rule rolls back this progress. 1,000 Days is concerned that the proposed rule will reduce benefit packages and at the same time weaken the individual and small group markets that are critical sources of coverage for people with pre-existing health conditions.

1,000 Days strongly maintains that Association Health Plans (AHPs) should not be allowed to sell bare-bones health insurance products or charge higher premiums to businesses based on employees' age, gender or industry. Women and young children—and all consumers—need comprehensive health insurance.

Because of this proposed rule, states will be able to fundamentally alter what plans are required to offer consumers. AHPs could substantially scale back their benefits, dropping benefits entirely or dramatically limiting them**.** This means critical services needed during the first 1,000 days would not be guaranteed to all women and their families. Limiting plan benefits is a predatory practice meant to discourage anyone with a pre-existing health condition or expected high health care utilization from enrolling in coverage.

The proposed rule puts the economic stability and health of consumers at risk by allowing employers to offer limited coverage that fails to meet the needs of women and young children. A small employer, for example, with a relatively healthy workforce might offer an AHP with low premiums but that also provides limited benefits. If an employee later becomes pregnant, she could discover that comprehensive maternity care is not covered by her health insurance forcing her to go without care or pay out-of-pocket. Lack of coverage for benefits before, during and after pregnancy can have devastating impacts. Significant evidence shows that costs, such as from uncovered services, prevent some people from obtaining services. In 2015, 20% of all women reported that they put off or postponed preventive services in the past year due to cost[ii]. Inadequate prenatal care is associated with increased risks for low birth weight, preterm birth, and neonatal, infant and maternal mortality[iii].

Critical health care services covered today would could be at risk. These services are not ancillary or optional services—they are core services needed by women and children. As an example of what is at risk, today plans are required to cover services including:

- Anemia screening on a routine basis: Iron plays an important role in building the brain during pregnancy and the damage done by iron deficiency in pregnancy and the first 2 years of a child's life can be irreversible.
- Breastfeeding support and counseling, including access to breastfeeding supplies (e.g., breast pump): In addition to the brain-building benefits it provides, breastfeeding gives babies the healthiest start to life. The nutritional and immunological properties unique to breastmilk help protect babies from infection and illness.
- Diet counseling for adults at higher risk for chronic disease; and Obesity screening and counseling: Obesity during pregnancy puts women at risk for gestational diabetes. A compelling body of evidence suggests that the origins of childhood obesity can be found in pregnancy. Researchers have found that high weight gain during pregnancy consistently and significantly increased the risk of childhood overweight and obesity.
- Folic acid supplements for women who may become pregnant: When a woman lacks sufficient folic acid before becoming pregnant and in the early weeks of her pregnancy, the development of the neural tube can go awry, leading to birth defects of the brain and spine (anencephaly and spina bifida) that can cause death or lifelong disability.
- Gestational diabetes screening for women 24-28 weeks pregnant and those at high risk for developing gestational diabetes: Gestational diabetes alters the hormonal environment

for a baby in utero in ways that negatively impact his/her development and make him/her more susceptible to obesity and type 2 diabetes later in life.

- Domestic and interpersonal violence screening and counseling: If a mother is experiencing severe stress, depression or violence during her pregnancy, those negative experiences can "imprint" themselves on her developing child.
- Tobacco use screening and interventions; and Alcohol misuse screening and counseling: A baby whose mother smokes during pregnancy is at a much greater risk of obesity later in life. Similarly, alcohol and drug use during pregnancy have strong negative impacts on the future well-being of a developing child.

The rule also appears to allow groups or associations to base premium rates on any other factor, including gender, age, industry and other circumstances actuaries create to estimate health care utilization. Small businesses with workforce that are, for example, disproportionately women, or in industries that are believed to attract high health care utilizers would suffer the most under high health care premiums.

