



Association Health Plans 2.0

On June 19, 2018, the U.S. Department of Labor (DOL) released its final regulations expanding the definition of “employer” under ERISA Section 3(5). This seemingly simple change to an existing federal regulatory definition paves the way for the creation of additional Association Health Plans (AHPs) under ERISA and broadens the opportunity for health care plan coverage for small business owners and self-employed individuals. Prior to this Final Rule, AHPs existed but were subject to stricter regulatory criteria which limited the ways in which small employers could organize to form large group plans.

Why just a definitional change?

The DOL accomplished these changes by modifying its definition of “employer” under ERISA – the same definition that is used to define Multiple Employer Welfare Arrangements (or MEWAs). For purposes of ERISA, “employer” is defined as “any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.” Prior to the Final Rule, the term “association” referred to a “bona fide” association which – having met certain criteria – would allow it to be treated as a single employer under ERISA.

Under ERISA, an employer can sponsor a single employee welfare benefit plan that provides benefits to its employees. However, grouping multiple single employers together to sponsor one plan triggers the ERISA MEWA rules along with complicated state regulatory requirements. The Final Rule does not eliminate the MEWA requirements, but it does expand the options for employers, including the self-employed, to band together to create a single association (or MEWA) health plan. The Final Rule also expands protections for AHP participants that are common in single-employer plans, such as covering preventive services at 100% and requiring compliance with the HIPAA non-discrimination rules.

When does the Final AHP Rule become effective?

While the Final Rule itself is effective August 20, 2018, the rules stagger applicability dates, as follows:

September 1, 2018 – The date the Final Rule becomes applicable for any existing fully-insured AHPs.

January 1, 2019 – The date the Final Rule becomes applicable for any existing self-funded AHPs that are already in compliance with the DOL’s previous sub-regulatory guidance on bona fide associations, and that choose to expand the association and its plan pursuant to the terms of the Final Rule (e.g., expand to a broader group of individuals, such as working owners without employees).

April 1, 2019 – The date the Final Rule becomes applicable for any new self-funded AHPs formed pursuant to and in compliance with the new rule.

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The upshot of these staggered applicability dates: an AHP that has been in place prior to the new rule can continue to operate (without changing its membership criteria) after the Final Rule takes effect provided they meet the new AHP plan requirements. If existing AHPs wish to broaden their membership definition they may do so provided their association formation documents (i.e., by-laws, etc.) are amended accordingly. Any newly formed AHP can establish broader-based membership criteria from the outset in accordance with the new rule and the health plan created must meet the Final Rule requirements.

What are the fine points of the Final Rule?

The Final Rule is long (198 pages in its originally published format) and includes a lot of detail. Creating or maintaining an AHP in accordance with the Final Rule will be just as complex as it was previously. Here are a few of the key components and considerations:

- The association of employers must still have at least one substantial business purpose unrelated to offering and providing health care benefits. However, the Final Rule does not define “substantial business purpose.” A business purpose does not have to be for-profit.
- There must also be a “common economic or representational interest” among the association members, and the members must control the association. Common economic and representational interest can include multi-state metropolitan areas. The Final Rule allows nationwide AHPs based on a common trade, industry, line of business or profession and multi-state AHPs based on a common metropolitan area. The Final Rule does not permit an AHP to be multi-state based simply on geography (for instance the Final Rule specifically declined to permit an AHP covering three (3) contiguous States based solely on the commonality of geography.)
- The association of employers must establish a “control test” to satisfy the requirement that the association is acting “in the interest of” the employer members. The control test requires that the functions and activities of the association are controlled by its employer members, and the association’s employer members that participate in the group health plan must control the plan. Control must be present both in form and in substance. Whether the requisite control exists is determined under a facts and circumstances test.
- The association can offer coverage to self-employed individuals and working owners with no other common law employees, along with their families.
- The association can cover current employees, former employees, spouses and dependent children.
- The association must comply with the HIPAA non-discrimination requirements for any health coverage offered.
- The Final Rule makes it clear that a health insurance carrier cannot sponsor an AHP because it lacks the relevant connection to the employer relationship.
- The Final Rule adopts an additional standard for full-time employment as it relates to “working owners.” Under the new rule, a working owner only needs to average 20 hours per week or work (or 80 hours per month) to be eligible for coverage. Working owners, however, must attest, through a separate verification process, that they are truly “hours worked.”
- An AHP must provide COBRA continuation coverage.
- An AHP sponsored health plan will be considered a large employer plan under the ACA.

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What happens next?

Remember that nothing will change immediately (see the above applicability dates). An existing fully-insured AHP can broaden its membership – and must comply with the Final Rule – effective September 1, 2018. If the existing AHP is self-funded, then the changes apply on January 1, 2019.

Thinking of starting a new AHP? Well then you will have to wait until April 1, 2019 to begin. But if that is your goal you should know that there will be additional huddles to cross. AHPs are still subject to both Federal and State laws. Existing ERISA pre-emption rules put regulatory authority for AHPs on State Departments of Insurance and each regulates them differently. The Final Rule does not modify or otherwise limit existing State authority. That means that for States like Ohio – who already have well-established MEWA laws and application processes – very little will change without Ohio Department of Insurance involvement. States without established rules may seek to implement them now. Even with pre-emption, the Final Rule does not permit the DOL to exempt self-funded AHPs from State insurance laws that apply to financial reserving and contribution requirements.

So, as in the past, AHPs must comply with two distinct levels of regulation: Federal and State. The Final Rule does not change this two-tier regulatory structure. Given this regulatory complexity, look for the DOL to work closely with state regulators.

Have more questions?

For more information on AHPs, MEWAs and the Final Rule, please contact Vice President of Compliance Caroline Fraker at (800) 851-0907 or cfraker@medben.com.

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