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REALTOR®

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May 1, 2019

Mr. William Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Barr:

On behalf of the 1.3 million members of the National Association of REALTORS® (NAR), we strongly support a full appeal of the ruling of the U.S. District Court for the District of Columbia that struck down provisions of the Department of Labor final rule clarifying the definition of "employer" under Section 3(5) of the *Employee Retirement Income Security Act* (ERISA) for purposes of establishing an Association Health Plan (AHP).[1] The Department of Labor's (the Department's) efforts to expand health insurance options for more Americans has been greatly welcomed, with over a thousand real estate professionals and their families enrolled in new group health plans. AHPs are especially attractive to self-employed real estate professionals who typically lack access to more affordable, employer provided coverage. We therefore respectfully request that any Department of Justice (DOJ) motions appeal the court's erroneous decision nullifying the expansion of AHPs to include working owners without employees.

NAR's 1.3 million members are involved in all aspects of real estate, as residential and commercial brokers, salespeople, property managers, appraisers, and counselors, all with varying health care concerns. The overwhelming majority of NAR members are not employees of the realty offices with which they are affiliated; they are independent contractors autonomous from the real estate company itself, paying for their business expenses and health insurance coverage out of their own pockets. NAR has long documented the challenges of finding affordable health insurance coverage and historically the rate of uninsured members has ranged between 10 and 30 percent.

As a result, NAR has persistently advocated for reforms to the health insurance markets to provide better coverage to the self-employed and small employers that support the real estate industry – one of the country's biggest economic sectors, making up more than 16 percent of the U.S. Gross Domestic Product. The Department's AHP regulation furthered those efforts in a most successful way for a number of state and local REALTOR® associations, providing new health care options for many self-employed individuals and their families.[2] It is therefore critical that the Department of Justice support the needs of the real estate industry to have

EQUAL HOUSING OPPORTUNITY

[1] *State of New York, et al. v. U.S. Dept. of Labor*, No 18-cv-01747 (U.S. Dist. Ct for D.C., filed Mar. 28, 2019).

[2] *See* https://www.nar.realtor/realtor-ae-magazine/the-path-toward-realtor-association-health-care.

affordable health insurance options so that these individuals can continue to focus their role on boosting America's economic growth.

The DOJ Must Defend Working Owners' Access to AHPs

Working owners currently have limited options when it comes to accessing health insurance. Some real estate professionals are able to obtain health insurance from a spouse, former employer, or government program, such as Medicare, but many are purchasing health insurance on their own. If a working owner happens to have a spouse who is offered group health plan coverage through the spouse's employer, the working owner may be eligible for coverage, however, in many cases this "family" coverage may still be unaffordable. If a working owner is not married – or their spouse's employer does not offer group health plan coverage – the only health care option that remains available to them is health coverage in the fully-insured individual market. This can dramatically limit a working owner's ability to access affordable and adequate health coverage.[3]

Passage of the *Patient Protection and Affordable Care Act* (ACA) resulted in significant regulatory changes to the individual insurance market (and the small group market) that have also resulted in significant increases in health care costs. REALTORS® understand the importance of having health insurance, but affordability continues to be a primary barrier to obtaining and maintaining coverage, with more than half of REALTORS® citing their existing insurance premiums as too expensive.[4] With a nationwide median individual gross income of $42,500, self-employed REALTORS® can only manage so many increases health insurance costs before foregoing coverage altogether.[5]

Thanks to the Department of Labor rule, access to AHPs has changed this landscape for the better for many REALTORS® and their families. In states such as Nevada, Tennessee, and Alabama, state and local REALTOR® associations now sponsor an AHP for their members, covering more than a thousand lives collectively. Many other state and local associations are also making substantial progress in implementing an AHP since the rule was finalized last year, including in Kansas, Kentucky, Louisiana, Mississippi, New Hampshire, North Carolina, Ohio, Virginia, some of which already have insurance carrier commitments.

However, insurer apprehension has been an ongoing hurdle to these and many potential AHP plans. The Department of Justice must act to ease this uncertainty by defending the longevity of the Department of Labor rule. Should the working owners provision fail to be maintained, before states are able to ratify permissible regulations or legislation, the essential coverage provided by the AHPs to plan participants may be eliminated, harming many hard working Americans depending on that insurance.

The DOJ Must Correct AHP Misconceptions as applied to Working Owners

To further support the reasonableness of including working owners, there are many misconceptions regarding expanding AHP access to working owners that must be corrected, including a lack of consumer protections, less comprehensive coverage options, and adverse impact to the individual market. None of these arguments is founded in fact and the record must be rectified.

