CORPORATE SYNERGIES®

compliance ALERT

April 2, 2019

Court Blocks Final Regulation on Association Health Plans

On March 28, 2019, a federal district court judge in Washington, D.C. blocked[1] the final regulation ("Final Rule") on association health plans ("AHPs"). The Final Rule, issued by the U.S. Department of Labor ("DOL") in June, 2018, pursuant to an Executive Order by President Trump, had eased the requirements under ERISA for small employers and individuals to join together in an employer group or association in order to create an "association health plan" ("AHP").

Background on recent changes to AHP rules

As explained in our earlier eAlert, the Final Rule made it easier for small employers and sole proprietors to join together in an employer group to avoid costly small group and individual health insurance market rules under the Affordable Care Act (ACA).

Among other changes, the Final Rule made two major changes to the pre-existing DOL rules on AHPs (referred to as "the Sub-regulatory Guidance" or "Previous Rules"). The Final Rule:

1. Relaxed the "commonality of interest" requirement to form a "bona fide association," which is necessary to establish an AHP, where, prior to the Final Rule, organizations interested in setting up an AHP had to show that they had several common interests, such as being in the same industry, or having a common purpose; and

2. Relaxed the definition of "employer" for purposes of these rules by allowing individual business owners with no employees to join AHPs.

With regard to this first change, the Final Rule relaxed the "commonality of interest" standard by allowing employers to sponsor a single, large-employer AHP if they are:

- In the same trade, industry, line of business, or profession; or

- 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).

With regard to this second change, the Final Rule broadened eligibility for participation in AHPs to include "working owners," for example, sole proprietors and other self-employed individuals, where there are no common law employees, provided certain requirements are met and the individual is not eligible for any other subsidized group health plan coverage.

Why did the court invalidate the new rules about association health plans?

This case commenced after 11 states and the District of Columbia sued the DOL on grounds that the Final Rule had unlawfully stretched the definition of "employer" too far beyond what was originally intended under the Employee Retirement Income Security Act of 1976 (ERISA), and therefore, was unlawful under the Administrative Procedure Act (APA).

The court agreed with those states and vacated the two rules discussed above, that is, the major changes to the

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Eleven states and the District of Columbia sued the DOL on grounds that the AHP Final Rule had unlawfully stretched the definition of "employer" beyond what was originally intended under ERISA.

This Final Rule was vacated by the court, but did not replace or invalidate the Previous Rules on AHPs.

[1] *State of New York v. U.S. Department of Labor*, No. 18-cv-1747 (U.S. Dist. Ct. D.C. Mar. 28, 2019).

AHP rules in the Final Rule pertaining to the "commonality of interest" standard, and the rule allowing for individual owners to be "employers." Both changes were deemed by the court to be "unreasonable interpretations of ERISA." The court further noted that "the Final Rule is clearly an end-run around the ACA."

The court remanded the rest of the provisions of the Final Rule to the DOL for consideration as to whether such rules should also be vacated under the Final Rule's severability provisions.[2]

Can organizations still use and rely on the previous AHP rules?

Yes. The Final Rule that was vacated by the court did not replace or invalidate the Previous Rules on AHPs. Accordingly, organizations that had formed AHPs under the Previous Rules can still rely on those rules, and new organizations interested in forming AHPs can still use the Previous Rules to form new AHPs.

How does this decision impact employers? What should employers do next?

It's still difficult to predict precisely how this court's decision will impact employers. Because the Final Rule had a staggered effective date ranging from September 1, 2018 to April 1, 2019, the Final Rule had yet to fully come into effect. Accordingly, it was still too early to tell whether there would be widespread utilization and formation of AHPs as a result of the Final Rule.

With regard to next steps, there's also some uncertainty about the fate of the Final Rule after this decision. The DOL could request a stay of the decision and appeal it. If a stay were to be granted, the Final Rule would likely remain in effect until a final decision could be reached, further delaying employers that were hoping to take advantage of the Final Rule.

Additionally, it's important to remember that the new Final Rule did not prohibit or otherwise preempt state laws that take steps to restrict the formation or operation of AHPs. Since all AHPs are multiple employer welfare arrangements (MEWAs), they still have to comply with state MEWA laws.

These laws vary significantly, and some states, including California, Delaware and New Jersey, have recently passed laws (whether in the form of rules applicable to all MEWAs in the state, rules applicable to AHPs, or other rules applicable to the small group and individual market) designed to preserve the viability of their Exchanges.

While less of a direct impact, another potential effect of this decision is that other courts may rely on this decision to invalidate other agency rules that were issued under the same Executive Order. Specifically, the DOL and other agencies have recently issued rules on short-term, limited-duration insurance (STLDI) for individuals, and new types of health reimbursement arrangements (HRAs) that may also be scrutinized and invalidated by courts.

Employers and individual business owners/sole proprietors in the small group and individual health insurance markets that have been hit by rising health insurance costs under the ACA, and that have been considering forming or joining an AHP under the now-vacated Final Rule, should consider alternative cost-reduction strategies, unless they can meet the more stringent standards of the Previous Rules on AHPs.

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.

[2]The Final Rule's severability provision provides that if a provision is found entirely invalid, then "the provision shall be severable from [the Final Rule] and shall not affect the remainder thereof." 29 C.F.R. § 2510.3-5(g).