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DISTRICT COURT TRUMPS DOL ASSOCIATION HEALTH PLAN RULE

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On March 28, 2019, a district court, in a case brought by eleven states and the District of Columbia, ruled that the United States Department of Labor ("DOL") exceeded its statutory authority when it issued a final rule expanding the type of entities that could sponsor a large group health plan under the auspices of an association health plan ("AHP"), 83 Fed. Reg. 28,912 (June 21, 2018) (hereinafter the "Final Rule"). *State of New York v. United States Department of Labor,* 2019 WL 1410370 (D.D.C. March 28, 2019). The court held that the Final Rule "scraps" the most fundamental distinction between ERISA covered plans which must have an employer-employee nexus and commercial transactions between insurance companies and unrelated insureds. *Id.* at *2. The court held that the Final Rule's interpretation of the statutory definition of employer "does violence to ERISA," and it invalidated those provisions in the Final Rule that expanded the definition of the term "employer" and that allow sole proprietors to participate in an AHP. *Id.* at *1 - *2. The court remanded the Final Rule to the DOL to review the impact of its decision under the Final Rule's severability provision. *Id.* at *21.

The court concluded that the DOL's Final Rule "was not a reasonable interpretation of ERISA" because it eroded the historical safeguards in DOL sub-regulatory guidance that demarcated employer-based health coverage from run-of-the-mill commercial insurance transactions with unrelated parties. *Id.* at **11-13. The Court explained that historically DOL's sub-regulatory guidance had been applied to limit the type of associations that could be deemed an "employer" within the meaning of ERISA §3(5) and legally sponsor a multiple employer large group health plan. *Id.* A key element in this historical guidance was whether the association constituted a "*bona fide"* association. The court explained that historically DOL applied three general criteria to determine whether an association sponsoring a health plan for its members could be deemed a *"bona fide"* association and thereby permitted to sponsor one large group health plan, rather than be deemed the sponsor of a health insurance arrangement that pools small employer plans into the arrangement. In general, the Final Rule summarized the criteria as follows:

> (1) [w]hether the group or association [was] a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits; (2) whether the employers share[d] some commonality and genuine organizational relationship unrelated to the provision of benefits; and (3) whether the employers that participate[d] in a benefit program, either directly or indirectly, exercise[d] control over the program, both in form and substance.

Id. at *3 (citing 83 Fed. Reg. 28,914).

The Final Rule adopted these three criteria, but the court ruled that DOL unreasonably "relaxed" two of the three criteria, the "purpose" test and the "commonality of interest" test, which were historically used to restrict when an association could establish a *bona fide* association for purposes of sponsoring a single large group health plan. Under the Final Rule, the "purpose" test allowed an association to sponsor a single large health plan even if its primary purpose is "to offer and provide health coverage to its employer members and their employees." *Id.* at *13. (citing 29 C.F.R. § 2510.3-5(b)(1). This expansion of the purpose test was a significant departure from the pre-Final Rule understanding of the purpose test which required that an association have an existence independent from the offering of health insurance benefits in order to be deemed a *bona fide* association. The court ruled that the Final Rule's purpose test "provides no meaningful limit on the associations that would qualify as 'bona fide' ERISA 'employers.'" *Id. at *14.*

With respect to the "commonality of interest" test, the Final Rule allows the test to be met under one or both of the following situations:

> 1. the employers are in the same trade, industry, line of business or profession (regardless of geographic location), **or**
> 2. the employers are in geographically limited areas, such as a single state or a certain metropolitan area (even if it crosses state lines).

The court ruled that the geographic test did nothing to "ensure that associations qualifying to sponsor AHPs under the Final Rule share a 'commonality of interest,' because it creates no meaningful limit on these associations." *Id.* at *13-15.

The court also invalidated those provisions in the Final Rule that allowed "working owners," i.e., sole proprietors, self-employed individuals and employers with no common law employees, to participate in an AHP. Under prior DOL guidance, working owners without common law employees were not permitted to participate in an AHP, as they did not meet the definition of an "employer" under Section 3(5) of ERISA. *Id.* at *17-20.

The court's ruling will likely be appealed. Many states have been engaged in reviewing state laws that apply to association sponsored multiple employer welfare arrangements. In particular, states have been reviewing those laws that restrict the definition of association plans to conform their state laws with DOL's Final Rule. The district court decision likely will disrupt that process. For now, we are advising clients that want to establish an AHP under the Final Rule to move cautiously while the district court decision evolves and to review any state law changes that may have been adopted to loosen the standards on association sponsored health plans. We will continue to follow this litigation and provide updates as necessary.