Washington Health Benefit Exchange Comments: Proposed Federal Rule – Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans

The Washington State Health Benefit Exchange (WAHBE or the Exchange) submits comments about the proposed Association Health Plan (AHP) rules, published by the United States Department of Labor (DOL) on January 5, 2018, 83 Fed. Reg. 614.

WAHBE is concerned about the changes proposed in this rulemaking. Generally, WAHBE cautions that several of the contemplated changes are likely to harm regulated health insurance markets by segmenting risk and further destabilizing the individual and small group markets. The Exchange emphasizes the importance of preserving state flexibility to regulate in response to state-specific market needs, while cautioning that with flexibility can come an erosion of federal standards. WAHBE encourages DOL to be aware of preserving the federal safeguards that have become a central feature of the regulated insurance markets in recent years and circumspect about making federal changes that will undermine stability in those markets.

Destabilization of the Individual and Small Group Markets

The Exchange shares concerns expressed by other stakeholders that the changes proposed in this rule will lead to destructive segmentation of healthier people who would otherwise participate in the small group and individual health insurance markets and undermine the stability that pooling of risk offers to any market.

The proposed rules exclude AHPs from being subject to the Affordable Care Act's (ACA) market rules applicable to the individual and small group insurance markets, including essential health benefits (EHB), rating, guaranteed issue, and single risk pool requirements. These proposed rules allow AHPs to form and tailor their products to "cherry pick" healthier enrollees. This model serves to further segment markets, leaving the individual and small group markets with higher cost enrollees, driving up prices, and potentially destabilizing the market. This outcome is made possible, and is virtually inevitable, when different rules apply to different segments of an insurance market.

WAHBE cautions against the following features of the proposed rules, which will result in the individual and small group markets becoming sicker, more expensive, and less stable over time.

AHPs not subject to essential health benefit requirements

One of the stated goals of the proposed rule is to provide less expensive alternatives to plans that are required to meet minimum actuarial value (AV) requirements (56% AV). To accomplish this, AHPs will be skimpier plans than today's qualified health plan (QHP) products, allowing AHPs to offer cheaper premiums but also cover fewer benefits and include greater cost-sharing requirements. It is certain that healthy people will leave regulated, "more expensive" coverage, and risk segmentation will follow. As AHP enrollees develop health conditions and need services not covered by their AHP, they will reenter the regulated market to obtain those services, further perpetuating the segmented risk pool.

AHPs can use benefit design and association eligibility rules to "cherry pick" for healthy risk

Benefits associated with more expensive health conditions (e.g., cancer care) are not required to be covered under AHPs, nor are particular prescription drugs required to be covered – allowing AHPs to be structured to appeal to healthy individuals. This undermines the nondiscrimination rules that prohibit discrimination on the basis of health status or condition.

The proposed rules expand the commonality of interest requirements for formation of AHPs, allowing an AHP to be formed to cover any geographic area or areas within a state or a multi-state metropolitan area. This permits AHPs to limit eligibility for participation in the association to certain geographic areas or to certain groups of individuals that have historically exhibited better health risk, essentially a form of health insurance gerrymandering.

AHPs are not subject to rating rules that apply in small group and individual markets

The proposed rules would allow AHPs to vary rates based on age, gender, geography, and other differences between employer groups. Contrary to DOL's assertion that its proposal will have little effect on individual and small group risk pools (*see* 83 Fed. Reg. 629), this structure encourages rating based on characteristics that are proxies for health status, allowing "cherry picking" of health risk.

AHPs will likely segment risk within member groups, as well as across the market generally

The proposed rules incentivize small employers to offer coverage that is lower than "minimum value" (56% AV). Healthy employees will have an incentive to take the AHP coverage, as it will be less expensive and provide narrower benefits than individual market coverage. As long as the coverage is below minimum value, sicker employees may decline the AHP coverage, apply for individual coverage through an ACA exchange, and be eligible for federal tax credits and cost-sharing reductions. These small groups are able to direct sicker workers and their families to the publicly-subsidized individual market, free from the countervailing influence of the employer shared responsibility payment, which deters larger employers from this practice in the large group market. This practice will further endanger individual market stability as that risk pool becomes less healthy.

