



## Health Care Reform Update



### **IMPORTANT NOTICE REGARDING HEALTHCARE REFORM Update #88**

**June, 2018**

#### **DOL Releases Final Rules for Association Health Plan**

The DOL has issued final regulations and FAQs designed to expand the availability of association health plans (AHPs). Following proposed regulations that received over 900 comments, the final regulations 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 Affordable Care Act (ACA) reforms applicable to the individual and small group insurance markets, such as the essential health benefits requirement. Existing guidance treats a MEWA as a single ERISA plan only where it is established by a “bona fide” association of employers that have a genuine organizational relationship and an ability to control the association. While the previous guidance has not been changed and may still be relied on, the final regulations provides additional ways for groups or associations to meet the definition of “employer.” Here are highlights of the new rules:

#### **Commonality of Interest**

The final regulations broaden ERISA's definition of “employer” by creating a more flexible “commonality-of-interest” test for the employer members of an association. Adopting the standard from the proposed rules, the final regulations allow employers to band together to offer 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).

However, the final regulations add a requirement that a group or association of employers have at least one substantial business purpose unrelated to the provision of health coverage or other employee benefits, even if the primary purpose of the group or association is to offer such coverage to its members.

#### **Employer Control**

The proposed requirements regarding employer control are adopted with modifications. Under the final regulations, the functions and activities of the group or association must be controlled by its employer members, and the employer members that participate in the group health plan must control the plan. Control must be present in form and in substance under a facts and circumstances test. The preamble identifies relevant factors and clarifies that members are not required to manage the day-to-day affairs of the group, association, or plan. The final regulations also retain the requirement that the group or association sponsoring the AHP cannot be a health insurer or owned or controlled by a health insurer.

#### **Working Owners**

Only employees and former employees of employer members (and their families) are permitted to participate in AHPs. But if certain conditions are met, the final regulations allow working owners without



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common-law employees, such as sole proprietors and other self-employed individuals, to elect to act as employer members of an association and be treated as employees of their businesses for purposes of being covered by the AHP. Working owners generally must work at least 20 hours per week or 120 hours per month, fewer hours than would have been required by the proposed regulations. A proposed rule that an individual would not be treated as a working owner if the individual was eligible to participate in any subsidized group health plan maintained by any other employer of the individual or the individual's spouse was not included in the final regulations.

#### **Health Nondiscrimination Requirement**

Building on existing HIPAA nondiscrimination provisions, the regulations prohibit a group or association from restricting membership in the association based on any health factor. The regulations also prohibit AHPs from treating member employers as distinct groups of similarly situated individuals. However, the final regulations clarify that AHPs are not precluded from making distinctions between employer members in all circumstances. Distinctions based on a factor other than a health factor (such as industry, occupation, or geography) are permitted, and several examples are provided.

The DOL has established an applicability date of September 1, 2018, for fully insured AHPs; January 1, 2019, for existing self-insured AHPs complying with the DOL's pre-regulation rules; and April 1, 2019, for new self-insured AHPs formed under the final regulations. The preamble acknowledges the regulations may allow small businesses to avoid some health care reforms such as the essential health benefits requirements, however, it also emphasizes that AHPs may still be subject to some health care reforms and are required to comply with applicable state and federal laws, including ERISA, COBRA, and the MHPAEA.

For more information, please use the links below.

[Regulations](#)

[FAQs](#)

[News Release](#)

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