

May 15, 2018

Robert Wake
Chair, National Association of Insurance Commissioners
ERISA (B) Working Group
General Counsel, Maine Bureau of Insurance
76 Northern Avenue
Gardiner, Maine 04345

RE: Draft Revisions to the NAIC ERISA Handbook

Dear Mr. Wake:

I am writing on behalf of The National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefit specialists. I am pleased to provide comments from NAHU members on the National Association of Insurance Commissioners' ERISA (B) Working Group's final draft of the federal Employee Retirement Income Security Act of 1974 (ERISA) handbook for state regulators.

Church Plans (Pages 35-36)

The draft handbook briefly discusses the ERISA exemption for church plans on pages 35-36. NAHU suggests that the NAIC consider referencing in the final version of the handbook the United State Supreme Court's June 5, 2017, decision in *Advocate Health Care Network v. Stapleton*, which addresses the scope of the church plan exemption.

Multiple Employer Welfare Arrangements and Association Health Plans (Pages 44-49, 72-74)

NAHU appreciates the depth of information provided in the draft handbook concerning Multiple Employer Welfare Arrangements and one of their derivatives, AHPs, provided in this draft paper. We also appreciate the Working Group's goal of finalizing this handbook as soon as possible in order to provide state insurance regulators with a needed ERISA reference tool. However, the Department of Labor has sent a final version of new regulation on Association Health Plans to the Office of Management and Budget for final review, signaling its imminent release. The content of this new final rule will possibly change the accuracy of these draft pages, and certainly any final federal AHP regulation will need to be summarized and referenced in this publication. Accordingly, NAHU urges the Working Group to allow time in the handbook-development process for revisions and further comments of interested parties following the release of the AHP rule.

Revisions on Multiple Employer Welfare Arrangements and Professional Employer Organizations (Pages 57-59)

This section contains a great deal of helpful information about the common-law employee standard and its applicability to MEWAs, collectively bargained multi-employer plans and PEOs. Clearly the focus of the inclusion of this information in the handbook is to clarify the applicability of ERISA and state laws to these plans. However, given the enactment of the ACA, its interplay with state regulation and the promulgation of IRS rules and guidance on the applicability of the IRC §4980H employer shared responsibility requirements, as well as the IRC §6055 reporting requirements on issuers relative to enforcement of the individual shared responsibility requirements on plans involving multiple employers, which also utilizes the common law employee standard, NAHU wonders if at least a reference to this federal guidance and the responsibility of the various types of group health plans involving multiple employers with regard to both coverage offers and information reporting should be included in this section.

References to Large Employers (Pages 87-91)

NAHU believes the handbook's section on the ACA generally provides an excellent overview of the applicable provisions of an extremely complicated law. One area where we feel an enhanced explanation might be necessary concerns the ACA's employer shared responsibility provisions outlined in IRC §4980H. These requirements apply to "applicable large employers," (ALEs) which are employers that employ 50 or more full-time-equivalent employees. In the ALE calculation, part-time employees are counted on a prorated basis when determining the overall number of full-time-equivalent employees counted toward ALE status. ALEs must then offer their full-time employees who work an average of 30 hours a week or more health coverage or face excise tax penalty liability. The draft document, on multiple occasions, confuses this standard by simply referring to large employers and/or employers that employ more than 50 people as the only ones that are subject to the employer shared responsibility provisions. As such, NAHU suggests a thorough review of the use of this section for accuracy and the use of the term ALE exclusively when referring to the applicability of the ACA's employer shared responsibility requirements.

For example, the sentence on page 87, "Employers with fewer than 50 employees are not subject to the 'shared responsibility' requirement," is not fully accurate. Actually, many smaller employers, that must purchase coverage defined by their state as small-group coverage, are also subject to the IRC §4980H employer shared responsibility requirements. This situation can occur for many reasons, including the state's definition of the small-group health insurance market, a small business that employs many part-time employees, and a small business that is part of a larger, controlled group.

NAHU members find this aspect of the ACA to be one of the more confusing requirements to explain to employer clients. Given that this section of the draft handbook, as well as others, often refers to both large-group market requirements and the employer shared responsibility requirements for ALEs, including how ALE actions could have ERISA

implications, NAHU also suggests a clear and succinct upfront description of the differences in determining what is a large employer for the purposes of purchasing health coverage versus the requirement to offer health coverage be included in this document. This description and explanation would likely be useful to reference in other sections of the handbook as well, including the new sections on professional employer organizations and association plans, as well as the revisions to the sections on multiple employer plans and MEWAs.

Wellness Program Requirements (Page 90)

NAHU suggests that the wellness program information on page 89 of the draft be updated to include information about the Equal Employment Opportunity Commission rules regarding wellness programs and the applicability of the Genetic Information Nondiscrimination Act and the Americans with Disabilities Act.

Dependent Coverage to Age 26 (Pages 90-91)

With regard to the note on dependent-coverage requirements for large employers in this section, the reference should specify ALEs for accuracy, not simply large employers.

Summary of Benefits and Coverage (Page 90)

The current draft notes that the Summary of Benefits and Coverage (SBC) template and Uniform Glossary were updated in 2017, and that plans would phase in these updates over time. However, all group health plans and issuers were required to fully phase in the new SBC and glossary language for plan years on or after April 1, 2017. As such, all group health plans are required to have the updated SBC and glossary language in place as of this time. NAHU suggests revising this section to note that the phase-in is complete, but that the federal government may update the SBC and glossary template periodically, to ensure that they always reflect the status of current federal requirements.

Health Reimbursement Arrangements and Qualified Small Employer Health Reimbursement Arrangements

Within the explanation of lifetime and annual limits, NAHU suggests that the document make reference to the numerous pieces of IRS and Department of Labor guidance and FAQs on how the prohibition on lifetime and annual dollar limits impact traditional HRAs. Additionally, NAHU suggests that the Working Group consider addressing QSEHRAs and how state law may or may not apply to these offerings.

ACA's Guaranteed Availability of Coverage Requirements

NAHU suggests the Working Group consider adding information to the handbook concerning the ACA's guaranteed availability of coverage provisions. Specifically we suggest that any future draft address how they relate to state laws and regulation of small- and large-group market participation and eligibility requirements, an employer's responsibility to offer group plan beneficiaries compliant coverage as per ERISA and the PHS Act and then the responsibility of ALEs subject to IRC §4980H to offer all ACA-designated

full-time employees and their dependent children coverage or face excise tax penalty liability.

Glossary

The draft glossary contains a definition of the term *employee*, referencing 29 U.S.C. §1002(6). NAHU suggests that, in addition to this definition, the ERISA Working Group consider adding a definition of the term *common-law employee*, given that the common-law employee standard is referenced multiple times in the draft handbook. There are important legal differences between the two types of employees, and there are benefit plan implications for both, so our organization believes both definitions should be included.

NAHU sincerely appreciates the opportunity to provide these comments on the draft handbook and we look forward to working with you as it is finalized for use by state regulators. If you have any questions, or if we can be of further assistance to you, please feel free to contact me at (703) 496-0796 or jessica@forwardhealthconsulting.com.

Sincerely,



Jessica Fulginiti Waltman
Principal, Forward Health Consulting

CC: Jennifer Cook, NAIC Senior Health Policy & Legislative Analyst & Counsel