



March 6, 2018

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Avenue NW
Washington, D.C. 20210

Submitted electronically via regulations.gov

RE: Definition of “Employer” Under Section 3(5) of ERISA – Association Health Plans (RIN 1210-AB85)

Dear Assistant Secretary Rutledge:

On behalf of broad group of organizations representing consumers, providers, hospitals, and health plans based in Massachusetts, we are writing to offer comments in response to the Department of Labor (DOL) Notice of Proposed Rulemaking (NPRM) titled, Definition of “Employer” Under Section 3(5) of ERISA - Association Health Plans (83 FR 614).

We have serious concerns that the proposed regulations could impact the stability of the Massachusetts marketplace by allowing individual employers to circumvent many of the protections and requirements of the Massachusetts merged market and the Affordable Care Act (ACA) by joining together as association health plans (AHPs) for the purpose of purchasing health coverage for their employees.

The proposed rule would broaden the definition of an employer under ERISA to allow more employers to form AHPs and bypass ACA rules. Specifically, the rule expands the criteria for determining when an association of employers may constitute a single multiple-employer group. First, the proposed rule would amend the existing requirement that associations sponsoring AHPs must exist for a reason other than offering health insurance, by expressly allowing a group or association to exist for the purpose of offering or providing health coverage to its members. Second, the proposed rule creates a more flexible “commonality of interest” test for the employer members than the Department of Labor has previously adopted in sub-regulatory interpretive rulings. The regulation would allow employers to band together for the express purpose of

offering health coverage if they either are: (1) in the same trade, industry, line of business, or profession; or (2) have a principal place of business within a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State). Therefore, associations whose members operate in the same industry can sponsor AHPs, regardless of geographic distribution; conversely, association members needn't be in the same industry, so long as they operate in a common geographic area.

This expansion of AHPs will work to undermine our state's efforts in providing near universal coverage to our residents, and will fragment the state's merged market risk pool. Massachusetts has a long history of health care reforms; prior to enactment of the ACA, our state had insurance rules in place requiring carriers to provide coverage on a guaranteed issue basis and prohibiting exclusions in health insurance policies based on pre-existing conditions. In 2006, Massachusetts adopted health reform legislation aimed at providing health insurance coverage for all Massachusetts residents. The law included several provisions to further stabilize our health insurance marketplace, including requirements establishing minimum creditable coverage standards for adult residents, adoption and enforcement of an individual mandate, and the merger of our state's small group market and individual market. These provisions were all important components designed to work with our existing insurance rules to create a robust and competitive merged market for small businesses and individuals and to ensure increased access to insurance for our state's citizens. Today, nearly 98% of Massachusetts residents are insured, due in large part to our state policy decisions. Any effort to weaken these components and "cherry pick" healthy risk from our merged market will drive up premiums for those small businesses and individuals remaining in the pool.

Unfortunately, AHPs, as contemplated in the draft rule, will work to undermine our state's efforts in providing near universal access to our residents and will lead to market instability and higher premiums for employers and individuals in the Massachusetts merged market. If this rule is finalized in its current form, it is likely that small businesses with younger, healthier risk will move to establish AHPs, while groups employing individuals with older and sicker workers will remain in our merged market. The proposed expansion of the definition of employer to include working owners would also incentivize individuals, who would normally purchase coverage in the merged market, to migrate to AHPs, leaving the merged market concentrated with unhealthy risk. As the better risk moves out of the merged market and into AHPs, premium rates for those businesses that remain will increase, making it more difficult for employers and individuals to maintain coverage.

Further, under the draft rule, AHPs are exempt from comprehensive coverage requirements as required by the ACA, including essential health benefits, guaranteed issue and preexisting condition protections, and regulations concerning premium rating and copayment limits. As a result, employees enrolled in AHPs may not have the same coverage as those in the regulated merged market, resulting in out of pocket costs for care that may have been covered under their previous plan and putting consumers at risk of unpaid medical bills. If AHPs do not use fully insured health plans for their members, they would be exempt from state solvency requirements, putting consumers at serious risk of incurring medical claims that cannot be paid by their AHP. The draft rule also allows for AHPs to be established in a state with fewer coverage requirements and less restrictive rating rules. Allowing AHPs to be established in states with weaker insurance

rules will further erode the state's merged market risk pool and jeopardize access to important consumer protections available to individuals in our state.

Stakeholders in Massachusetts have dedicated countless time and financial resources to implementing both state and federal market reform rules over the past ten years. While we continue to strive to offer more affordable insurance products which will meet the needs of small businesses and employers, we oppose proposals such as this one, which would undermine the essential health benefits and patient protections critical to comprehensive health insurance and the maintenance of a robust competitive insurance marketplace. Efforts to erode the delicate balance established in Massachusetts will lead to higher premiums and less coverage for many of our residents. For the above reasons, we urge the Department of Labor to retain the existing regulations and sub-regulatory guidance that presently exist and to issue a final rule that protects the role of states in regulating insurance, insulates consumers from decreased consumer protections and higher costs, and ensures the maintenance of market stability in Massachusetts.

Sincerely,



Deirdre W. Savage
Vice President, Blue Cross Blue Shield of
Massachusetts



Amy Rosenthal
Executive Director, Health Care for All



Lora Pellegrini, President & CEO,
Massachusetts Association of Health Plans



Steve Walsh
President & CEO, Massachusetts Health and
Hospital Association



Henry L. Dorkin, MD, FAAP
President, Massachusetts Medical Society

cc: Charlie Baker, Governor
Marylou Sudders, Secretary, Executive Office of Health and Human Services
Gary D. Anderson, Commissioner, Massachusetts Division of Insurance
Louis Gutierrez, Executive Director, Commonwealth Health Insurance Connector