

DOL's New Rules for Association Health Plans Allow Small Employers to Avoid Costly ACA Obligations

January 8, 2018

On January 4, 2018, the U.S. Department of Labor (DOL) issued a [proposed regulation](#) (“the Proposed Rule”) that will make it easier for small employers to join together in an employer group or association in order to collectively be treated as if they were one large employer-sponsored group health plan. These arrangements, commonly referred to as “association health plans” (AHPs), have long been difficult to establish under ERISA and applicable DOL regulations. The Proposed Rule will change that by easing the requirements for adopting and administering AHPs.

What Does This Have To Do with the Affordable Care Act (ACA) and Why Is This So Important?

Since the Affordable Care Act (ACA) went into effect, employers in the small group health insurance market (generally, employers with 50 employees or less) have faced rising costs and limited coverage options. This is because, under the ACA, the small group and individual markets require plans to include essential health benefits (EHBs) and community rating.

One strategy utilized by employers to get around the ACA's small group market rules is to band together into AHPs or other similar kinds of arrangements, as this gives them a higher employee count, and thus, access to large group market health plan options with less regulatory restrictions. However, qualifying as an association that can form an AHP is difficult under current law.

In an effort designed to provide more affordable healthcare coverage options to more people, on October 12, 2017, President Trump issued [Executive Order 13813](#). Among other provisions, the Executive Order directed the DOL to consider proposing, or revising, existing guidance that would allow more U.S. employers to form AHPs.

How Does the Proposed Rule Work? How Will it Change Things?

The Proposed Rule, consistent with the directions of the Executive Order, would make several technical changes to ERISA regulations designed to allow more businesses and individuals

to join associations.

Specifically, under the Proposed Rule, association membership would not be limited in the way that it currently is under ERISA. Under current law, most association health plans are not considered to be single ERISA-covered health and welfare plans. This means that, for most associations, when it comes to determining if they are subject to the small or large group market rules, the association is typically disregarded, and the component entities within the association are typically considered on their own (*i.e.*, independently).

The new rule would allow businesses in the same industry, but in different states, to band together to form associations, or within the same geographic area, but in different industries, to band together to form associations. In some cases, the associations could have members nationwide. Specifically, employers would be allowed to band together for the purpose of offering health coverage if they either are: (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). Additionally, associations that have already met the criteria under current DOL guidance for being considered to be an association with a single ERISA-covered health and welfare plan, will continue to be recognized as such under the new rule.

All of these proposed changes would help to make health insurance coverage more readily available across state lines. Further, without having to comply with the ACA's EHB or community rating rules, these new associations could offer more “bare-bones” benefit plans than what their component entities

What's In It for the Small Employer?

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offered in the past and save on costs. This may come as a surprise for some of the workers in these new associations.

Additionally, the Proposed Rule would change ERISA to allow, for the first time, sole proprietors or other working owners of trades or businesses with no employees to join AHPs. In order for an individual to be considered a working owner that can join an AHP, the individual must work in such trade or business at least 30 hours of service per week, at least 120 hours of service per month, or must have earned income derived from such trade or business that at least equals the cost of coverage in the AHP. The new rule would allow individuals, like Uber Drivers for example, to band together to buy coverage as a large group, instead of having to purchase coverage through the ACA's Exchanges.

This change to existing law pertaining to sole proprietors could mean that younger, healthier people working in the gig economy will leave their state's Exchange to join associations, and as a result, leave an older and sicker pool of people in the Exchanges. This could, in turn, drive up premiums for Exchange plans.

How Will These Changes Affect Employers?

The Proposed Rules essentially create new loopholes to current laws and regulations under ERISA and the ACA that have raised costs for employers in the small group and individual market. By liberalizing these rules, and allowing for more employers to have large group health plans, these employers should see lower costs, but can still expect the commonplace administrative burdens that come with forming or joining an association. In other words, even with the new, easier rules, many employers may still decide that they don't want to deal with the "everyday" hassles of joining such an

association. For many employers, the cost savings of joining an association may not be attractive enough to make the switch.

Additionally, it's important to understand that the Proposed Rule is not law yet, and as a result, could still change before becoming finalized. The new rules are currently subject to a 60-day comment period.

Finally, it should be noted that the Proposed Rule does not preempt state regulation. This means that individual states could still take steps to try to make it more difficult for associations to form within their boundaries, and thus, reduce any adverse impact on their Exchanges and health insurance markets.

What Should Employers Do Next?

Employers and sole proprietors in the small group and individual market that have been burdened by higher costs as a result of the ACA should carefully study these new rules and discuss with their trusted advisors how they may be able to use them to their advantage.

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

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