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Association Health Plans Final Regulations

After receiving over 900 comments in response to its Proposed Rule which was released on January 4, 2018, the Department of Labor (DOL) released its long-awaited Final Rule on Association Health Plans (AHPs) on June 19, 2018. According to the DOL, the purpose of the Final Rule, which is the result of President Trump's Executive Order 13813, released October 12, 2017, is to facilitate adoption of AHP's and to expand access to affordable health coverage for employees of small employers, as well as the self-employed.

From the outset, the DOL makes it clear that the final rule is intended to provide an additional mechanism for groups or associations to meet the definition of an "employer" and sponsor a single ERISA-covered group health plan and that both existing and new employer groups or associations that conform to the DOL's pre-rule guidance can sponsor an AHP.

Below are the highlights of the final rule:

1. It establishes a more flexible “commonality of interest” test for employer members than previously adopted DOL sub-regulatory interpretive rulings under ERISA § 3(5). In line with the Proposed Rule, the Final Rule states that in order to qualify as a “bona fide” employer group or association, the members must be in the same trade, industry, line of business, or profession OR maintain their principal places of business in a region that does not exceed the boundaries of the same state, or in the same metropolitan area (even if the metropolitan area includes more than one state).

An area that meets the definition of “metropolitan statistical area” or a “combined statistical area,” as defined by the OMB, would constitute a metropolitan area for purposes of the rule. However, the Final Rule makes clear that the DOL wanted to leave open the possibility that other geographic areas may also qualify as metropolitan areas. This is subject to a facts and circumstances analysis.

2. The Proposed Rule required the AHP to have a “formal organization structure with a governing body” as well as by-laws or other indications of formality. The DOL adopted the Proposed Rule without modification on this issue. Similarly, the Final Rule maintains the “control test” which provides that the functions and activities of the AHP must be controlled by its employer members and the AHP employer members that participate in the group health plan. Whether the

requisite control is present is determined from the facts and circumstances; however, if the following three factors are present, the DOL will consider the control aspect met: 1) whether employer members regularly nominate and elect the governing body of the association and the plan; 2) whether the employer members have authority to remove a member of the governing body with or without cause; and 3) whether employer members that participate in the plan have the authority and opportunity to approve or veto decisions which relate to the formation, design, amendment, and termination of the plan.

3. The Final Rule requires that a bona fide group or association have at least one “substantial business purpose” unrelated to the provision of benefits to be eligible to sponsor an ERISA-covered group health plan. However, the Final Rule makes clear that a group’s “principal purpose” may be the provision of benefits. The business purpose does not have to be a for-profit purpose. The offering of classes or educational materials on business issues, convening conferences or offering other services to its members would qualify. The baseline is whether the group would be a viable entity in the absence of sponsoring an employee benefit plan.

4. The Proposed Rule provision regarding “working owners,” which the DOL adopted in the Final Rule with a few modifications, establishes criteria under which “working owners”, i.e., sole proprietors, self-employed individuals, and employers with no common law employees, could participate in AHP’s. First of all,

the working owner must be engaged in a legitimate trade or business. Secondly, it is required that the individual work an average of 20 hours per week or 80 hours per month (which is a reduction from the Proposed Rule which would have required at least 30 hours per week or 120 hours per month). The Final Rule also imposes a duty on the AHP to confirm that the working owner is in fact meeting these minimum hour standards. The Final Rule, in opposition to the Proposed Rule, does not prohibit a working owner from participating in an AHP if the individual is eligible to participate in a group health plan maintained by the individual's employer or spouse.

Regarding the applicability of other laws, the Final Rule applies solely for purposes of Title I of ERISA and for determining whether health insurance coverage of the AHP is regulated by the Public Health Service Act provision that apply to the individual, small group, or large group market and not, for example, for purposes of taxation under the Internal Revenue Code. An AHP offered by a bona fide group or association under the Final Rule is subject to all of the ERISA provisions applicable to group health plans, including the fiduciary responsibility and prohibited transaction provisions in Title I of ERISA, as well as disclosure requirements (i.e., provision of SPDs). The DOL noted that the bona fide group or association that sponsors the AHP assumes responsibility for operating and administering the AHP, including ensuring compliance with these requirements.

AHPs formed under the Final Rule are not subject to federal mandates (e.g., the ACA's ten categories of essential health benefits (EHBs) and federal pricing rules (e.g., modified community rating rules) that apply exclusively to the individual and small group insurance markets.

HIPAA rules apply to AHPs, including those regarding wellness plans found at 29 CFR 2590.702(f). The HIPAA nondiscrimination rules also apply to AHPs, like any other group health plan. Therefore, AHPs cannot discriminate in eligibility, benefits, or premiums against individuals within a group of similarly situated individuals based on a health factor. AHPs may, however, make distinctions among groups based on bona fide employment based factors. For instance, an AHP may offer different coverage to dairy farms than to corn growers or different pricing to retailers than restaurateurs.

The Final Rule also confirms that self-funded AHPs are still considered to be multiple employer welfare arrangements (MEWAs) and are, therefore, subject to state regulations. They will also need to ensure compliance with existing federal regulatory standards governing MEWAs, such as M-1 filings. This means that self-insured AHPs will also be subject to the various MEWA laws in each state in which the self-funded AHP has employer members. Also, state benefit mandates regarding such things as mental illness treatment, substance abuse disorders, autism services, childhood immunizations and mammography may apply to fully-insured AHPs

through the policies they purchase and to self-funded AHP's under state MEWA statutes and regulations.

The Final Rule will be effective as of 60 days after publication in the Federal Register (which has not happened as of the date of this publication). The Rule calls for a staggered implementation approach in order to allow state insurance regulators time to bring their regulations in line with the Final Rule. All associations (new or existing) may establish a fully insured AHP beginning September 1, 2018. Existing associations that sponsored an AHP on or before the date of the Final Rule was published may establish a self-insured AHP beginning January 1, 2019. All other associations (new or existing) may establish a self-insured AHP beginning April 1, 2019.

In conclusion, the Final Rule is intended to allow small employers and the self-employed to band together to be able to purchase coverage under "large group" insurance policies, which are subject to fewer ACA mandates, and to benefit from greater risk pooling and have greater flexibility in plan design than small group plans. The DOL estimates that only about one-third of employers with fewer than 50 employees presently provide health coverage to their employees and predicts that nearly 4 million additional people will enroll in AHPs as a result of the new Final Rule.

The attorneys of Holifield Janich Rachal Ferrera are monitoring the situation and will keep you informed of any new developments or guidance. Stay tuned!

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