



March 6, 2018

Assistant Secretary Preston Rutledge
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
Department of Labor
200 Constitution Avenue, NW
Washington DC 20210

Attn: Definition of Employer—Small Business Health Plans, RIN 1210-AB85

RE: Proposed Rule regarding the Definition of “Employer” under Section 3(5) of ERISA—Association Health Plans

Dear Assistant Secretary Rutledge:

On behalf of the nearly 4,300 members of the Private Practice Section (PPS) of the 100,000 member American Physical Therapy Association (APTA), I write to comment on the Department of Labor (DOL) Proposed Rule regarding “the Definition of “Employer” under Section 3(5) of ERISA—Association Health Plans (RIN 1210-AB85), published in the January 5, 2018 *Federal Register*.

PPS is an organization of physical therapists in private practice who could utilize Association Health Plans (AHPs) to increase their options for health insurance coverage. Our members provide rehabilitative and habilitative care that is included in the current list of Essential Health Benefits (EHB). As small business owners, we are interested in products that will allow for the best use of our resources, including affordable quality health coverage for ourselves and our employees; however, we have significant concerns with the proposed rule. The proposed changes to the AHP rules, if adopted, would likely have a detrimental impact on the quality of insurance that our members could purchase. As the DOL works to implement the policies proposed in this rule, PPS strongly urges the Agency to consider the following recommendations that are relevant to our membership.

PPS Recommendations

- 1. PPS urges the Department of Labor to not permit an AHP created under these proposed rules to offer benefit packages that bypass the consumer protections of existing laws, including standards related to the coverage of EHBs.**
- 2. PPS appreciates the consideration of self-employed individuals but urges the Department to maintain the current safeguards and patient protections in place to protect this special class.**
- 3. Should the Department allow for the formation of AHPs based on a market that crosses state lines, PPS urges strong certification and coverage requirements be implemented to protect against erosion of plan quality.**

Currently, trade associations who offer health insurance coverage are regulated by the same federal standards and applicable state insurance regulations that apply to insurance coverage sold by health insurance issuers directly to these individuals and small employers. However, in most situations involving employment-based association coverage, the group health plan exists at the individual employer level and not at the association-of-employers level. As a result, the products sold by these associations are generally treated a collection of individual market coverage, small-group market coverage, large-group market coverage, and mixed associations of more than one coverage type. Under current law, the test used to determine whether association coverage is individual, small-group, or large-group market coverage is the same test that is used to evaluate health insurance offered directly to individuals or employers. When assessing the type of coverage held by an individual, CMS currently looks directly to the plan held by each association member; this is because association coverage does not exist as a distinct meaningful category of health insurance coverage.

On January 5, 2018, the DOL released a proposed rule to implement the October 12, 2017 Executive Order 13813 “Promoting Healthcare Choice and Competition Across the United States”. This proposed rule would implement a more flexible “commonality-of-interest” test as well as other new avenues by which AHPs can be offered. This flexibility has been cited as a way sole-proprietors and small business owners may have the option to band together and use an AHP to purchase health coverage for themselves and their employees.

PPS urges the Department of Labor to not permit an AHP created under these proposed rules to offer benefit packages that bypass the consumer protections of existing laws, including standards related to the coverage of EHBs.

The October 2017 Executive Order directed the Secretary of Labor, “to the extent permitted by law and as supported by sound policy, to consider expanding the conditions that satisfy the commonality-of-interest requirements” when interpreting the definition of an “employer” under section 3(5) of ERISA. The Administration made it clear that its goal for this rulemaking is to

expand access to affordable health coverage, especially among small employers and self-employed individuals, by removing undue restrictions on the establishment and maintenance of association health plans under ERISA.

In order to determine eligibility for association coverage, the Agency's evaluation process would focus on the association itself instead of the individual members of the association. While implementing this flexibility, the regulation would continue to distinguish employment-based plans from mere commercial insurance programs and administrative service arrangements marketed to employers. As with all other commercial plans, these health insurance plans would be subject to federal and state standards and regulatory authority.

The AHPs established under this metric would use the number of employees in the entire AHP to categorize the plans as small-group or large-group health plans. While some argue that this purchasing power could reduce costs because of economies of scale, it is important to note that upon utilizing an AHP, it is likely that the insured individual(s) would no longer be eligible for the Affordable Care Act's consumer protections required for those utilizing individual and small group health plans.

PPS Comment:

The Affordable Care Act (ACA) established significant safeguards for consumers utilizing individual and small-group health plans by requiring that those plans feature a higher baseline of coverage. These additional features include coverage of Essential Health Benefits (EHBs)—of which rehabilitative and habilitative therapy is feature—and the use of a single system-wide risk pool in order to minimize the range of costs for higher-risk patients. Insurers are also limited in the multipliers of factors such as age, geographic location, and tobacco use which they may use to determine the cost of an individual or small-group plan holder's insurance premium. Individual health plans have caps on out-of-pocket expenses; the annual deductibles on small-group plans are also restricted. Furthermore, for individuals and small employers who obtain their coverage through an insured association, that coverage must also comply with these ACA protections.

Under this proposed rule, an AHP offered to a wide range of members would be treated as a single plan. The category of the plan (large- or small-group) would be determined by the number of enrollees in that entire AHP. Upon passing the 50-person threshold, a plan would be considered large-group; therefore, should an AHP have 51 or more participants, the above-mentioned ACA-imposed individual and small-group consumer protections would no longer be required.

