



NJ For Health Care Coalition
March 4, 2018

**COMMENTS to the Department of Labor's Proposed Rule on Association Health Plans
Redefining "Employer" under ERISA, 83 Fed. Reg. 614 (January 5, 2018)**

New Jersey Appleseed Public Interest Law Center respectfully submits, on behalf of the NJ for Health Care Coalition the following comments to the Department of Labor in response to the proposed regulations concerning Association Health Plans released in the Federal Register on January 5, 2018.

The NJ For Health Care Coalition is a broad-based alliance of health care, consumer, senior, student, disability, women's, labor, faith-based, civil rights and social justice organizations working to bring guaranteed, high quality, affordable health care to all New Jersey residents. Such organizations include, but are not limited to, AARP-NJ, New Jersey Policy Perspective, New Jersey Citizen Action, NJ-PIRG, Statewide Parent Advocacy Network and Latino Action Network. See <http://njforhealthcare.org/index.html> (list of all participating organizations). We have been working over the past several years to build strong alliances with patients, providers, small and large businesses and health care and social service agencies across the State in order to ensure that the Affordable Care Act (ACA) is effectively implemented in New Jersey in accordance with our core principles: affordability, transparency, and accountability to all consumers. We are committed to making sure that the ACA works for New Jersey residents, and that all insurance markets in New Jersey are stable, affordable and responsive to consumer's concerns.

We understand that the proposed rule was developed in response to Present Trump's recent executive order directing the federal government to expand the availability of health insurance coverage sold through associations of employers – known as Association Health Plans (AHP). This specific proposal, however, has potential to erode consumer protections, destabilize the individual and small group insurance markets in our State, promote adverse selection, and raise prices for New Jersey consumers. We thus urge the Department of Labor ("DOL"), as it moves forward in finalizing this proposed rule, to expressly provide that states will maintain their full authority to regulate AHPs, and that federal law will not pre-empt such regulation.

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At the onset, we want to make clear that the NJ for Health Care Coalition understands the challenge that small businesses and sole proprietors, including freelancers and consultants, face in obtaining affordable health care insurance coverage, and accordingly, as a Coalition we support measures that seek to make comprehensive and affordable coverage available to everyone. We fear, however, that this proposal will actually make it harder for many New Jersey residents to obtain insurance coverage, and that those who purchase coverage through an AHP will not receive access to the health care services critical to their health. History tells us that AHPs may induce and perpetuate “death spirals” by attracting younger, healthier individuals and leaving a smaller, sicker pool in the small group and individual markets, forcing insurers to raise premiums for all those enrolled in those plans. Furthermore, as acknowledged throughout the DOL proposed rule preamble, the history of AHPs has been fraught with fraud and abuse. This was particularly the case before the ACA fortified states’ ability to oversee AHPs and when there was only minimal federal oversight. In New Jersey, before our State acted, many AHPs became insolvent, leaving consumers and health care providers stuck with the bill. Moreover, reduced state oversight of AHPs would result in fewer protections for patients, such as laws that require coverage for emergency care and certain specialists; mandatory grievance procedures; and review of denied medical claims. As recently as 2014, we, in New Jersey, fought off an attempt to deregulate and lower the coverage standard for certain large employer Multiple Employer Welfare Associations operating in our state. We really hope that the federal government will not allow to happen what we in New Jersey have already considered and rejected.

Should the DOL proceed with expanding the use of AHPs as a means to cover small employers and individuals, we urge the following:

Clarify and Ensure State Authority over AHPs.

In the proposed rule, DOL expresses that there would be a “limited” effect on state regulation of AHP plans, both self-insured and fully-insured. However, the rule also raises questions about the extent of state authority to assess whether AHPs meet the new tests for single-employer status, whether to subject AHPs to traditional individual and small group marketplace rules, and whether the future federal rules would pre-empt state regulation of AHPs. Given the strength and success of New Jersey’s regulations, the Coalition opposes any attempt by DOL to pre-empt state authority to regulate AHPs.

