



August 2, 2018

The Honorable R. Alexander Acosta  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

The Honorable Alex Azar  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue S.W.  
Washington, D.C. 20201

Re: Association Health Plans

Dear Secretaries Acosta and Azar:

We have reviewed the Final Rule promulgated by the Department of Labor titled “Definition of ‘Employer’ Under Section 3(5) of ERISA – Association Health Plans” (“AHP Final Rule”)<sup>1</sup>, in light of the Public Health Service Act (“PHSA”), administered by the Department of Health and Human Services, and Pennsylvania law. We have also received numerous inquiries from interested parties as to how the AHP Final Rule will be implemented in Pennsylvania. We are aware that the AHP Final Rule purports that it will apply to certain plans as soon as September 1, 2018. If implementation of the AHP Final Rule is not enjoined prior to that date, as sought by Pennsylvania and 11 other jurisdictions in the Civil Action filed on July 26, 2018 (D.D.C. No. 18-1747), it is our intent to implement the AHP Final Rule as outlined below.

Consistent with Pennsylvania state law, the Public Health Service Act, and the allegations in the Civil Action, and recognizing that the AHP Final Rule repeatedly acknowledges that it “does not modify or otherwise limit existing State authority”,<sup>2</sup> it is our position that:

- An association may provide for health care coverage for its members in Pennsylvania **only** if the association is properly formed as specified in Pennsylvania law, including, *inter alia*, that it is maintained in good faith for purposes other than that of obtaining insurance, and has been in active existence for at least two years.<sup>3</sup>
- The health care coverage an association issues to its members in Pennsylvania must be fully-insured by an entity licensed and with a certificate of authority to do the business of health insurance in Pennsylvania.<sup>4</sup>

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<sup>1</sup> 83 Fed. Reg. 28912 *et seq.* (June 21, 2018).

<sup>2</sup> 83 Fed. Reg. at 28936; *see also, id.* at 28953, 28958, 28959.

<sup>3</sup> 40 P.S. § 756.2.

<sup>4</sup> *See* 40 P.S. § 46.



- A health plan formed by an association is a multiple employer welfare arrangement (“MEWA”). Unless a MEWA is licensed and has a certificate of authority to do the business of health insurance in Pennsylvania, it is illegal in Pennsylvania.<sup>5</sup>
- The health care coverage an association issues to its members in Pennsylvania will be subject to all Pennsylvania legal requirements for health insurance, not only vis-à-vis licensure, but also pertaining to solvency, form and rating standards, examination provisions, and enforcement.
- Compliant with Pennsylvania law and the Public Health Service Act, a sole proprietor continues to be a part of the individual market and is not an “employer” for purposes of health insurance coverage.<sup>6</sup>
- An insured health plan for employer members of an association in Pennsylvania will provide policy forms and rates, compliant with Pennsylvania law and the Affordable Care Act, consistent with the market in which each employer member is a part, that is, a sole proprietor will have an individual policy, an employer group of 2-50 employees will have a small group policy, and an employer group of more than 50 employees will have a large group policy.<sup>7</sup>
- An AHP organized in another jurisdiction, and its agents, may not market, i.e., sell, solicit, or negotiate, its plan, whether insured or self-funded, in Pennsylvania without appropriate compliance with all applicable Pennsylvania laws and regulations.<sup>8</sup>

If you have any comments in response to this approach, we respectfully request that you provide them by no later than August 15, 2018, so that we may consider them prior to the possible September 1, 2018 initial applicability date of the AHP Final Rule.

Sincerely,

A handwritten signature in blue ink that reads "Jessica K. Altman".

Jessica K. Altman

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<sup>5</sup> See 83 Fed. Reg. at 28936 (“The Department agrees that the final rule does not modify or otherwise limit existing State authority”); see also, *id.* at 28953, 28958, 28959. See also <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf>, at Appendix A, Advisory Opinion 90-18A (July 2, 1990) (at page 48 of 132) and Letter dated March 1, 2002 (at page 54 of 132). Cf. Joint State/Federal Statement on Regulation of Multiple Employer Welfare Arrangements (attached; published at 22 Pa. B. 3235, June 27, 1992).

<sup>6</sup> See 40 P.S. § 3801.301 (incorporating PHSA definition of “small group”); 42 U.S.C. § 300gg-91(d)(6), (e)(1)(B)(i) and (e)(4). Cf. AHP Final Rule, 83 Fed. Reg. at 28912 (sole proprietors qualify as employers for purposes of participating in an association “solely for purposes of Title I of ERISA”) (emphasis added).

<sup>7</sup> See 40 P.S. § 3801.301 (incorporating PHSA definition of “small group”); 42 U.S.C. § 300gg-91(e)(6)(A) (aggregation of employer rules reference IRC “control group” provisions); see also CMS Insurance Standards Bulletins – Sept. 1, 2011, Transmittal No. 02-02 (August 2002) and Transmittal No. 02-03 (August 2002) (“look through” approach described).

<sup>8</sup> See 40 P.S. §§ 46, 756.2; see also 40 P.S. §§ 310.1 *et seq.* (producers); 40 P.S. §§ 324.1 *et seq.* (administrators).



cc: Amy Turner, DOL Office of Health Plan Standards and Compliance Assistance  
Joe Canary, DOL Office of Regulations and Interpretations  
Randy Pate, HHS/CMS/CCIIO Deputy Administrator & Director  
The Honorable Bob Casey Jr., U.S. Senate Pennsylvania  
The Honorable Pat Toomey, U.S. Senate Pennsylvania  
The Honorable Bill Shuster, U.S. House Pennsylvania District 9  
The Honorable Brendan Boyle, U.S. House Pennsylvania District 13  
The Honorable Brian Fitzpatrick, U.S. House Pennsylvania District 8  
The Honorable Conor Lamb, U.S. House Pennsylvania District 18  
The Honorable Dwight Evans, U.S. House Pennsylvania District 2  
The Honorable Glenn Thompson, U.S. House Pennsylvania District 5  
The Honorable Keith Rothfus, U.S. House Pennsylvania District 12  
The Honorable Lloyd Smucker, U.S. House Pennsylvania District 16  
The Honorable Lou Barletta, U.S. House Pennsylvania District 11  
The Honorable Matt Cartwright, U.S. House Pennsylvania District 17  
The Honorable Michael Doyle, U.S. House Pennsylvania District 14  
The Honorable Mike Kelly, U.S. House Pennsylvania District 3  
The Honorable Robert Brady, U.S. House Pennsylvania District 1  
The Honorable Ryan Costello, U.S. House Pennsylvania District 6  
The Honorable Scott Perry, U.S. House Pennsylvania District 4  
The Honorable Tom Marino, U.S. House Pennsylvania District 10