

To: Christina Goe, ERISA (B) Working Group

From: Timothy Jost, NAIC Consumer Representative

Re: Response to AHIP's comments on the ERISA handbook section on Association Coverage

Date: October 7, 2016

In their comments of October 4, 2016, AHIP suggests two changes to the ERISA (B) Working Group Draft Revisions to the NAIC ERISA Handbook. We would recommend alternative language to address the issues that they raise.

First, they note that in some circumstances (which HHS cautions are "[rare](#)") a group or association of closely related employers may be considered a single employer sponsor of a group health plan. They recommend that footnote 8 of the association section be revised to reflect this. Their suggested revision, however, does not clarify the "rare" circumstances in which this could be the case. The standard that must be met for qualifying as a bona fide single employer association group is quite high, and may be tightening. For example, in its most recent advisory opinion, the [DOL held](#) that a chamber of commerce does not qualify for this status.

We suggest that the Working Group add to footnote 8 language from the DOL MEWA Guide that is currently linked in the footnote or the language from one of the linked advisory opinions that we included in our comments. In this way regulators will be able to see directly the standards that should be applied. The [MEWA Guides](#) states, in language that could be included in note 8:

In order for a group or association to constitute an "employer" within the meaning of Section 3(5), there must be a bona fide group or association of employers acting in the interest of its employer-members to provide benefits for their employees. In this regard, the Department has expressed the view that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of Section 3(5). Similarly, where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of their status as employers (i.e., the group or association members include persons who are not employers) or where control of the group or association is not vested solely in employer members, the group or association is not a bona fide group or association of employers for purposes of Section 3(5).

The following factors are considered in determining whether a bona fide group or association of employers exists for purposes of ERISA: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed; the purposes for which it was formed and what, if any, were the pre-existing relationships of its

members; the powers, rights and privileges of employer-members; and who actually controls and directs the activities and operations of the benefit program. In addition, employer-members of the group or association that participate in the benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the benefit program.

Second, AHIP notes that an employer-sponsored group health plan, including presumably a bona fide single employer association group may be able to restrict benefits or charge different premiums for “similarly situated individuals” enrolled in a plan. AHIP contends that this means that a bona fide single employer group plan may be able to treat each employer or group of employers within the association as a separate risk pool.

AHIP is correct that under 29 CFR 2590.702(d) a group health plan may provide different premiums or charge different premiums to “similarly situated individuals” enrolled in the plan on the basis of “bona fide employment-based classifications.” These classifications include: “full-time versus part-time status, different geographic location, membership in a collective bargaining unit, date of hire, length of service, current employee versus former employee status, and different occupations.” This could be noted in the ERISA handbook.

But 29 CFR 2590.702(d) is clear that “a classification based on any health factor is not a bona fide employment-based classification, unless the requirements of paragraph (g) of this section are satisfied (permitting favorable treatment of individuals with adverse health factors).” Thus a bona fide single employer group health plan must treat all enrolled individuals as a single risk pool for health risk classification purposes. The paragraph on page 3 that AHIP wishes to strike accurately states the law and should be retained.

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