PUBLIC SUBMISSION

Received: February 28, 2018
Status: Pending_Post
Tracking No. 1k2-91ra-q1ve
Comments Due: March 06, 2018
Submission Type: Web

Docket: EBSA-2018-0001
Definition of Employer Under Section 3(5) of ERISA-Association Health Plans

Comment On: EBSA-2018-0001-0001
Definition of Employer Under Section 3(5) of ERISA-Association Health Plans

Document: EBSA-2018-0001-DRAFT-0375
Comment on FR Doc # 2017-28103

Submitter Information

Name: Richard Ekman
Address: 220 W. Mercer St. Suite 400
Seattle, WA, 98119
Email: r.ekman@ekman-law.com
Phone: 206-576-4804
Organization: Washington Alliance for Healthcare Insurance Trust

General Comment

AHPs offering coverage across state lines.
Historically State Insurance Commissioners have had authority to approve insurance products offered to individuals
and businesses in their states. This proposal would allow Association Health Plans in a single industry to shop of insurance
in states with little in the way of health coverage and benefit requirements and consumer protections and then offer those
health insurance products in states that have taken the initiative to protect their health insurance purchasers (both individual
and business) from skinny low cost health plans devoid of benefits and consumer protections. Association Health Plans that
seek to offer insurance coverage in different states should be required to comply with the insurance laws of each state in

which they seek to do business.

AHP coverage of sole proprietors and partners without common law employees
Under existing law, if a sole proprietor or partnership does not have common law employees, the sole proprietor or partners
have not been able to participate in a group health plan as employees. This proposal would allow sole proprietors and
partners without common law employees to participate in a group health plan offered by an Association Health Plan if they
belong to the sponsoring association. While this expansion of coverage may, on the surface, appear benign, it presents
unique challenges and risks to an Association Health Plan. Given the guaranteed issue and guaranteed renewability
requirements of the non-discrimination rules in the proposed regulations, Association Health Plans should, as part of a bona
fide employment based classification, be able to exclude from coverage groups of two or less individuals or groups with no
common law employees.

Non-discrimination provisions applicable to AHPs
Current law does not permit Association Health Plans to discriminate against individual participants by taking health status
factors into account in either offering them coverage or setting the benefits they will receive or the rates they will pay.
Current law does permit Association Health Plans to underwrite distinct groups or employers taking into account the group's
or employer's own overall health status or claims experience and does not limit the amount a distinct group or employer can
be charged for coverage. This underwriting practice has permitted Association Health Plans to grow and succeed in
offering the kind of affordable health coverage to small employers envisioned by the President's Executive Order. This
method of underwriting and rate setting is very common in the Association Health Plan industry today. The proposed
regulations will require that Association Health Plans not treat member employers as distinct groups and consequently
all groups would be treated the same for benefits and rates with a few limited "bona fide employment based classifications"
taken into account. It is noted that gender and age are not included in the proposed regulations as "bond fide employment
based classifications." The writers of the proposed regulations go to great lengths in

justifying and supporting the new
non-discrimination rule that they are proposing. Nevertheless, when the new non-discrimination rule prohibiting underwriting
that takes into account any health status factor by group or employer is combined with the guaranteed issue and guaranteed
renewability rules the result is a disaster for Association Health Plans. Most Association Health Plans do not have the
resources to withstand one or two years of bad claims experience (even with stop loss insurance) without raising their
rates to the point that they are not competitive in the small group market. Individual group or employer underwriting is the safety valve that allows Association Health Plans to maintain and grow with reasonably priced coverage and benefits and fulfil the promise of more affordable health care for small employers.
If the decision of the Department is to proceed with the non-discrimination rule as proposed, we would ask the Department
to consider a grandfathering of existing Association Health Plans that have already met the bona fide or true single employer
test to continue the underwriting practice they currently use.