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February 20, 2024

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans (RIN: 1210-AC16)

Dear Acting Secretary Su and Assistant Secretary Gomez:

We write in support of the rule proposed by the Department of Labor (Department) entitled *Definition of Employer—Association Health Plans* (Proposed Rule).[1] The Proposed Rule will greatly benefit consumers by reversing the harmful actions previously taken by the Trump Administration to undermine the *Affordable Care Act* (ACA).[2] We applaud the Department for the approach it has taken in the Proposed Rule, which would fully rescind the prior rulemaking and provide necessary clarity for both employers and consumers.

As you are aware, on October 12, 2017, then-President Donald Trump issued Executive Order 13813 (E.O. 13813), which, *inter alia*, instructed the Department to revise its regulations to expand enrollment in health plans that are exempt from certain consumer protections under the ACA.[3] Pursuant to E.O. 13813, the Department promulgated a final rule (2018 Final Rule)[4] that would dramatically expand the circumstances in which a group or association of employers may sponsor a single health plan known as an "association health plan" or "AHP." The 2018 Final Rule would have rolled back critical guardrails under the *Employee Retirement Income Security Act* (ERISA)[5] and allowed AHPs to be offered to self-employed individuals whose businesses do not have any common law employees.[6]

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[1] U.S. Dep't of Labor, Definition of "Employer"—Association Health Plans, 88 Fed. Reg. 87968, (Dec. 20, 2023) (to be codified at 29 C.F.R. pt. 2510).
[2] Pub. L. No. 111–148 (2010).
[3] Executive Order on Promoting Healthcare Choice and Competition Across the United States (Oct. 17, 2017), 82 Fed. Reg. 48385, https://www.federalregister.gov/documents/2017/10/17/2017-22677/promoting-healthcare-choice-and-competition-across-the-united-states (E.O. 13813 of Oct 12, 2017, revoked by E.O. 14009 of Jan. 28, 2021).
[4] U.S. Dep't of Labor, Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28912 (June 21, 2018).
[5] Pub. L. No. 93–406 (1974).
[6] U.S. Dep't of Labor, *supra* note 4 at 28912 ("The final rule also sets out the criteria that would permit, solely for purposes of Title I of ERISA, certain working owners of an incorporated or unincorporated trade or business, including partners in a partnership, without any common law employees").

The 2018 Final Rule would have been harmful to millions of consumers, including people enrolled in AHPs as well as those left behind in the traditional insurance market. AHPs established under the 2018 Final Rule would have been exempt from vital consumer protections, including the ACA's requirement to provide coverage of Essential Health Benefits, such as maternity and newborn care, prescription drugs, and mental health and substance use disorder care.[7] According to the Department's own analysis, these AHPs would provide fewer benefits than ACA-compliant plans while shifting costs to consumers remaining in the small group and individual markets in the form of higher premiums.[8] Accordingly, the 2018 Final Rule faced widespread opposition, with approximately 95 percent of comments received by the Department from health care groups opposing or criticizing its approach.[9] Patient groups, including the American Cancer Society, emphasized that the 2018 Final Rule would fail to protect participants against discriminatory insurance practices while leading to instability in the individual and small group market, ultimately hindering access to affordable coverage for consumers who need it most.[10]

The 2018 Final Rule directly contradicted the text and purpose of ERISA as well as longstanding guidance issued by the Department. To protect consumers and provide clarity to stakeholders, Departmental guidance has imposed strict guardrails on the formation of AHPs, ensuring these arrangements are established in limited situations on behalf of employers who have significant ties and shared interests with one another, consistent with the text and purpose of ERISA.[11] Yet, under the 2018 Final Rule, groups of unrelated employers, as well as entities with no common law employees, could be treated as ERISA-covered health plans, subject to fewer requirements than those applying to plans offered through an ACA-compliant arrangement. This deviation from the purpose of the statute prompted a federal court to determine that the 2018 Final Rule was unlawful, striking down its core provisions and finding that it was "clearly an end-run around the ACA" that "does violence to ERISA."[12] Accordingly, the court vacated and remanded its remaining provisions to the Department for reconsideration.[13]

