

## DOL Releases Final Regulations on Association Health Plans; Easing ACA Obligations for Small Employers

June 20, 2018

On June 19, 2018, the U.S. Department of Labor (DOL) issued a [final regulation](#) (“Final Rules”) that eases the requirements under ERISA for small employers to join together in an employer group or association in order to create an “association health plan” (“AHP”).

The new rules will make it easier for small employers to avoid costly small group health insurance market rules under the Affordable Care Act (ACA). Additionally, the Final Rules clarify a number of questions that remained after a proposed regulation (“Proposed Rules”) was issued in January of this year.

Among other clarifications and changes to the Proposed Rules, the Final Rules now include a staggered effective date (discussed below) and clarify compliance obligations for AHPs that had formed prior to the new rules.

### Background on Changes to AHP Rules:

As explained in our earlier e-Alert on the DOL’s proposed AHP rules (available [here](#)), since the ACA went into effect, employers in the small group health insurance market (generally, employers with 50 employees or less), as well as those in the individual health insurance market, have faced rising costs and limited coverage options due to the ACA’s requirement that these plans have essential health benefits (EHBs) and community rating.

In an effort to provide more affordable healthcare coverage options to more people, on October 12, 2017, President Trump issued [Executive Order 13813](#), which directed the DOL to consider proposing, or revising, existing rules and guidance in a way that would allow more U.S. employers to form AHPs. These new AHP rules are a result of that Executive Order.

### How Do the Final Rules Work and How Do They Differ From the Proposed Rules?

The Final Rules, like the Proposed Rules, relax the “commonality of interest” requirement to form a “bona fide association,” which is necessary to establish an AHP under existing DOL guidance. This will make it easier for more employer groups to sponsor single large-employer AHPs.

**The new rules will make it easier for small employers to avoid costly small group health insurance market rules under the Affordable Care Act.**

It should be noted that the new Final Rules retain the prior AHP rules for establishing a “bona fide association” capable of sponsoring an AHP. Specifically, the Final Rules explain that the new, relaxed interpretation of AHP requirements in the Final Rules does not change the prior rules, but rather, merely provides an additional mechanism for forming an AHP. Accordingly, AHPs that had formed prior to these new rules do not need to make structural changes to their associations, or make changes to their plans, in order to retain their AHP status.

Under the new Final Rules, sufficient “commonality of interest” to sponsor a single, large-employer AHP exists if employers are:

- In the same trade, industry, line of business, or profession;<sup>1</sup> 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).

<sup>1</sup>It should be noted that if the association sponsoring the AHP is itself an employer member of the group, then the group will be deemed, for purposes of the “commonality of interest” requirement, to be in the same trade, industry, line of business, or profession as the other employer members of the group, regardless of whether that sponsoring employer is, in fact, in the same industry, trade or profession.

In addition to these “commonality of interest” standards above, the purpose for forming the AHP must be reviewed prior to the association qualifying to be an AHP. In contrast to the Proposed Rules, the Final Rules made the “purpose” component of AHP qualification a bit harder. Under the Final Rules, in order to be a bona fide association, the group must have at least one “substantial business purpose” unrelated to the offering of health coverage, even if the “primary purpose” is providing health insurance coverage. This new rule in the Final Rules differs from the Proposed Rules, as the Proposed Rules would have allowed AHPs to be formed *solely* for the purpose of providing healthcare coverage.

Additionally, the new Final Rules broaden eligibility for participation in AHPs to include “working owners” (e.g., sole proprietors and other self-employed individuals) without common law employees, provided certain requirements are met and the individual is not eligible for other subsidized group health plan coverage.

The Final Rules require that the “working owner” definition be satisfied when the individual first becomes eligible for coverage under the plan, and eligibility must be periodically confirmed “pursuant to reasonable monitoring procedures.” With respect to these requirements, one significant change from the Proposed Rules is that the Final Rules reduced the “hours worked” requirement for these “working owners” from an average of thirty (30) hours per week to an average of twenty (20) hours per week or eighty (80) hours per month.

