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March 6, 2018

Jeanne Klinefelter Wilson  
Deputy Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

**Re: RIN 1210-AB 85: Definition of “Employer” Under Section 3(5) of ERISA—  
Association Health Plans**

Dear Deputy Assistant Secretary Wilson:

The American Kidney Fund (AKF) appreciates the opportunity to provide comments on the proposed rule that would modify the definition of “employer” under the Employee Retirement Income Security Act (ERISA) section 3(5) and which would facilitate the adoption and administration of association health plans (AHPs).

The American Kidney Fund is the nation’s leading independent nonprofit organization working on behalf of the more than 30 million Americans with kidney disease. For the past half-century, AKF has existed to help people fight kidney disease and live healthier lives. We provide a complete spectrum of programs and services: top-rated education materials; free kidney disease screenings in numerous cities across the nation; clinical research funding; and need-based financial assistance enabling one in five U.S. dialysis patients to access lifesaving medical care, including dialysis and transplantation.

AKF has significant concerns with the Department of Labor’s (the Department) proposed rule and the adverse impact it could have on the individual and small group markets. In particular, we are concerned that the expanded use of AHPs will undermine the availability of affordable, comprehensive health care coverage for people with chronic conditions such as kidney disease.

**Coverage of benefits and consumer protections**

We believe it is imperative to ensure patient protections for people with chronic conditions such as kidney disease, so that individuals have access to the services they need to manage their conditions. Therefore, we have major concerns with the proposed modification to the definition of “employer” under

ERISA section 3(5). As outlined in the proposed rule, this would allow more small business owners, their employees, sole proprietors and other self-employed people to join together and create an AHP and be treated as a large group plan, which would exempt them from certain Affordable Care Act (ACA) requirements such as providing the essential health benefits (EHBs). We believe this would potentially weaken the level of meaningful health coverage available to individuals with a chronic disease, as AHPs seek to offer less comprehensive coverage that excludes benefit categories required for ACA-compliant plans.

We acknowledge the Department includes nondiscrimination protections in the proposed rule that are intended to prevent risk selection. Those protections prohibit AHPs from “conditioning eligibility, benefits, or premiums on health status.” However, the nondiscrimination protections outlined in the proposed rule do not prevent AHPs from implementing benefit designs that, because they are not subject to EHB requirements, could exclude benefits and services that people with chronic diseases need access to. In effect, AHPs can still discriminate through benefit designs that are attractive to younger and healthier employees, but that offer inadequate coverage for employees with chronic conditions who need more comprehensive coverage.

This could have a profound impact on individuals with chronic kidney disease, which as mentioned previously affects more than 30 million Americans, and millions more are at risk. Kidney disease can be treated, and if it is caught and treated early enough, it is often possible to slow or stop the progress of kidney disease before it leads to kidney failure, also known as end-stage renal disease (ESRD). However, in 2015, 36 percent of people who were diagnosed with kidney failure in 2015 received little or no pre-ESRD nephrology care.<sup>1</sup> Given the high incidence and prevalence rate of kidney disease, there is a reasonable possibility that the expansion of AHPs could negatively affect employees who have AHP coverage that does not cover certain services or that have prohibitively high out-of-pocket costs that prevent them from seeking nephrology care for kidney disease.

### **Effect on individual and small group insurance markets**

Continuing with the example above of an employee with kidney disease, that individual could instead seek more comprehensive, ACA-compliant coverage on the individual market. However, they are likely to encounter higher premiums on the individual market due to another significant concern that AKF has with this proposed rule: the expansion of AHPs could create an uneven playing field in the individual and small group markets for ACA-compliant plans. As AHPs siphon off healthier and younger enrollees, that will leave a less healthy risk pool in the individual and small group markets offering ACA plans, driving up premiums. A recent analysis has projected the proposed rule would result in a 3.5 percent premium increase in the individual market compared to current law.<sup>2</sup>

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<sup>1</sup> [https://www.usrds.org/2017/view/v2\\_01.aspx](https://www.usrds.org/2017/view/v2_01.aspx)

<sup>2</sup> <http://avalere.com/expertise/managed-care/insights/association-health-plans-projected-to-enroll-3.2m-individuals>

In addition, for individuals who currently work for a small employer that does not offer health coverage and who are eligible for premium subsidies to help them afford individual coverage on the ACA Marketplace, they will become ineligible for ACA premium subsidies if their employer offers an AHP. For individuals in this scenario with chronic conditions, they would face a difficult decision: pay the full premium and cost-sharing for an ACA plan (which they may not be able to afford), enroll in and pay their share of the AHP coverage that may not meet their care needs, or go uninsured.

### **Risk of fraud and abuse**

As has been well documented in articles and studies, AHPs have had a history of mismanagement, fraud and abuse that has resulted in AHP insolvencies and millions of dollars in unpaid claims for policyholders and providers. The Department acknowledges that despite proposed requirements in the rule to protect against fraud and abuse, “Nevertheless, the flexibility afforded AHPs under this proposal could introduce more opportunities for mismanagement or abuse, increasing potential oversight demands on the Department and State regulators.” AKF has significant concerns with the potential for fraud and abuse with the expanded use of AHPs, and we are very concerned that the Department acknowledges this threat but provides no further detail or clarity on how the Department and states should address it. We recommend the Department provide more information and clarity on the oversight demands and responsibilities of the Department and the states under the proposed rule.

AKF appreciates the opportunity to submit comments on the proposed rule, and we urge the Department to consider the adverse impact it could have on the coverage and care for people with chronic conditions. Thank you for your consideration of AKF’s comments and concerns.

Sincerely,



LaVarne A. Burton  
President and CEO