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DOL Proposes More Permissive Association Health Plan Rule

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Small businesses and self-employed individuals may soon have more options for obtaining affordable group health coverage. As directed by Executive Order 13813, on January 5, 2018, the U.S. Department of Labor (DOL) released proposed regulations (83 Fed. Reg. 614) intended to increase the availability of association health plans (AHPs). The proposed regulations would achieve that aim by broadening the definition of "employer" to make it easier for employers to join together to sponsor an AHP for their employees.

Section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA) defines "employer" to mean "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." Under current guidance, however, only in rare cases will a "group or association of employers" that sponsors an AHP be considered an "employer" under ERISA; rather, the AHP is considered a collection of smaller single-employer plans sponsored by each participating employer. Because many employers participating in AHPs are smaller (between 2 and 50 employees), treatment as a smaller single-employer plan results in that coverage being treated as "small group coverage," and thus subject to the less favorable small group coverage rules which make this coverage more expensive (e.g., the requirement to provide the 10 "essential health benefit" categories, the risk adjustment program, or the single risk pool requirement). In contrast, large group coverage tends to have better premium rates and coverage, due to increased negotiating power and economies of scale, and is not subject to the requirements above for small group coverage.

The proposed regulations would broaden the definition of "employer," making it easier for an AHP to qualify as a single large group plan. The proposed regulations would also extend AHP coverage to certain self-employed individuals.

Expanded Definition of "Employer"

Under the DOL's current guidance, only in rare cases will the association or employer group that

maintains the AHP be considered a single employer and therefore a single ERISA large group plan. The current definition of “employer” under ERISA requires an association or group of employers to be tied by a common “economic or representational interest” that is unrelated to the provision of health coverage (called the “commonality of interest test”), and the member-employers must have the right to exercise control, directly or indirectly, over the form and substance of the AHP (called the “control test”). In past advisory opinions, the DOL has expanded only slightly on the current regulatory definition, and has applied a facts-and-circumstances analysis, focusing on (1) whether the group is a bona fide organization with business or organizational purposes unrelated to the provision of insurance; (2) whether the employers share some commonality and genuine organizational relationship unrelated to the provision of benefits; and (3) whether the employers that participate in the AHP exercise control over the program both in form and substance, whether directly or indirectly. The DOL has applied these requirements very narrowly, concluding that a single ERISA plan existed in only a minority of cases.

Under the proposed regulations, association member-employers would meet the commonality of interest test by *either* being in the same trade, industry, line of business, or profession (regardless of geographic location) *or* by having a principal place of business within a single state or metropolitan area (even if the metropolitan area includes more than one state). Examples given of such metropolitan areas include the Greater New York City Area/Tri-State Region covering parts of New York, New Jersey, and Connecticut, and the Washington Metropolitan Area of the District of Columbia and portions of Maryland and Virginia. Smaller geographic regions, such as a city or county, would also satisfy the commonality of interest test.

However, the proposed regulations do not modify the current control test for determining an AHP’s single ERISA plan status. The association satisfies the control test by having a formal organizational structure through which member-employers, directly or indirectly, control the AHP’s functions and activities, including the establishment and maintenance of the group health plan. The employer group must, for example, have a governing body and bylaws or other formalities appropriate for the association’s or group’s legal form.

To ensure that the groups or associations sponsoring AHPs are bona fide employment-based organizations, the proposed regulations specifically provide that AHPs may only cover the employees and former employees (and family members and beneficiaries) of their employer members. Coverage cannot be sold to non-member employers or the general public.

Coverage of Self-Employed Individuals

In another change from existing guidance, the proposal regulations expand the availability of AHP coverage to working owners, sole proprietors, and other self-employed individuals without common law employees, by allowing them to elect to act as employers for purposes of participating in an employer group or association. A working owner may be treated as an employee for purposes of participating in an AHP if the individual earns income from self-employment for providing personal services and either works an average of at least 30 hours per week (120 hours per month) or earns income from self-employment that at least equals the cost of coverage under the AHP. If the self-employed individual is eligible for other subsidized group health plan coverage under a plan sponsored by any other employer, including the plan of a spouse’s employer, he or she would not be considered a “working owner” and would not be eligible for coverage under the AHP plan.

Nondiscrimination Rules

The proposed regulations also include nondiscrimination provisions that build upon the nondiscrimination provisions already applicable to group health plans under the Health Insurance Portability and Accountability Act of 1996 and the Affordable Care Act. The nondiscrimination provisions are designed to prohibit associations from restricting or denying membership, and thus AHP coverage, on the basis of health factors (which include health status, medical condition, claims experience, receipt of healthcare, medical history, genetic information, evidence of insurability, and disability). Under the proposed regulation's nondiscrimination provisions, an association would be prohibited from premium rating at the member-employer level, but it could still set eligibility requirements and premiums based on "bona fide employment-based classifications." For example, eligibility and premiums could not vary on an employer-by-employer basis, but could vary based on classifications such as full-time versus part-time status, current versus former employee status, different geographic locations, date of hire, membership in a collective bargaining unit, length of service, different occupations, or relationship to an employee or former employee.

AHPs Are Multiple Employer Welfare Arrangements

Finally, the proposed regulations make clear that AHPs are still considered multiple employer welfare arrangements (MEWAs). Due to past abuses by MEWA operators, MEWAs are often subject to heavy regulatory scrutiny. Currently, MEWAs are subject to regulation by each state in which they operate, and that may have a chilling effect on the proliferation of AHPs across state lines. In the preamble to the proposed regulations, the DOL notes its authority under ERISA to exempt non-fully insured MEWAs from state regulation, and requests comments on the impact of such exemptions, if granted, on healthcare choice and competition, as well as the risk such exemptions may pose to appropriate oversight of AHPs by the DOL.

Conclusion

While the possible increased ability of smaller employers and working owners to band together and purchase health coverage as a large group plan is good news, the proposed rule is still open for public scrutiny, and comments may be submitted on or before March 6, 2018.

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