DEPARTMENT OF LABOR RELEASES
PROPOSED RULE TO EXPAND AVAILABILITY
OF ASSOCIATION HEALTH PLANS

The Department of Labor (DOL) yesterday issued proposed regulations that would expand the availability of association health plans (AHPs). The DOL issued the rule in accordance with the Oct. 12, 2017 Presidential Executive Order "Promoting Healthcare Choice and Competition Across the United States."¹

The proposed rule would broaden the definition of “employer” within the Employee Retirement Income Security Act (ERISA) to allow more small businesses, including sole proprietors, to qualify to join together to offer employer-sponsored coverage. These employers could come together on the basis of geography or industry. A plan could serve employers in a state, city, county, or a multi-state metropolitan area, or it could serve all the businesses in a particular industry regardless of geography. By modifying rules related to working owners (e.g., the self-employed or sole proprietors), some individuals who currently purchase coverage through the individual market could be eligible to buy coverage through an AHP. The coverage offered through AHPs would not need to meet many of the Affordable Care Act requirements that apply in the individual and small group markets, including rules related to the essential health benefits and limits on variations in pricing of premiums, among others.

The DOL acknowledges that a number of uncertainties prevent a comprehensive quantitative impact analysis of the proposed rule. Instead, the DOL discusses some of the potential impacts, highlighting the potential for AHPs to allow small employers to gain efficiencies by becoming self-insured, increase their market power in negotiations with providers, and tailor benefit packages and pricing to meet employee needs. The DOL acknowledges that AHPs could disrupt the individual and small group markets by attracting away healthier, younger individuals who do not receive subsidized coverage. The DOL also notes that there have been instances of financial mismanagement and abuse within such plans in the past. Finally, the DOL discusses the potential financial impact and suggests that the proposal could increase or decrease the federal deficit. AHPs could increase the federal deficit if individuals who currently buy coverage with taxable income would now receive health care as a tax-free benefit. They could

decrease the federal deficit if individuals who currently are enrolled in subsidized marketplace coverage or Medicaid opt to instead enroll in an AHP.

The AHA is committed to ensuring access to affordable care and coverage. We are concerned that the expansion of AHPs could weaken the individual and small group markets, ultimately reducing consumer choice and increasing costs for the individuals and small businesses who rely on them. While we are pleased that the DOL is proposing some steps to ensure such plans do not discriminate against employers expected to have employees with higher cost claims, we are concerned that discrimination and restricted access to specific services could still occur in the absence of a minimum required benefit package.

The DOL solicits comments on the proposal overall, as well on specific provisions, including:

- **Definition of Metropolitan Area.** The rule would allow AHPs to serve employers in metropolitan areas that cross state lines. One example provided includes the Greater New York City Area/Tri-State Region, including portions of New York, New Jersey and Connecticut. The DOL seeks comments on whether more clarification on this definition would be helpful, whether it should use another definition, such as federal designations by either the U.S. Census or the Office of Management and Budget. The DOL also seeks input on whether AHPs could manipulate this definition to avoid offering coverage to employers who may have employees with more costly health claims.

- **Requirements Related to Organizational Structure and Functions.** The DOL proposes to establish certain criteria to identify which types of employers and associations can offer AHPs. These rules would require that the group or association sponsoring the AHP have a formal organizational structure with a governing body, and that the employer-members must control the AHP. These rules are intended to serve as a consumer protection to ensure that the organization is acting in the interest of employees.

- **Limitations on Eligible Enrollees.** The proposed regulations would limit who could enroll in an AHP to employees, former employees and their families/beneficiaries. Notably, the regulations would allow “working owners” (e.g., sole proprietors and other self-employed individuals) to qualify to participate in an AHP. This provision would expand the number of eligible individuals, including millions who currently enroll in coverage through the individual market.

- **Non-Discrimination Protections.** The DOL proposes to put several policies in place to prevent AHPs from discriminating against employers who may have high cost employees. The regulations would prohibit the group or association from
restricting membership based on any health factor, including health status, medical condition, claims experience, receipt of health care, medical history, genetic information, and disability, among other factors. The group or association also would be prohibited from charging different employers within the AHP different rates.

- **Request for Information.** Embedded in the proposed rule is a request for information through which the DOL seeks comment on other actions it could take to promote consumer choice and competition in health care, including how the DOL can best ensure AHP solvency.

Comments on the regulation are due March 6, 2018. If you have questions please contact Molly Smith, AHA vice president for coverage and State Issues Forum, at mollysmith@aha.org.