U.S. DOL Issues Final Regulations on Association Health Plans

- *The U.S. Department of Labor (DOL) issued final regulations on association health plans (AHPs) to help small companies afford health insurance for their workers.*
- *Effective dates of the new rules will be phased in by type of plan, between Sept. 1, 2018, and April 1, 2019.*
- *The new rule expands the types of groups that qualify to form AHPs.*
- *The DOL modified the proposed guidance to address numerous concerns.*
- *Questions remain about the application of various tests and requirements for establishing AHPs.*

On June 19, the U.S. Department of Labor (DOL) issued final regulations on association health plans (AHPs). These rules generally maintain the expanded AHP flexibility of the proposed structure released in January. However, the DOL made some changes to address some stakeholders' concerns. Under the new rules, employer groups and worker owners — including some independent contractors — can band together to purchase health insurance plans typically only available to large employers.

The DOL maintains that the intent of the final rule is to help small employers afford health care coverage for their employees. Critics say the Trump administration is dodging the Affordable Care Act's (ACA's) mandate that plans must pay for essential health benefits.

The DOL is phasing in effective dates for the new rules by plan type. The incremental approach, the agency says, will give quick relief to individuals seeking affordable health coverage through AHPs while providing more time for the DOL and state authorities to address concerns about self-insured AHPs' vulnerability to financial mismanagement and abuse.

The new rules take effect on:

- Sept. 1, 2018 for fully insured plans;
- Jan. 1, 2019 for existing self-insured AHPs; and
- April 1, 2019 for new self-insured AHPs.

Overview of the final rules

When employers may unite in a group or association

Multiple employers sponsoring an AHP as a single employer

The final rules essentially change section 3(5) of the Employee Retirement Income Security Act (ERISA) for determining when employers may unite in a group or association that will be treated as the employer sponsor of a single multiple-employer "employee welfare benefit plan" and group health plan. The change allows more types of groups to qualify to form AHPs by primarily expanding the commonality-of-interest test. The DOL now allows:

- Association plans to form when the primary purpose is to offer health insurance, if that group or association of employers has at least one substantial business purpose unrelated to offering health coverage or other employee benefits to its employer members and their employees;
- Unification of businesses in the same state or multistate metropolitan area, as well as those in the same trade, industry, line of business or profession; and
- Worker owners (including sole proprietors and self-employed individuals) to join the association, with restrictions. This essentially gives such people dual status as employers and employees.

New healthcare market rules

The DOL changed the market rules for AHPs, redefining the employer as the association rather than the individual members. The new rules place most AHPs in the large-group market, and generally subject them to regulations pertaining to larger employers. As a result, these AHPs will be subject to less requirements and restrictions than those in the small-group market. For instance, the ACA limits underwriting factors for the small-group markets to age, tobacco use and geography.

The ACA also mandates the inclusion of essential health benefits (EHBs) in the small-group and individual markets, so in some areas of the country AHPs will be free of these requirements. States still have the authority to set market rules for large groups and regulate AHPs, so this change will affect AHPs based on geography. Some states' community rating regulations and mandates benefits are more stringent than those of the ACA. AHPs in these states will likely not see any changes to plan structures.

Many of the ACA market reforms apply to the large-group and self-funded markets. These include:

- A ban on denying coverage for an otherwise covered but pre-existing health condition;
- A requirement that plans offering dependent coverage must do so for dependent children up to age 26;
- No lifetime or annual dollar limits for any EHB (non-grandfathered plans);
- Coverage of certain preventive health services without cost-sharing;
- Special enrollment rights;
- Capping out-of-pocket expenses for covered EHBs (non-grandfathered plans);

- No waiting periods longer than 90 days for coverage; and
- Medical loss-ratio requirements for fully insured AHPs, but not for self-funded arrangements.

The DOL added a requirement to prevent discrimination based on health status across AHP employee members. Employer membership cannot be based on health factors and a plan cannot discriminate by imposing higher premiums based on health factors.

