



ASSOCIATION HEALTH PLANS: NOW WHAT?

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ASSOCIATION HEALTH PLANS

- Association health plans (AHPs) are a way for an association of employers to band together to purchase health insurance.
- A larger group of participants mean greater bargaining power with insurers, administrators, and provider networks.
- The larger group of participants also creates more risk spreading and lessens the premium impact of adverse claims experience.

AFFORDABLE CARE ACT

- The Affordable Care Act establishes a very high baseline for benefits in the individual (including sole proprietors) and small group health insurance (less than 50 employee in most states) markets.
- Large groups (+50 employees in most states) have greater flexibility to customize plan designs to meet employee needs and reduce the costs of benefits.
- An AHP provides an alternative that, in theory, would be treated as a single large employer.
- Employer participants (including sole proprietors) in an AHP can, in theory, escape the restrictions imposed by ACA individual and small-group regulation.

PRE-TRUMP AHP GUIDANCE

- Department of Labor guidance restricted the formation of AHPs to “bona fide” associations.
- Three element “facts and circumstances test”
 - Is the association a bona fide organization with business or organizational purposes and functions unrelated to the provision of benefits?
 - Do the employers share some commonality and genuine organizational relationship unrelated to the provision of benefits?
 - Do the employers that participate in a benefit program, either directly or indirectly, exercise control over the program, both in form and substance?

PRE-TRUMP AHP GUIDANCE

- The facts and circumstances tests were strictly construed and most associations failed.
- A group of employers that purchased insurance that do not qualify as a bona fide association are treated as an assemblage of separate plans.
- The “look through” rule requires that each separate plan be evaluated as to whether it is an individual plan, a small group plan, or a large group plan.

TRUMP AHP RULE

- The Trump AHP rule significantly relaxes the standards for an association that can sponsor an AHP.
- The factors remain the same—common interest, purpose other than sponsoring benefit plans, and control by employer participants—but the test for each is relaxed.
- Common interest – the members of the association must be either (a) in the same trade, industry, line of business, or profession or (b) be in the same geographic area that does not exceed the boundaries of the same state or the of same metropolitan statistical area (even if not in the same state)
- Purpose – The association can be formed for the primary purpose of offering health insurance, so long as the association has one substantial other business purpose.

SELF-FUNDED VS. FULLY INSURED

- Any AHP is also a “multiple employer welfare association” or MEWA.
- States have considerable regulatory enforcement authority over MEWAs, unlike self-funded single employer plans.
- A self-funded AHP will generally be required to register with each state either under a state MEWA law or as an authorized insurance company.
- States generally regulate fully insured AHPs indirectly by regulating the health insurance carriers that offer the insurance to these AHPs.

MORE TECHNICAL DETAIL ON AHPS

- The preceding slides have provided a summary of the new AHP rule.
- See the presentation we gave late last year for more technical detail:
<https://www.hollandhart.com/pdf/Associations-Health-Plan-Final-Rule.pdf>

STATE REACTIONS - POSITIVE

- Several states have issued guidance that is favorable to formation of AHPs—particularly fully insured AHPs—under the new DOL rule.
- This guidance typically will (a) affirm that an AHP is an acceptable employer grouping under state law, meaning that the state will not attempt to impose the “look through” rule by state insurance law and (b) provide any specific state requirements for issuing a policy to a fully insured AHP.
- Examples of such states: Idaho, Alaska, Nevada, Nebraska, and Texas.

STATE REACTIONS - NEGATIVE

- Multiple states have published guidance that attempts to block the formation of new AHPs.
- These states assert that sole proprietors must issued individual plans and small employers must be issued small group plans.
- In other words, these states attempt to re-create the “look through” rule that existed before the DOL issued the new AHP guidance.
- Examples: California, Connecticut, Iowa, Massachusetts, New York, Pennsylvania, Oregon.

NEW YORK V. UNITED STATES DEPT. OF LABOR

- 11 states and District of Columbia sued in federal court for the District of Columbia to overturn the DOL rule on association health plans.
- The states argued that the rule exceeded DOL's authority to interpret the definition of "employer" under ERISA Section 3(5).
- On March 28, 2019, District Judge John Bates found in the states' favor and vacated the bulk of the rule.
- The DOL has appealed the decision. Judge Bates' decision is well-reasoned but may be overturned on appeal either based on standing (based on the state's status to bring the claim) or on the merits.
- DOL is seeking a fast track appeal.

DOL INTERIM GUIDANCE

- DOL has issued two rounds of interim guidance to AHPs that formed in reliance on the rule.
- AHPs must honor their contractual obligations to pay benefits.
- AHPs formed under the new rule must cease marketing and enrolling new employers.
- The DOL and HHS will not enforce, and will not penalize states for failing to enforce, the look through rule on AHPs for their current plan year.

CONCLUSION

- Opponents of the rule have won a victory but the issue will not be settled until all appeals are complete.
- The states challenging the rule are the same states that issued anti-AHP guidance, so no new AHPs actually formed in these states.
- The affected states and employers are all located in states that did not challenge the new rule.
- If the DOL's rule is reinstated on appeal, DOL should issue additional rulemaking that expressly preempts state-regulations that attempt to undermine the AHP rule.

FOR MORE INFORMATION



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