



Health Care Reform Update



IMPORTANT NOTICE REGARDING HEALTHCARE REFORM Update #79 January, 2018

DOL Proposes Rules Intended to Broaden Availability of Association Health Plans

The DOL has issued proposed regulations designed to expand the availability of association health plans (AHPs), with the goal of giving small employers and self-employed individuals greater access to affordable health coverage. Foreshadowed Executive Order issued last October, the proposals would make it easier for a group or association of employers to be considered an “employer” sponsoring a multiple employer welfare arrangement, or MEWA that qualifies as a single ERISA-covered plan. If the MEWA is treated as a single plan, it may avoid many requirements applicable to the individual and small group insurance markets under the Affordable Care Act (ACA). Under current guidance, a MEWA is treated as a single ERISA plan only where the MEWA is established by a “bona fide” association of employers that have a genuine organizational relationship and an ability to control the association. As a practical matter, the DOL treats few MEWAs as single ERISA-covered plans, instead treating them as a collection of discrete plans, separately sponsored by each of the participating employers. The proposals are aimed at making it easier for MEWAs (insured and self-insured) to be treated as single ERISA-covered plan. Here are highlights:

Expanded Commonality-of-Interest Requirement: The proposed regulations would modify ERISA’s definition of “employer,” in part, by creating a more flexible “commonality-of-interest” test for the employer members than the DOL currently uses. The regulations would allow employers to band together for the express purpose of offering health coverage if they are either: (1) in the same trade, industry, line of business, or profession; or (2) have a principal place of business within a region that does not exceed the boundaries of the same state or the same metropolitan area, even if the metropolitan area includes more than one state. By expressly allowing an association to exist for the purpose of offering or providing health coverage to its members, the regulations would depart dramatically from previous DOL guidance providing that a bona fide association must exist for a purpose other than offering health coverage to be considered an “employer.” Further, recognizing the sufficiency of a geographic commonality of interest, as an alternative to focusing on a common trade or industry, would significantly relax a longstanding DOL standard for determining whether a sufficiently close economic or representational relationship exists among the employers and employees that participate in the plan.

Organizational Requirements: Each association would have to have a formal organizational structure with a governing body and bylaws or similar indications of formality. Employer members would have to directly or indirectly control the functions and activities of the association, including establishment and maintenance of the AHP, through regular election of representatives. These requirements mirror existing DOL guidance and, according to the preamble, are necessary to ensure that associations act in the interest of participating employers and are not merely commercial enterprises claiming to be AHPs but more akin to traditional insurers in practice.



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Special Rules for Treatment of Working Owners: The proposals would permit only employees and former employees of employer members (and their families) to participate in AHPs. But if certain conditions are met, they would allow working owners, such as sole proprietors and other self-employed individuals (e.g., partners in a partnership), to elect to act as employer members of an association participating in an AHP and also be treated as employees of their businesses for purposes of being covered by the AHP. [EBIA Comment: This approach is consistent with existing DOL advisory opinions concluding that working owners may be “participants” in ERISA plans.]

Health Nondiscrimination Requirement: Building on existing HIPAA nondiscrimination provisions, the proposed regulations would add a new requirement to prohibit a group or association from restricting membership in the association itself based on any health factor. The HIPAA portability rules define a health factor as health status, medical condition, claims experience, receipt of healthcare, medical history, genetic information, evidence of insurability, and disability. The proposed regulations would also apply HIPAA’s health status nondiscrimination rules more strictly, prohibiting AHPs from treating member employers as distinct groups of similarly-situated individuals. This provision marks a significant change to HIPAA’s health status nondiscrimination rules, which allow group underwriting on an employer-by-employer basis (while prohibiting group health plans from charging different premiums to individuals based on their own health status). Under the proposed regulations, AHPs would be precluded from charging employer members higher premiums based on the health status of their specific employees and dependents.

The preamble expressly acknowledges that the proposed regulations would allow small businesses to avoid many of the ACA’s requirements, such as essential health benefits, single risk pools, restrictions on risk underwriting, and medical loss ratio provisions, but views these as acceptable trade-offs to offer more affordable alternatives than are currently available to them. The DOL considered, but rejected, applying the proposal only to insured AHPs. The proposed regulations have no immediate legal effect and may undergo significant changes before being finalized. It will be interesting to see what impact AHPs ultimately have on insured and self-insured plans of both small and large employers.

Links to additional Information:

[Proposed Regulations](#)

[News Release](#)

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