

DOL Proposes Rules for Association Health Plans

In accordance with President Trump's [Executive Order 13813](#) "Promoting Health Care Choice and Competition Across America", the Department of Labor ("DOL") issued a [Notice of Proposed Rulemaking](#) to enhance the ability of small employers and sole proprietors to form Association Health Plans ("AHP"). In their announcement, the DOL stated: "*The proposed rule, which applies only to employer-sponsored health insurance, would allow employers to join together as a single group to purchase insurance in the large group market...By joining together, employers may reduce administrative costs through economies of scale, strengthen their bargaining position to obtain more favorable deals, enhance their ability to self-insure, and offer a wide-array of insurance options.*" Large employers and employers with self-funded plans have more design/cost flexibility under the ACA (i.e. are not subject to the Essential Health Benefits requirement) which is not available to small employers and sole proprietors. The DOL is seeking public comment by March 6, 2018 on a number of issues raised in the proposed rules.

Current Rules for Association Health Plans

Association Health Plans are not new. Under current rules, most associations are generally treated as a collection of small employers, each separately sponsoring their own health plans with none of the advantages enjoyed by larger employers. Coverage obtained by each member company in the association would be subject to state insurance laws and all the ACA market rules that apply.

Alternatively; when the employer association, rather than the individual member companies, is considered the plan sponsor, the health coverage will be treated as a single multiple employer plan under Title I of ERISA and be able to enjoy the benefits of being considered a large group health plan. For the AHP to be treated as a "single" employer plan rather than a collection of individual employer plans, there needs to be a "commonality of interest" and bone fide purpose *other than for the purpose of providing health coverage* among the member companies. The proposed rules aim to expand this limiting definition of employer for purposes of establishing AHPs.

AHPs may also be treated as Multiple Employer Welfare Plans ("MEWA") subject to state regulation. The proposed rules do not change the existing ERISA state provisions governing MEWAs.

Proposed Rules for Association Health Plans

The following highlights key elements of the DOL proposal:

- **Relax the requirement to form for the purpose other than providing health insurance:** Employers would be able to form AHPs for the sole purpose of providing health insurance.
- **Enhance the "commonality of interest" requirement:** Employers would be able to form associations based on either having a (i) common geographical location, or (ii) common industry, trade, line of business or profession. Common geographical consideration would include businesses located in the same state, metropolitan region (even across state lines), or smaller areas such as cities or counties.
- **Expand the definition of employer:** Sole proprietors and self-employed individuals (with no common law employees) meeting certain criteria would be eligible to participate in an AHP. To help prevent fraud and abuse, an individual business owner must be earning income from the trade or business and either (i) work 30 hours per week in the business (or 120 hours per month), or (ii) earn income derived from the business to cover the AHPs

health insurance cost. In addition, the individual must not be eligible for subsidized group health coverage from an employer or spouse's employer.

- **Coverage must be limited to employees of employer members and working owners:** Employees and former employees (and family members/beneficiaries) are the only individuals eligible to participate in the association's group health plan.
- **The AHP must have an organizational structure and be controlled by its employer members:** The AHP would need to operate in accordance with governing by-laws with the members controlling activities, including the establishment and maintenance of the group health plan.
- **Nondiscrimination rules would apply:** The association cannot restrict membership based on any HIPAA/ACA health status factor. The rules will also prohibit discrimination *within* groups of similarly situated individuals. The rules would not, however prohibit such discrimination *across* groups of different similarly situated individuals such as full-time/part-time, geographic location, occupation, etc. To prevent risk-rating of each member employer, the association may not treat member employers as distinct groups of similarly situated individuals.

Final Thoughts

It will be interesting to see how the proposed changes (and ultimately the final rules) may impact the delivery of healthcare coverage in the individual and small group markets. Currently, sole proprietors must obtain coverage from the individual market where premiums have been increasing significantly over the past several years. Having the ability to band together and participate in large group health plans could help these business owners obtain more affordable coverage.

Today, many smaller employers secure health coverage through a Professional Employer Organization ("PEO") to help gain access to benefits, technology and administration solutions that typically are available to larger companies with bigger budgets. However; upon initial application to join a PEO, the PEO can require medical information (questionnaire, claims experience, etc.) to underwrite the prospective employer's medical risk to set medical plan premium rates or potentially deny the employer's request to join the PEO, a requirement prohibited by the proposed nondiscrimination AHP rules.

ADDITIONAL INFORMATION

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