Changes and clarifications: Final rules vs. proposed rules

In response to comments from various stakeholders, the DOL modified the proposed guidance to address numerous concerns:

- *Existing AHPs permitted to comply with previous guidance* – There was concern that the new rules would put existing AHPs at a disadvantage, notably those with narrow membership parameters or that base premium levels on health risk factors, similar to traditional insurance offerings. Now an association group may comply with either the new rules or earlier requirements.
- *An association must have at least one other substantial, business-related purpose other than sponsoring an AHP* – Under the proposed rules, an entity could exist solely to set up AHP. With the change to the final rules, the DOL aims to mitigate potential fraud, preventing groups forming only to offer an AHP without regard for their members.
- *Clarification-to-control test in proposed rule* – The DOL sought to clarify the degree of control employers must have in an AHP so the plans are not just insurance by another name. The DOL gave general guidance on a three-factor control test, but other reasonable interpretations can be made from the answers.
- *Health insurance issuer cannot sponsor an AHP* – The final rules make it clear that this is not a permissible arrangement.
- *Working owner:*
    - Fiduciary responsibility of the issuer — To ensure that a business owner is engaged in a legitimate trade or business activities (really working), the DOL gave general examples of reasonable verification, but left the issue open for interpretation regarding individual circumstances.
- *Minimum-hour threshold for working owners* — The final rules reduce the threshold to 20 hours per week or 80 hours per month, and allow more flexibility in calculating hours to account for the variability of independent contractors.
- *Clarification of state authority:* The new rules do not circumvent current state laws from regulating insurance or AHPs. Instead, they "provide an additional basis for a group or association of employers to be treated as an 'employer' sponsoring a single ERISA-covered multiple-employer group health plan (a multiple employer welfare arrangement, or MEWA). This is significant because a MEWA that is treated as a single plan may avoid some ACA reforms applicable to the individual and small group insurance markets, such as the essential health benefits requirement." Such state mandates may apply to fully insured AHPs through the health

insurance policies they purchase. Under ERISA's* provisions saving state regulation of MEWAs from preemption, states may also extend benefit mandates to self-insured AHPs. However, any state law that regulates insurance may apply to an AHP.

- *Clarification of applying size of group for certain mandates:* The DOL explained that for the purpose of certain other health benefit mandates, such as mental health parity, the size of the AHP (not the employer) determines adherence to the requirement. This is consistent with the approach of treating AHPs as large employers.

- *Divergent requirements for voluntary employees' beneficiary associations (VEBAs) and AHPs:* The DOL acknowledges that IRS guidance regarding VEBAs sets out different criteria for employer groups and associations that seek to establish and use those arrangements than these final rules describe for sponsorship of a group health plan under ERISA. When an employer group or association offering an AHP uses a VEBA in connection with the AHP, the arrangement must comply with applicable VEBA requirements. The DOL views VEBAs as convenient — but not exclusive — AHP funding mechanisms.

Open questions

Many questions remain about the application of various tests and requirements for establishing AHPs. For example:

- *Does the size of the AHP or the size of an employer member determine whether COBRA** is required?* The DOL is consulting with the Treasury Department and the Internal Revenue Service to craft guidance.

- *What would qualify as a substantial business-related activity for the purpose of forming an association?* The rule does not define this term. Rather, it gives an explicit safe harbor under which a substantial business purpose is considered to exist when a group or association would be a viable entity even without sponsoring an employee benefit plan. The final rules also state that a business purpose is not required to be for profit, leaving the issue open to interpretation.

Consultative Opportunities for Accountants

Association plans generally allow smaller groups to band together to purchase health coverage, spreading the claims risk and creating economies of scale – providing another option your clients have for supporting their employee health care needs. Regardless of your opinion on health care, your clients are going to need you. This is a real opportunity to add value. Some considerations include:

- Provide client education and awareness regarding key points of the final rule on AHPs.
- Ensure your clients are cognizant of how their state regulates AHPs and the large group market, to help minimize any potential risk of joining groups with potential red flags.
- Encourage your clients to evaluate the regional circumstances, labor demands, and state regulations when considering whether an AHP is the appropriate way to provide health coverage.

- Ensure your clients are aware of their overall employee population health care needs, and what they are demanding, to determine the best options and strategies to support them. Educate them on benefits for their situation that might include AHPS, QSEHRAs, premium tax credit, small business tax credit, etc.

For additional information on the Final Rule on AHPs.

And, for more information on regulatory items, refer to Paychex WORX.

**Employee Retirement Income Security Act*

***Consolidated Omnibus Reconciliation Act – A federal law giving workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan for limited periods of time under certain circumstances, such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events.*

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