As we wrote to the Department in February 2023, the court's decision represented a critical victory for consumers.[14] However, further action by the Department is necessary to resolve ambiguity regarding

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[7] 42 U.S.C. § 18022.
[8] U.S. Dep't of Labor, *supra* note 4 at 28939 ("[AHPs] use their regulatory flexibility to design more tailored, less comprehensive health coverage. . . [which] will necessarily lead to some favorable risk selection toward AHPs and adverse selection against individual and small group markets.").
[9] Noam Levey, Trump's New Insurance Rules Are Panned by Nearly Every Healthcare Group that Submitted Formal Comments, Los Angeles Times (May 30, 2018), https://www.latimes.com/politics/la-na-pol-trump-insurance-opposition-20180530-story.html.
[10] American Cancer Society, RIN 1210-AB85: Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans Proposed Rule (March 6, 2018), https://www.fightcancer.org/sites/default/files/National%20Documents/ACS%20CAN%20Comments%20on%20AHP%20Proposed%20Rule%20FINAL.pdf. *See also* I Am Essential (Coalition Of 118 Patient and Community Organizations), RE: Association Health Plans Proposed Rule (RIN 1210–AB85) (March 6, 2018), https://www.aafa.org/wp-content/uploads/2022/08/AAFA-Comment-Letter-Opposing-Association-Health-Plans-Proposed-Rule.pdf; American Hospital Association, RIN 1210-AB85: Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans Proposed Rule (March 6, 2018), https://www.aha.org/system/files/2018-03/180306-definition-employer-small-business-health-plans.pdf.
[11] *See*, *e.g.*, U.S. Dep't of Labor, Advisory Opinion 2008-07A (Sept. 26, 2008), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2008-07a; U.S. Dep't of Labor, Advisory Opinion 96-25A (Oct. 31, 1996), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1996-25a.
[12] *New York v. U.S. Dep't of Lab*., 363 F. Supp. 3d 109, 117 (D.D.C. 2019).
[13] *Id*. at 141. Note that the ruling was appealed to the United States Court of Appeals for the District of Columbia Circuit but has been on hold since February 8, 2021, while "[t]he matter remains under consideration by the Department." Status Report at 1, *New York v. U.S. Dep't of Lab.*, Case No. 19-5125 (D.C. Cir. Aug. 2022).
[14] Letter from the Hon. Robert C. "Bobby" Scott and the Hon. Mark DeSaulnier to the Hon. Lisa M. Gomez (Feb. 13, 2023), https://democrats-edworkforce.house.gov/imo/media/doc/rm_scott_letter_to_ebsa_on_trump-era_association_health_plan_rule.pdf.

the standards governing AHPs to ensure stakeholders comply fully with the court's decision. Accordingly, the Proposed Rule represents a welcome step forward that will definitively resolve this ambiguity and ensure that stakeholders rely upon the Department's longstanding guidance regarding the establishment of AHPs. We strongly support this approach and urge the Department not to reinstate any components of the 2018 Final Rule, which would create additional uncertainty for both employers and consumers.

When considering future rulemaking in this area, we encourage the Department to thoroughly examine all steps that can be taken within its regulatory authority to strengthen compliance with consumer protections under ERISA and the ACA. Specifically, the Department correctly notes that "Congress did not intend to treat commercial health insurance products marketed by private entrepreneurs, who lack the close economic or representation ties to participating employers and employees, as ERISA-covered welfare benefit plans."[15] Codification of previously-issued guidance through additional notice-and-comment rulemaking, while a valuable step in its own right, should not preclude the Department from also taking action to address new and emerging threats to consumers raised by arrangements that seek to circumvent requirements of the ACA and ERISA. Moving forward, we urge the Department to prioritize protecting consumers from these harmful arrangements in any future rulemaking.

We thank the Department for the opportunity to comment, and we encourage the swift finalization of the Proposed Rule. We look forward to continuing to collaborate on this and other important issues as we work to advance our shared goal of protecting the hard-earned benefits of workers and their families.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Ranking Member

MARK DeSAULNIER
Ranking Member
Subcommittee on Health, Education, Labor, and Pensions

[15] U.S. Dep't of Labor, *supra* note 1 at 87978-9.