

September 28, 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 most recent draft of the federal Employee Retirement Income Security Act of 1974 (ERISA) handbook for state regulators.

NAHU sincerely appreciates all of the work and attention to detail that has gone into the preparation of this draft document. We are also grateful that so many of the clarifying suggestions NAHU made in its May 15, 2018, comment letter on the draft handbook are reflected in the latest version. NAHU believes that the additional information provided about the Patient Protection and Affordable Care Act's (ACA) employer shared responsibility provisions and the requirements for applicable large employers enhances the document, as do other minor additions concerning ACA requirements.

Concerning the current draft, NAHU believes the following would add to the content of the draft document:

**Association Health Plans**

NAHU appreciates the depth of information provided in the draft handbook concerning Multiple Employer Welfare Arrangements and one of their derivatives, Association Health Plans (AHPs), including the details of the new federal AHP regulation. However, NAHU believes the handbook would greatly benefit from a detailed explanation of how now AHPs have the option to take one of two tracks. Entities now have the choice of forming a plan based on preexisting MEWA guidance or organizing according to the requirements of the new regulation. In addition to a clear explanation of the two paths, it would be helpful if the guidebook would compare and contrast the two options, highlighting their regulatory and

plan-parameter differences, including the different treatment of health status, gender and age rating. How state regulators may treat each option should also be addressed.

### **ERISA Plan Characteristics and Relationship to State Regulation**

This section contains a great deal of helpful information about the common-law-employee standard and its applicability to general ERISA plans, as well to MEWAs, collectively bargained multi-employer plans and professional employer organizations (PEOs). 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 HHS and IRS rules and guidance on the applicability of the IRC §4980H employer shared responsibility requirements, the SHOP exchanges and the Small Business Tax Credit, all of which also utilize the common-law-employee standard, NAHU wonders if at least a reference to these requirements should be in this section.

### **Wellness Program Requirements**

NAHU appreciates that the wellness program section of the handbook has been updated to reflect the Equal Employment Opportunity Commission rules regarding wellness programs and their interaction with the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) notes that in *AARP v. EEOC, D.D.C., No. 16-2113* (Dec. 20, 2017) the federal District Court instructed the EEOC to revise the regulations. However, NAHU believes that the text in this section should be further updated to reflect that unless the Department of Labor and the EEOC produce revised regulations before January 1, 2019, the EEOC's rules will be vacated. Since to date the EEOC has made no move to release new rules, NAHU believes vacating will likely occur and the regulatory challenges concerning the ADA, GINA and employer-sponsored wellness programs that prompted the initial EEOC rulemaking will reoccur.

### **Qualified Small Employer Health Reimbursement Arrangements**

The revised document makes a note of the full range of Treasury Department and DOL guidance concerning ACA provisions and Health Reimbursement Arrangements. Additionally, NAHU suggests that the Working Group consider explicitly addressing Qualified Small Employer Health Reimbursement Arrangements (QSEHRAs), which have exemptions from specific ACA requirements. It is not entirely clear at this time that certain ERISA Title One provisions, like plan documents and others, apply to QSEHRAs, given that they are both HRAs and only to be used for individual health insurance premium reimbursement under specified conditions. Additionally, there may be issues about how state laws may or may not apply to these offerings. Given that the October 12, 2017, Presidential Executive Order "Promoting Healthcare Choice and Competition Across the

United States” calls for the expansion of such HRA offerings, NAHU believes it would be prudent to address them in the revised handbook.

### **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 including an explanation of the term *common-law employee*, given that the common-law-employee standard is referenced multiple times in the draft handbook. There are significant legal differences between the two types of employees, and there are benefit-plan implications for both, so our organization believes the handbook should address both definitions.

NAHU sincerely appreciates the opportunity to provide these comments on the draft handbook, and we look forward to working with you as you finalize it 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](mailto:jessica@forwardhealthconsulting.com).

Sincerely,



Jessica Fulginiti Waltman  
Principal, Forward Health Consulting

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