



**Bernstein, Shur,
Sawyer & Nelson, P.A.**
100 Middle Street
PO Box 9729
Portland, ME 04104-5029

T (207) 774 - 1200
F (207) 774 - 1127

Steven Gerlach
(207) 228-7128 direct
sgerlach@bernsteinshur.com

Electronically Submitted

February 20, 2024

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: RIN 1210-AC16, Proposed Rescission of AHP Final Rule

To whom it may concern:

As discussed in greater detail below, this letter addresses the ability of Pathway 1 AHPs to cross state lines, respectfully requests that the portion of the 2018 AHP Rule which liberalized this ability be preserved, not rescinded, and further requests that Pathway 1 guidance be clarified to provide that bona fide employer groups or associations may collaborate across state lines. Regarding the latter clarification, we make the additional request that the DOL provide specific guidance with respect to what structures would be permissible for such collaborations.

My firm represents three Pathway 1 Association Health Plans ("AHPs"), two of which were formed prior to the issuance of the 2018 regulations issued by the Department of Labor ("DOL") entitled "Definition of Employer—Association Health Plans" ("2018 AHP Rule"). This letter provides comments regarding the DOL's proposed regulations issued December 20, 2023, in which the DOL proposed rescinding the 2018 AHP rule in its entirety.

The primary reason for any AHP to want to cross state lines is to increase the number of its participants because, as the DOL knows, health coverage cost is governed by the laws of large numbers. Specifically, the larger a group's risk pool, the more stable is the claims experience and the less likely it is that a single high claim will significantly increase costs in the aggregate. As claims experience becomes stabilized, premiums become more predictable and rise less quickly. Larger numbers also permit plan sponsors to take advantage of cost control measures like employing centers of excellence, value-based pricing and direct contracting. Additional cost control is gained by a larger group's leverage and buying power, which can be used to get lower coverage rates and administrative costs. Finally, combined groups can employ economies of scale to further lower infrastructure and administrative costs. It is with these considerations in mind—bona fide associations working together to further the common goal of high-quality, affordable health coverage for their members—that we approach our discussion of the 2018 AHP Rule.

In the 2018 AHP Rule, section 2510.3-5(c)(1)(i) provides that the commonality of interest requirement (to be a bona fide group or association eligible to sponsor an AHP) is met if the employers participating in the group or association "are in the same trade, industry, line of business or profession" (hereafter collectively referred to as "industry associations"). This definition imposes

no geographic boundaries on groups otherwise meeting this definition. It thus stands to reason—and many of us working in the industry at the time understood—that industry associations would be permitted to work together across state lines to provide coverage to their combined members.

As contemplated, these collaborations could take any number of forms; here are four examples:

- A state association which sponsors an AHP for its members could allow members of its sister association in a different state to participate in its AHP.
- Sister associations from different states, each of which sponsors an AHP, could merge their AHPs (and affiliated trusts).
- National or regional associations comprised of member state industry associations could act as the sponsor of a multi-state AHP.
- Associations from various states could form a consortium—a separate entity from any one state association—to sponsor the AHP.

Due largely to the *NY v. DOL* case, however, the expansion of multi-state association sponsored AHPs did not have a chance to gain traction before the legal foundations of the 2018 AHP Rule came into question. *State of New York v. United States Department of Labor*, 363 F.Supp.3d 109 (D.D.C. 2019).

Significantly, neither *NY v. DOL* nor the DOL in its preamble to the 2023 proposed regulations take issue with industry associations crossing state lines. By contrast, both documents discuss at length the potential dangers of geographically based AHPs and allowing working owners to participate in AHPs. We infer that neither Judge Bates nor the current DOL leadership perceive such dangers in multi-state industry association sponsored AHPs. Nor do such dangers exist. Relying on pre-2018 guidance, Judge Bates found that ERISA supports only associations “with close economic and representational ties to their employer members,” that is, Pathway 1 AHPs. Nothing about the proposed multi-state collaborations modifies or dilutes the close economic and representational ties industry associations have with their employer members.

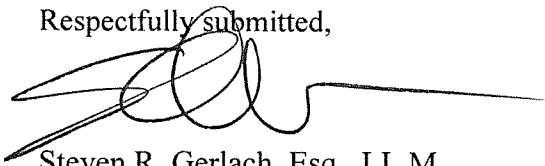
Moreover, the expressed concern that the 2018 AHP Rule created “an end-run around the ACA” simply does not apply to Pathway 1 AHPs, which predate the ACA and the 2018 AHP Rule, and have since been re-affirmed by the DOL (*see* discussion below re Pathway 1 guidance). Such plans crossing state lines have no negative effect on ACA compliance and, from a practical perspective, would look much like any other plan sponsored by a multi-state employer, which is permitted under the ACA.

We also note that existing DOL rulings support multi-state Pathway 1 AHPs. For example, in Advisory Opinion 2019-01A, the DOL ruled that the Ace Hardware Corporation Cooperative Group Health Plan (the “Plan”), which provided health coverage to the employees of Ace Hardware franchisees across the United States, was sponsored by a “bona fide group or association of employers” under the Pathway 1 rules and therefore the Plan was an AHP. The DOL also ruled in favor of a multi-state AHP in Advisory Opinion 2017-02AC, in which independent dairy farmers from Minnesota and Wisconsin—members of an independent dairy cooperative—established a consortium to sponsor an AHP to provide health benefits to its members’ employees. Although we recognize that neither of these cases is identical to the example collaborations described above, we note that multi-state sponsorship presents no barriers to achieving AHP status in either case.

In conclusion, both the 2018 AHP Rule and existing Pathway 1 guidance support the ability of industry associations to work across state lines to provide high-quality, affordable coverage for their members. Neither the *NY v. DOL* case nor the DOL’s preamble to the 2023 proposed regulations take issue with Pathway 1 AHPs crossing state lines. Moreover, crossing state lines would permit state industry associations to take advantage of the stable claims experience while leveraging greater bargaining power and economies of scale inherent to larger groups, thereby

enabling them to control and lower costs. We therefore respectfully request that the DOL preserve that portion 2018 AHP Rule which liberalized the ability to cross state lines, clarify Pathway 1 guidance to provide that bona fide employer groups or associations may collaborate across state lines, and further clarify what structures would be permissible for such collaborations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. Gerlach", with a long horizontal line extending to the right.

Steven R. Gerlach, Esq., LL.M
Bernstein, Shur, Sawyer & Nelson, P.A.

SRG/lhc