

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF COLUMBIA

STATE OF NEW YORK,  
COMMONWEALTH OF  
MASSACHUSETTS, DISTRICT OF  
COLUMBIA, STATE OF  
CALIFORNIA, STATE OF  
DELAWARE, COMMONWEALTH  
OF KENTUCKY, STATE OF  
MARYLAND, STATE OF NEW  
JERSEY, STATE OF OREGON,  
COMMONWEALTH OF  
PENNSYLVANIA,  
COMMONWEALTH OF VIRGINIA,  
and STATE OF WASHINGTON,

Plaintiffs,

v.

U.S. DEPARTMENT OF LABOR; R.  
ALEXANDER ACOSTA, in his  
official capacity as Secretary of the  
U.S. Department of Labor, and  
UNITED STATES OF AMERICA,

Defendants.

Civ. Action No. 18-1747

**DECLARATION OF MYRON  
BRADFORD "MIKE" KREIDLER  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT**

I, Myron Bradford "Mike" Kreidler, declare:

1. I am the elected Insurance Commissioner for the State of Washington and head of the Washington State Office of the Insurance Commissioner (OIC).

2. The OIC administers the laws of Washington State as they pertain to the protection of the insurance consumer through the regulation of the insurance industry. Among other work, OIC monitors financial solvency, authorizes insurance companies, licenses

producers, reviews and approves rates and forms, coordinates the takeover and liquidation of insolvent insurance companies and the rehabilitation of financially troubled companies, and investigates and enforces state laws and regulations pertaining to insurance.

3. The Affordable Care Act (ACA) has been very successful in improving quality and access to health care for small employers and individuals in Washington State.

4. Since the implementation of the ACA beginning in 2012, the uninsured rate in Washington State has declined from 13.9% in 2012, to 5.4% in 2016.

5. The ACA has provided members of small groups and individuals in Washington State with robust protections that non-ACA compliant plans often fail to provide. Examples of these protections include coverage for essential health benefits (*e.g.* maternity services, mental health and substance use disorder services, and prescription drugs) and preventing insurance policies from excluding individuals based on age, occupation, health condition, claims experience, duration of coverage, or medical condition.

6. The U.S. Department of Labor's Final Rule re-interpreting ERISA's definition of employer ("Final Rule") will negatively impact the individual and small group insurance markets in Washington State by increasing market segmentation in the individual and small group markets.

7. Prior to the ACA, Washington state law allowed association health plans (AHPs) offered through associations that were formed for the primary purposes of offering health coverage to experience rate individual employers, and allowed sole proprietors to participate in AHPs, very similar to the plans now allowed by the Final Rule.

8. In 2011, Mathematica Policy Research published a study, cited by the U.S. Department of Labor in support of the Final Rule, of the Washington AHP and small group

markets as of 2010, prior to the enactment of the ACA. That study noted that market segmentation was an issue in the Washington State small group market because carriers were permitted to use health underwriting and claims experience in setting rates. Specifically, the study noted that, “By rating coverage strategically and denying employers where the associations’ own rules may permit, carriers can separate the risk pools for AHPs and other employer groups and can isolate high-cost small groups in community-rated coverage. As a result, premiums in the community-rated small group market might be higher for the same benefit design, discouraging some employers from offering coverage at all and driving others to offer less coverage (with more limited benefits and greater cost sharing) than they might if premiums were lower.”

9. With the implementation of the ACA, the AHP market in Washington State was required to change. Sole proprietors, or groups of one, were no longer permitted to participate in AHPs, and all carriers and self-insured multiple employer welfare arrangements (MEWAs) were required to demonstrate that AHPs were only offered to groups that satisfied DOL’s guidance concerning what is a bona fide association. As a result, the requirements of the ACA allowed AHPs to continue, but created healthy limitations on access to AHPs. Even with these healthy limits in place, the AHP market in Washington State has continued to thrive, remaining close to the same size as the Washington State small group market. With the ACA limitations in place, Washington State has experienced a fairly stable small group market over the last several years.

10. However, under the new rule, market segmentation noted in the Mathematica study will likely be exacerbated. Particularly under the new pathway described in the Final Rule, more people are likely to be pulled out of both the small group and individual markets. This new pathway would allow “chamber of commerce” type associations to return to the Washington

State market. These large, geographically based associations were allowed in Washington at the time the Mathematica study was published, but were not permitted under the ACA.

11. In addition, the Final Rule gives these new pathway associations more ways to discriminate between their enrollees. By allowing AHPs to divide membership on virtually any basis that is not explicitly a health factor, the Final Rule increases the likelihood that healthier risk will be retained by the AHP, and less healthy risk will be pushed into the community rated markets.

12. The impacts of this market segmentation will be most readily seen in the small group market, where those impacts were already discernable in the 2011 Mathematica study.

13. The Mathematica study also noted that it did not have sufficient information about the sole proprietors and “groups of one” to draw any conclusions about AHP impacts on the individual market. Even so, it is likely that expanding the definition of employer to include sole proprietors will also create a degree of market segmentation in the individual market not present under the previous ACA requirements. This segmentation is likely to result in higher individual premiums, as a result of healthy risk being pulled out of the individual market, and less healthy risk being pushed back into the individual market.

14. The new rule also creates unnecessary confusion concerning cross border sales and what constitutes an appropriate metropolitan area for purposes of the new pathway for AHPs. This vagueness opens the door to legal challenges my office may be forced to use resources to defend or bring, in order to ensure geographically based AHPs still fully comply with state insurance requirements.

15. Although Washington has not seen the proliferation of fraudulent MEWAs that some jurisdictions have seen, the new rule does create an opportunity for the unscrupulous to

exploit Washington small businesses and especially less sophisticated sole proprietors with plans that do not suit their health needs, or that do not actually comply with the law.

16. As a result of the Final Rule, the OIC expects that enrollment in the individual and small group markets will be lower than it would have been if the Final Rule had not been issued.

17. I am also concerned that the small groups and individuals who leave the community rated markets will likely have insurance inferior to that which they would have obtained if they had remained in the individual and small group markets. AHPs are not required to offer comprehensive essential benefits that are required of small groups and individual policies. As a result, the members of these small groups and individuals who leave the individual and small group markets and purchase AHPs will be at risk for unanticipated health care costs in the event that they or their dependents suffer a sickness or injury that is not covered.

18. The Final Rule may also result in indirect financial harm to Washington State, to the extent that enrollees receive health care services that are not covered by their AHP. This could result in increased expenditures to programs and funding designed to assist uninsured and under insured groups within Washington State.

19. Those who remain in the individual or small group market will likely end up paying higher premiums over time.

I declare under penalty of perjury that the foregoing is true and correct and of my own personal knowledge.

Executed on August 9, 2018, in Olympia, Washington.

  
Myron Bradford "Mike" Kreidler  
Washington State Insurance Commissioner