PPS is concerned that the DOL's proposal would allow for a significant increase in the number of AHPs who were able to design benefit offerings that bypass the consumer protections of existing laws, including standards related to the coverage of EHBs. By DOL's own admission within the proposed rule, the goal is to expand access to affordable health coverage, especially

among small employers and self-employed individuals, by removing undue restrictions on the establishment and maintenance of association health plans under ERISA. However, what the Agency has described as “undue restrictions” are, in part, consumer protections which ensure that individual insurance coverage includes coverage for essential health benefits and restrictions on age-rating, geographic location, and tobacco use while capping annual out-of-pocket expenses but not restricting lifetime benefits.

Should the proposal become final, PPS members would be able to purchase coverage as part of an AHP; however, they’d have to decide whether it was worth being covered by an insurance product which did not contain the consumer protections granted to those holding individual or small-group insurance coverage. As providers of rehabilitative and habilitative care, private practice physical therapists are keenly aware of the value of insurance coverage for these and other EHBs. We see, on a daily basis, the positive impact on functional outcomes that arises directly from patient access to covered care.

PPS appreciates the consideration of self-employed individuals but urges the Department to maintain the current safeguards and patient protections in place to protect this special class.

Should this proposed rule become final, it would broaden the criteria used to determine when employers may join together as an employer group or association to become the employer-sponsor of a single multiple-employer group health plan. If the eligibility criteria are met, a single AHP could serve multiple employers whose insurance had formerly been supplied on an individual or small-group basis.

The proposal expressly provides that sole proprietors and other self-employed individuals be categorized as “working owners” who may elect to act as employers for purposes of participating in an employer group or association and also be treated as employees of their businesses for purposes of being covered by the group or association’s health plan. This dual treatment would allow a self-employed small business owner to offer AHP group coverage to employees while also qualifying as an employee of their own business in order to be eligible for the coverage offered by that AHP.

PPS Comment:

Many PPS members are self-employed individuals or work in small business settings. While we appreciate the consideration of the interests of sole-proprietors, self-employed, and small business owners, we request the Department maintain the distinction between association-sponsored employment-based plans, standard commercial insurance programs, and administrative service arrangements marketed to employers, while adding the new option of “working owner” plans. These distinctions should be maintained so that the Department can clearly provide “working owners” with the consumer protections they currently access when

they purchase their individual or small-group insurance. Should this proposed rule be implemented with no additional protections, consumers could wind up with a less comprehensive plan, fewer protections, and a loss of currently covered services.

Should the Department allow for the formation of AHPs based on a market that crosses state lines, PPS urges strong certification and coverage requirements be implemented to protect against erosion of plan quality.

This proposed rule also seeks allow the formation of AHPs to sell insurance across state lines if its members have a principal place of business in a metropolitan area that includes more than one state. Examples of such regions include Greater New York City, Washington D.C.'s metropolitan area, and the Quad Cities region spanning Illinois and Iowa. This new criterion for formation of an AHP would not have a requirement that the members work in the same industry or meet the commonality-of-interest threshold, instead geographic proximity would be sufficient.

PPS Comment:

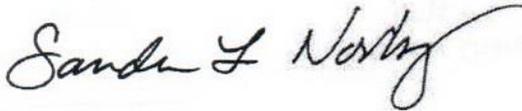
PPS would like to point out that while the proposed rule asked about “concerns that associations could manipulate geographic classifications to avoid coverage to employers expected to incur more costly health claims”, the proposed rule failed to discuss other important factors to be considered when proposing to allow for the sale of insurance across state lines. First, how is the AHP to determine which of the region’s state insurance commissioners would be responsible for certifying that the AHP’s insurance coverage complied with minimum coverage requirements? Secondly, what protections are in place to prevent associations from taking advantage of members by choosing to have their plans certified by the state with the least coverage requirements? To that end, PPS requests that should the final rule allow for the formation of geographically centered AHPs functioning in a metropolitan region, that the final rule also contain formal guidelines to determine which state insurance commissioner would be responsible for certifying the health plans offered by the AHP in order to prevent forum shopping and a race to the bottom. Likewise, PPS requests that the final rule include provisions to prevent associations from choosing to be governed by the state with the lowest minimum coverage requirements in order to market bare-bones plans.

Conclusion

PPS appreciates the opportunity to share our insight and perspective with the Department of Labor on its proposed rule which would significantly alter the way AHPs are regulated. We have determined that the proposed regulatory changes which would provide us with increased purchasing power are not worth the trade-off of eroded consumer protections for our members and our patients. PPS strongly recommends that the DOL respect the protections put in place by the ACA in order to provide Americans with quality and affordable health insurance through mechanisms such as consumer protections, required coverage of EHBs. In order to retain these

protections, PPS recommends that the DOL pair the proposed expansion of the “commonality-of-interest” test for employer members of an association with requirements that newly eligible participants be granted the consumer protections that they would have otherwise been afforded in the individual and small-group markets. We look forward to working together in pursuit of meaningful and effective regulations to ensure access to insurance coverage that is both high quality and affordable.

Sincerely,

A handwritten signature in black ink that reads "Sandra F. Norby". The signature is written in a cursive, flowing style.

Sandra Norby, PT, DPT
President, Private Practice Section of APTA