Notably, the new Final Rules do not change the legal or regulatory framework for Multiple Employer Welfare Arrangements (“MEWAs”)—of which AHPs are one type. Since MEWAs are subject to both federal and state regulations, this means that each state can still impose difficult-to-comply-with rules and regulations on AHPs, and this can make it difficult for AHPs to operate in more than one state.

Additionally, the Final Rules contain anti-discrimination provisions that, among other things, prohibit AHPs from distinguishing between employees of different employer members based on health factors for purposes of setting premiums, benefits and terms of coverage. Specifically, the new Final Rules:

Prohibit AHPs from restricting employer membership based on any individual’s health factor (e.g., health status, medical condition, claims experience, medical history, disability, etc.);

Require AHPs to comply with HIPAA nondiscrimination rules with respect to eligibility for benefits, premiums, required

contributions, and participant/beneficiary coverage; and Prohibit AHPs from treating the employees of different employer members as distinct groups of similarly-situated individuals based on a health factor of one or more individuals (for purposes of premiums, benefits and terms of coverage).

While compliance with these anti-discrimination rules may be difficult for some prospective AHPs, the Final Rules also give AHPs considerable flexibility to design their benefit plans in a way that attracts lower-risk participants. Specifically, the Final Rules allow AHPs to lower their prices to “lower risk groups” based on the factors of “age, gender, or industry.” This could result in AHP coverage being less robust or comprehensive than other plans available in the small group and individual market.

Since AHPs will not need to meet as stringent requirements as other plans when it comes to the level of coverage, and can vary their prices on the basis of age, gender, or industry, it is possible that new employees may not want to join these types of plans.

#### When Do the Final Rules Go into Effect?

The Final Rules have the following staggered applicability dates:

**September 1, 2018** – all associations (new or existing) may establish a fully-insured AHP under the new Final Rules;

**January 1, 2019** – existing associations that sponsored an AHP on or before the publication date of the Final Rules in the Federal Register may establish a self-funded AHP under the new Final Rules; and

**April 1, 2019** – all other associations (new or existing) may establish a self-funded AHP under the new Final Rules.

#### What Challenges Remain for the Success of these New Rules? Will these New Rules Lower Costs and Compliance-related Challenges?

It’s still difficult to predict how the new Final Rules will impact employers. On the one hand, the Final Rules clearly give employers considerably more flexibility when choosing how to set up their health insurance plan, and the potential for significantly lowering their health insurance costs if

joining an association is administratively feasible for their organization. However, one of the major challenges that remains for the new Final Rules to be successful in lowering costs for small employers and sole proprietors, is the challenge of complying with new state laws and regulations.

Specifically, the new Final Rules do not prohibit or otherwise preempt state laws that take steps to restrict the formation or operation of AHPs. States may pass such 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) in order to preserve the viability of their Exchanges. This is because the new AHP rules are expected to result in a lot of healthy people leaving state Exchanges to join AHPs, which will result in a less favorable risk pool on those Exchanges, and in turn, will likely cause insurers to exit those Exchanges.<sup>2</sup>

We have already recently seen several states take very proactive steps to sign legislation in order to preserve the viability of their Exchanges, and other states will likely soon follow suit. For example, last month, New Jersey passed a law that imposes a health insurance “individual mandate” (*i.e.*, a tax penalty) on New Jersey residents for not having health insurance in the state in 2019 (see our eAlert on that topic [here](#)).

Another potential concern for some employers is that an AHP might not be the right fit for their culture and recruitment/retention needs. Since AHPs will not need to meet as stringent requirements as other plans when it comes to the level of coverage, and since AHPs can vary their prices on the basis of age, gender, or industry, it is possible that new employees may not want to join these types of plans. Offering such a plan may prevent certain employers from recruiting and retaining talented workers that would prefer to join (or stay with) an employer with a more robust health insurance package.

### What Should Employers Do Next?

Employers and sole proprietors in the small group and individual health insurance markets that have been hit by rising health insurance costs under 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.

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

<sup>2</sup>The Congressional Budget Office (CBO) estimates that, as a result of the rule, four million Americans will be covered by AHPs by 2023, including approximately 400,000 who are currently uninsured.

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