Expansion of the Availability of Association Health Plans

A primary goal of the proposed regulation is to reduce barriers to AHP formation. However, making AHPs more widely available and lowering standards around participation in AHPs will exacerbate the impacts of risk segmentation discussed above and potentially open the door to fraud and abuse by entities subject to limited oversight. WAHBE recommends against the following proposed changes, which are intended to result in expanded availability of AHPs.

Permitting working owners with no employees to sponsor and receive coverage through an AHP

WAHBE cautions against overturning the long-standing interpretation of ERISA to require a working owner to have at least one employee to sponsor and participate in an ERISA employee benefit plan. To the extent that AHPs will attract healthier risk through narrower benefits and lower premiums, extending AHPs to working owners with no employees will increase premiums for those who remain in individual market coverage. Moreover, the reasoning that justifies looser rating and market rules in the large group market does not exist with respect to a "group of one." These individuals would receive none of the protections with respect to EHBs, rating, and guaranteed issue that apply in the individual market, but would not experience the buffering impacts of population variation provided in a large group plan.

The rules propose to accept an individual's attestation of meeting the "working owner" standard to be eligible for participation in an AHP. As part of that attestation, WAHBE cautions against using an earned income minimum threshold of the cost of the AHP monthly premium, which is too low. Setting this low earned income requirement is likely to result in over-reporting of "working ownership," a concern that is exacerbated by the proposed provision allowing attestation of employer status. The proposed working owner rule opens the door to fraud and abuse, and is likely to destabilize the individual market through a system that would have very little oversight.

Associations would no longer be required to have a purpose other than offering health coverage

WAHBE recommends retaining the requirement that an employer association may not exist solely for the purpose of offering an AHP. We believe the requirement that associations exist for a purpose beyond the provision of health coverage provides a necessary safeguard to protect employers and their employees from the sort of fraud and abuse that occurred in multiple employer welfare arrangements in the early 2000s, and serves to ensure that associations are bona fide employer organizations created for the purpose of providing real benefits to their members.

Expansion of the commonality of interest test to include merely having a principle place of business in the same state or, if in different states, in the same metropolitan area

Currently, associations are required to consist of employers in the same trade, industry, or line of business in order to offer an AHP to the employer members. WAHBE recommends that DOL retain this requirement when finalizing these rules. Employers in the same trade, industry, or line of business are more likely to have similar workforces and employees that have similar health insurance needs than, e.g., all the small employers in a state. There is not necessarily any employment-related nexus between employers in a given area and an employer-sponsored plan. Further, the formation of AHPs based on geographic lines is likely to exacerbate the risk segmentation issues discussed above and encourage the proliferation of AHPs designed to seek only good risk, contributing to the destabilization of non-AHP markets. WAHBE is also concerned about the ability of AHPs to be offered across state lines, and would emphasize the importance of requiring any such AHP to comply with the insurance rules of all states in which it is offered.

Nondiscrimination Rules

WAHBE advises DOL that, although the HIPAA nondiscrimination standards are necessary protections, they may not be sufficient to deter discriminatory treatment of employers and employees with medical needs. Because AHPs would be exempt from ACA EHB, rating, guaranteed issue, single risk pool, and nondiscrimination rules, these plans would be able to structure association eligibility, plan benefits, and rates in such a way that would result in de facto discrimination based on health status factors. For example, AHPs could be designed to only be available in geographic areas that have a history of a low incidence of cancer, or not be open to employers in specific industries that have a history of higher medical claims. An AHP could offer coverage without maternity coverage, mental health benefits, or coverage of certain prescriptions. Rating could be applied discriminatorily, charging women higher rates than men, older individuals higher rates without limit, or individuals in certain industries higher rates than others.

Because the small group and individual market protections would not apply to AHPs, demographic and other factors can be used as proxies to achieve de facto discrimination based on health factors, even if health status is not used explicitly in eligibility or rating decisions. Failure to extend these ACA protections to AHPs will also endanger the stability of the individual and small group markets.