We encourage DOL to specifically strengthen the language in the rule providing states with enforcement authority to protect their residents. Under current law, New Jersey currently requires AHPs to: be state-licensed insurers; meet minimum financial solvency standards; cover state-mandated benefits (e.g., alcohol treatment, autism, breast reconstruction) and meet other state insurance standards (e.g., rating rules, risk pool regulations); and acquire pre-

approval of marketing materials to consumers. With such authority, New Jersey limits potential risks of AHPs, including fraud, insolvency, and adverse insurance market distortions. Specifically, we urge that the rule, at minimum, make clear that a state, such as New Jersey, may continue to regulate the risk pool to prevent adverse selection in the small group market; and thus may be permitted to require the so-called “large” group AHP to offer equivalent value plans as provided by small group plans. Furthermore, the DOL should also clearly state that AHPs covering people in more than one state would have to comply with all state laws in states in which they operate and continue to be subject to state oversight and regulation.

Limit Ability to Discriminate Based on Geography.

DOL is proposing to prohibit AHPs from discriminating based on health status related factors. We encourage DOL to retain this requirement in the final rule and ensure that it apply to all AHPs. However, there are concerns that other aspects of the proposed rule will result in discrimination against people with medical needs, including how DOL proposes to expand the “commonality” criteria for the purpose of employers to form an AHP. That is, to be considered a single-employer AHP, members could be either in the same industry or have their principal place of business in the same geographic region. Both criteria lend themselves to potentially creating disparities in options for coverage based on health-related factors. DOL should consider ways to mitigate that potential and explicitly detail them in the final rule.

Moreover, DOL should prohibit the ability of AHPs to “carve out” areas within markets. New Jersey already has a set of geographic rating areas that issuers must use to set rates. DOL should consider these areas for AHP “commonality” purposes, which may also have the benefit of having consistency across various insurer market and service area designations.

Transparency of AHP Benefits and Consumer Protections.

In the event that the final rule permits AHPs not to comply with state coverage mandates, AHP plans should be required to affirmatively inform members and prospective members that they are not receiving specific consumer protections or benefits that they would have otherwise received under the traditional state-regulated individual and small group markets. These would include detailing deviations from the essential health benefits and whether dollar limits apply to any benefits. Further, disclosure requirements should be in place regarding the factors such as full-time or part-time employment or occupation type that influence premium levels, benefits provided, and membership status.

Clarify Eligibility for ACA Coverage if also Offered AHP Coverage.

Given the new definition of “employer”, it may be possible that employees who are eligible for subsidies to buy insurance in the individual or small group marketplace may also be offered insurance through their employer’s AHP membership. Moreover, the AHP coverage may have non-equivalent benefits relative to the essential benefits required with individual or


small group marketplace coverage. Under such a scenario, the employee should maintain the ability to acquire the subsidized coverage. DOL should clarify in the final rule language that AHPs and participating employers have the same obligation as all other employers to provide employees with an annual notice of the availability of marketplace coverage, with financial help for those that qualify.

Ensuring Access to Data for Research and Policymaking.

After Gobeille v. Liberty Mutual Insurance Co., 577 U.S. ___, 136 S. Ct. 936 (2016), there has been greater interest revisiting ERISA rules to ensure a level playing field for what health care data is available for research and policymaking. Post-Gobeille, ERISA plans are no longer subject to state all-payer claims database (APCD) reporting requirements, depriving states of essential information on health care utilization, pricing, and quality in the state. AHPs can further exacerbate this imbalance as to the health care data available to inform policy decisions and analysis. We suggest that DOL take this opportunity, as it considers how to create a pathway for reporting of self-funded data, to also ensure data from AHPs will be available to state APCDs. In New Jersey, we have been trying to establish an APCD, and tie it to out-of-network payment reforms. Our inability to secure self-funded data and its negative impact in understanding health care charges in the State will only grow AHPs, both self-insured and fully-insured plans, substantially expand their enrollment.

In sum, we believe that AHPs could undermine coverage, erode consumer protections, and raise health care costs for New Jersey residents. Should DOL expand their availability, however, the policies described above would lessen those negative consequences, especially a declaration making clear that states, such as New Jersey will be able to continue to regulate such plans as they have been successfully doing the past few years.

Respectfully submitted,



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