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Association Health Plans: A Primer for Large Employers

The DOL recently expanded the types of arrangements through which groups of employers can band together to form association health plans and be treated as single employer for ERISA purposes. This rule aims to help employees of small businesses obtain large group health coverage that is not subject to certain market mandates — and, therefore, is generally less costly. While the final rule has garnered media attention, it will not directly affect most large employer plans.

Background

Health coverage provided through an employer trade association or similar organization to individuals and small employers — called a multiple employer welfare association (MEWA) — is generally regulated under the same standards as coverage sold directly to individuals and small employers (and not as a single ERISA-covered plan). MEWAs have been the subject of DOL as well as state scrutiny due to frequent instances of fraud and abuse.

The Affordable Care Act (ACA) imposed insurance market reforms on issuers and group health plans, the applicability of which depends on the type of coverage and whether the coverage is sold in the small group or large group market. For a MEWA, the size of each employer determined whether the small group or large group market rules applied. Coverage in the individual and small group markets is subject to certain reforms like the modified community rating rules, essential health benefits, and rate review with which large group plans need not comply.

In an October 2017 executive order, President Trump directed the DOL to issue guidance expanding access to association health plans (AHPs), a type of MEWA, so that more small employers can take advantage of "larger pools of individuals across which they can spread risk and administrative costs." (See our October 20, 2017 *Legislate.*)

Bird's-Eye View of Final AHP Rule

Following a January 2018 proposal, DOL's June 21, 2018 final rule changed the definition of "employer" under ERISA for the purpose of determining when employers can join together in a group or association to be treated as

the "employer" sponsor of a single multiple-employer employee welfare benefit plan and group health plan. The DOL later released ERISA compliance assistance guidance for AHPs.

Rationale

The idea behind expanding the kinds of arrangement that can constitute an AHP is to allow more small businesses to band together and purchase health coverage as a large group for their member companies — and thereby broaden risk pools and access to health coverage at lower rates. The preamble to the final rule describes AHPs as "an innovative option for expanding access to employer-sponsored coverage" that is "not subject to the regulatory complexity and burden that currently characterizes the market for individual and small group coverage," and that can give participating groups of employers "increased bargaining power vis-à-vis hospitals, doctors, and pharmacy benefit providers."

Critics of AHPs, on the other hand, argue that they undermine the risk pool in the individual market by allowing groups to define themselves in ways that carve out certain high-cost geographical areas and/or employers. They also maintain that AHPs will diminish consumer protections and open the door to the same types of fraud and mismanagement that have plagued MEWAs over the years.

Mechanics

The final rule allows employers to form an AHP where the employers are in the same trade, industry, line or business or profession, or each employer has a principal place of business in the same region that does not exceed the boundaries of a single state or metropolitan area, even if the metropolitan area includes more than one state.

Under the final rule, an AHP must:

- Make health coverage available only to current and former employees or employer members and their family members
- Have a formal organizational structure with a governing body and bylaws
- Not be a health insurer, nor be owned by one
- Not condition membership on a health factor — but distinctions based on other factors like industry, occupation, or geography are permitted
- Have at least one "substantial business purpose" not related to offering health coverage, even if offering health coverage is its primary purpose — which can be general, such as promoting the business interests of its members

AHPs are subject to ERISA's disclosure requirements, including the requirement to provide an SPD. Participation in an AHP, however, will not subject employers to joint employer liability under any other federal or state law, rule or regulation.

The final rule preserves states' ability to regulate AHPs as they currently regulate MEWAs.

The final rule is effective August 20, 2018, but applicability dates stretch through April 2019 depending on the type of AHP.

> The AHP final rule applies only to health benefits, but the DOL noted in the preamble that it "will consider comments submitted in connection with [the AHP proposed rule] as part of its evaluation of multiple employer plan issues in the retirement plan and other welfare benefit plan contexts."

Challenge

The day after the final rule was issued, the attorneys general of Massachusetts and New York released a statement expressing their intent to "sue to safeguard the protections under the Affordable Care Act and ensure that all families and small businesses have access to quality, affordable health care." The statement asserted that the expanded rule will "invite fraud, mismanagement, and deception" and that the rule will "lead to fewer critical consumer health protections."

On July 26, 2018, led by Massachusetts and New York, the attorneys general of eleven states and the District of Columbia filed a lawsuit alleging that the final rule is unlawful in that it "upends a decades-old understanding of a foundational employee benefits law for the purpose of exempting a significant portion of the health insurance market from the Affordable Care Act's consumer protections" and "increases the risk of fraud and harm to consumers." The attorneys general maintain that the rule "is unlawful and should be vacated."

What's in it for Large Employers?

In short, not much. The final rule does not directly impact most large employers — though there may be some large employers that interact with AHPs in the context of franchises that employ smaller groups of workers.

In Closing

While it has been the subject of media attention, the expanded AHP definition will not directly affect most large group plans. Additionally, the recent challenge to the final rule injects some uncertainty into the future of AHPs.

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