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[3] For example, the Congressional Budget Office found that premiums in the individual market were 27 percent to 30 percent higher in 2016 than they would have been in 2009. *See* *https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51130-Health_Insurance_Premiums.pdf*. Others have argued that many healthy individuals experienced rate increases of 100 to 200 percent. *See* https://www.finance.senate.gov/imo/media/doc/12EP2017RoySTMNT.pdf. According to Avalere Health, 73 percent of the individual market plans offered through an ACA Exchange had restrictive (i.e., narrow) networks. *See* http://avalere.com/expertise/managed-care/insights/plans-with-more-restrictive-networks-comprise-73-of-exchange-market. *See also* Ashley Semansee et al., *How Premiums Are Changing in 2018*, Kasier Family Foundation (Nov. 2017), https://www.kff.org/health-reform/issue-brief/how-premiums-are-changing-in-2018/.

[4] Eighty-four percent of REALTORS® plan to continue buying coverage even in light of the recent change to the individual mandate penalty. National Association of REALTORS® Research Division, 2018 Health Insurance Survey, (February 2018).

[5] National Association of REALTORS® Research Division, 2017 Member Profile, (May 2017), https://www.nar.realtor/reports/member-profile.

Working owners still enjoy the consumer protections put in place under ERISA and the ACA, as the final rule in no way altered these requirements. Additionally, state benefit mandates still apply to fully-insured large group AHPs, to ensure adequate coverage is being provided to plan participants. Working owners' access health coverage through AHPs therefore remains more than adequately regulated while also providing comprehensive coverage at an affordable price.

AHPs enjoy the benefits of lower prices found in the fully-insured large group market that are typically not found in the individual and small group markets. This lower price point is not the product of less comprehensive – or "skinny" – coverage. In fact, such large group plans tend to offer more comprehensive coverage to ensure and attract enrollment. These lower costs are driven by administrative efficiencies, where the same administrative costs that drive up the cost of individual and small group coverage are not present in the fully-insured large group market, such as market volatility.[6]

Critics of AHPs also argue that by allowing working owners to participate in these arrangements will adversely affect the individual health insurance market. However, working owners that are eligible for the ACA's premium tax credit are likely to remain in the individual market, as it will be more affordable than any unsubsidized AHP coverage. Additionally, the health status of the individual market will not be adversely impacted, as AHP coverage will be equally attractive to both a "healthy" working owner or a working owner that utilizes a significant amount of health care (i.e., a "high medical-utilizer"). As a result, while a healthy working owner may exit the individual market thereby having a negative effect on the overall risk pool, a high medical-utilizer may also exit the individual market thus having a positive impact on the overall risk pool.[7]

Should the working owners provision in the final rule be eliminated, millions of self-employed individuals across the country will lose access to AHPs that offer the same protections as those found on the exchanges that may actually be more comprehensive and most likely much more affordable. These benefits realized by so many individuals already must be defended.

The DOJ Must Defend the Department of Labor's Regulatory Authority

In the final regulation, the Department of Labor explains its requisite authority to supersede its previous interpretations as articulated in non-binding Advisory Opinions – as well as supersede a prior interpretation by a Federal court – to address marketplace developments and new policy and regulatory issues.[8] Based on this precedent, the Department has the requisite authority to reinterpret its own rules to address new issues presented in an ever-evolving economic environment, especially in light of how courts defer to Federal agencies provided there is a rational basis for the decision and it is explained through the normal rulemaking process under the *Administrative Procedure Act*.[9]

Conclusion

NAR supports the Department of Justice's diligent efforts in protecting the AHP rule that provides working owners across America with new cost-effective health insurance plans. The AHP rule removes regulatory barriers that make it possible for self-employed individuals and small employers to purchase health insurance through a professional or trade associations, providing much-needed savings in an increasingly expensive market.

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[6] For example, industry experts have explained that volatility in the individual and small group market adds significantly to insurers' already very high administrative costs, as greater resources are devoted to underwriting, and dis-enrolling and re-enrolling small participants. Prices in the individual and small group markets are also typically higher due to the ACA's risk adjustment program, the requirement to cover the ACA's essential health benefits, and the ACA's adjusted community rating rules.

[7] This would occur in instances where a high-medical-utilizer would find that the AHP coverage is superior to any un-subsidized individual market coverage. And, it would occur in cases where the AHP is less costly than any un-subsidized individual market coverage.

[8] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); *see also*, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

[9] *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 US 29 (1983).

The Department of Justice must ensure that working owners remain eligible to participate in group health plan coverage under an AHP and support the many benefits born by these plans. I encourage the Department of Justice to pursue proper legal action and defend the ability of REALTORS® across the country to have the freedom and flexibility to choose a health insurance plan that best fits their needs. Please do not hesitate to contact me with any questions, or if REALTORS® can serve as a resource on these very important matters.

Sincerely,

John Smaby
2019 President, National Association of REALTORS®