DOL Issues Association Health Plan Final Rules

The Department of Labor ("DOL") has issued its final rule to better enable small employers and sole proprietors to form Association Health Plans ("AHP"). The final rule generally adopts the proposed rules issued back in early January however; there are some modifications which are noted below.

Background

Association Health Plans are not new. Under prior rules, most associations would generally be 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 Affordable Care Act ("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 final rule expands this limiting definition of employer for purposes of establishing AHPs to help provide more plan design flexibility at (hopefully) lower cost for sole proprietors and small businesses.

AHPs are also considered Multiple Employer Welfare Arrangements ("MEWA") subject to state regulation. The final rule does not change the existing ERISA state provisions governing MEWAs. In this regard, some states may seek to limit the formation of AHPs as states may view the ability to create less robust plans than required by the ACA as (i) undermining the ACA's benefit protections, and/or (ii) disrupting the existing individual and small group marketplaces causing premiums to further escalate.

For example, the governors of New York and Massachusetts are considering bringing legal challenges to the final AHP rule. In addition, under the recently passed New Jersey individual healthcare mandate, coverage under an AHP would not be considered acceptable coverage (unless certain benefit mandates are covered under its group health plan) causing a New Jersey resident to be subject to a state tax penalty.

The Final Association Health Plan Rules

The final rule does allow existing as well as newly formed associations to operate association health plans in accordance with either existing DOL sub-regulatory guidance or under this final AHP regulation. The following highlights key elements of the DOL final regulations and indicates where differences with the proposed rule have been incorporated:

- **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 as "working owners". To help prevent fraud and abuse, an individual business owner must be earning income from the trade or business and either (i) work 20 hours per week in the business (or 80 hours per month), a lower threshold of 30 hours/week or 120 hours/month in the proposed rule, or (ii) earn income derived from the business to cover the AHPs health insurance cost. The requirement that working owners not be eligible for subsidized group health coverage from an employer or spouse's employer has been removed. Groups and associations will have the ability to establish their own eligibility requirements and may exclude working owners.
- **Coverage must be limited to employees of employer members and working owners.** The final rule clarifies that (i) employees of *a current employer member of the association*, and (ii) former employees *of a current employer member* who became entitled to coverage under the health plan *when that former employee was employed by the member company*, are the only individuals eligible to participate in the association's group health plan. This clarification is intended to ensure the group health plan is not open-ended to provide coverage to ALL

former employees of a member company who may have worked for that employer at *any time* in the past. Spouses and dependents may also be eligible to participate.

We await more guidance to determine how continuation coverage will be applied (i.e. COBRA/state continuation), either based on the entire population of the association or separately by each member company's size.

- **Proposed rule relaxed the requirement to form for the purpose other than providing health insurance:** The proposed rule allowed employers to form AHPs for the *sole purpose of providing health insurance*. Based on comments, the final rule clarifies that there must be "at least one substantial business purpose unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees". The DOL confirms a for-profit business purpose is not required. A safe harbor in the final rule indicates a business purpose exists where the association is considered a viable entity (i.e. Chamber of Commerce) even in the absence of sponsoring an employee benefit plan.
- **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. There was basically no change to this provision in the final rule.
- **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. The final rule notes that *form and substance* control must be present which will be determined based on facts and circumstances. The DOL states the following criteria are important determining factors, such as whether employer members:
    - Regularly nominate and elect directors, officers, trustees or other similar persons that constitute the governing body or authority of the employer group or association and plan;
    - Have authority to remove any such director, officer, trustees, or other similar person with or without cause;
    - Have the authority and opportunity to approve or veto decisions or activities which relate to the formation, design, amendment and termination of the plan, for example, *material amendments* to the plan, including changes in coverage, benefits and premiums. (Restricted to employer members that participate in the plan).

It will be interesting to see how much input/involvement will be necessary by member companies to satisfy this form of control and to identify what might constitute a "material amendment". For example, will the association need a member vote to change insurance carriers, add a new benefit option or establish a wellness program incentive? What level of change may be considered "material" when modifying plan deductibles, copayments and out-of-pocket limits, and will this include for example, changes to these parameters that are annually set by the IRS to determine if a plan is a Qualified High Deductible Plan that allows Health Savings Account contributions?

- **Nondiscrimination rules would apply.** The association cannot restrict membership based on any HIPAA/ACA health status factor although the final rule clarifies the association may use such factors as industry, age and gender in rating employer member groups (although state laws may prohibit underwriting on age/gender). The rule will also prohibit discrimination *within* groups of similarly situated individuals. The rule 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.

Effective Dates

The final rule becomes effective August 20, 2018 and sets the following staggered AHP applicability dates:

September 1, 2018: Fully insured AHPs

January 1, 2019: Existing self-insured AHPs wishing to expand availability based on the final rule

April 1, 2019: New self-insured AHPs

Final Thoughts

Only time will tell how the final rule 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, as well as technology, human resources 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 nondiscrimination AHP rules. The final rules do not appear to directly impact PEOs however; it remains to be seen how AHPs may potentially disrupt the PEO market space.

For additional information about our services, please contact Kyle Frigon at 404-733-3256 or via email at: kfrigon@cherrybekaertbenefits.com.