Currently, because of the ACA protections, plans are prohibited from basing premiums on anything other than age (within a 3:1 ratio for adults), tobacco use, family size, and geography. As one example of problematic rating practices before the ACA took effect, 92 percent of best-selling plans on the individual market practiced gender rating, costing women approximately $1 billion a year[iv]. While the proposed rule would protect *individuals* from being charged more because of their gender, it appears that employers with higher rates of female employees could be charged higher premiums, which would ultimately be passed down to their employees.

If the Department moves forward with finalizing this rule, we strongly urge you to maintain the nondiscrimination provisions. Both are critical to stem the damage that the proposed rule will cause for insurance markets and consumers themselves. 1,000 Days strongly supports consumer protections that ensure that plans cannot discriminate against consumers.

While 1,000 Days strongly opposes finalizing this rule, if the Department does move it forward AHPs should be required to provide notice to employers and potential beneficiaries if plans do not meet benefit standards. This will ensure that employers and employees know that the plans are less comprehensive than health plans available in the individual or small group markets. Further, if the AHP does not meet the standard of a qualified health plan, employees must be made aware of their right to receive coverage through the health insurance marketplaces, potentially with premium tax credits based on their income.

We are pleased that the proposed rule applies the HIPAA nondiscrimination provisions in § 2590.702(a) and § 2590.702(b) to AHPs. The nondiscrimination provisions prevent AHPs from discriminating based on health status related factors against employer members or employers' employees or dependents. As proposed, this would prevent AHPs from using health factors to determine eligibility for benefits or in setting premiums. Health factors include: health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. We support this part of the proposal, as it is essential to help protect both employers and their employees from discrimination based on health status. We strongly encourage the Department to retain this requirement in the final rule. We support this provision applying to all AHPs, regardless of when in time they were established. AHPs currently

in operation should be required to fully comply with nondiscrimination requirements, without exception and without delay.

Unfortunately, however, this language does not go far enough. By offering bare-bones insurance packages and by allowing plans to adjust their rates based on a variety of factors, plans will still be engaging in discriminatory practices, particularly against people with preexisting conditions. An AHP would be exempt from essential health benefit (EHB) provisions, rate reforms, guaranteed issue and single-risk pool requirements. Consequently, an AHP can simply avoid covering people and businesses with high-cost medical needs. For example, individuals and small employers would not necessarily have access to coverage that includes maternity benefits. Also, an AHP could discriminate in rates, charging women higher rates than men, charging smaller businesses higher rates than larger businesses, charging businesses in certain industries higher rates, and charging older adults higher rates without limit.

To meaningfully prevent discrimination, the Department should also strengthen the protections in this provision by preventing groups or associations from varying premium rates to different employer members based on gender, age, zip code or other geographic identifier, industry, or other factor that may be used to vary rates based on expected health care utilization. The final rule should also apply EHB provisions, guaranteed issue and single-risk pool requirements. The single-risk pool requirement is an important way to ensure that AHPs, where they exist, do not result in a segmented market.

Access to health services in the first 1,000 days is critical to the health outcomes of moms and infants. These services are truly essential and scaling back insurance coverage for them would be devastating for both women and their children. As the evidence shows, the costs of uncovered services often are a significant factor preventing people from obtaining those services. The Department must act to preserve access to coverage and care for all the services needed, and not move forward with this proposed rule. **1,000 Days urges the Department to rescind this proposed rule, which undermines the health of women of children.**

Sincerely,

Adrianna Logalbo
Managing Director
1,000 Days

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i National Women's Law Center. 2009. Nowhere to Turn. http://action.nwlc.org/site/PageNavigator/nowheretoturn_Report

ii Preventive Services Covered by the Affordable Care Act. Kaiser Family Foundation. August 2015. http://files.kff.org/attachment/preventive-services-covered-by-private-health-plans-under-the-affordable-care-act-fact-sheet

iii Women and Health Insurance: By the Numbers. American Congress of Obstetricians and Gynecologists. https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/hcfwhcfa-numbers.pdf?dmc=1&ts=20160624T1632284584

iv National Women's Law Center. (2012). Turning to Fairness: Insurance Discrimination against Women Today and the Affordable Care Act. Retrieved 14 December 2016, from http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf