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DOL Expands Access to Association Health Plans

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The Department of Labor (DOL) recently issued a final regulation (Final Regulation) under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), that modifies the criteria under Section 3(5) of ERISA for determining when unrelated employers may join together as a group or association of employers to sponsor a single employer health plan (commonly known as an Association Health Plan (AHP)).¹ Specifically, the Final Regulation establishes a more flexible “commonality of interest” test for unrelated employers to sponsor a single employer health plan, which may allow such employers to access better rates for health insurance coverage.² The Final Regulation will be of interest to many employers, including small employers, franchisees, and self-employed individuals. However, even if a group or association of employers could theoretically join together to establish an AHP, the group or association may still face numerous practical challenges in maintaining an AHP, given the requirements of state and federal multiple employer welfare plan (MEWA) regulations.

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The Final Regulation became effective September 1, 2018 for fully insured plans, as of January 1, 2019 for existing self-insured AHPs, and as of April 1, 2019 for new self-insured AHPs.³

Background

AHPs offer an opportunity for similarly situated employers (e.g., a consortium of farmers⁴ or members of a local Chamber of Commerce⁵) to obtain coverage that is comparable to the coverage enjoyed by large employers.⁶ When a group or association of employers can successfully join together to purchase health insurance, they are generally able to reduce the cost of health coverage for several reasons, including through increased bargaining power when negotiating pricing agreements with hospitals, providers, and pharmacies.⁷

Under ERISA, an AHP may be established as an employee welfare benefit plan if, among other criteria, the AHP is established or maintained by an employer, an employee organization, or both.⁸ The term “employer” is defined as “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.”⁹

If a group or association of employers is able to satisfy the ERISA definition of employer and establish an AHP, all of the group or association’s employer members will be evaluated as a single employer and will be subject to the small group rate or the large group rate based on the number of employees employed by all of the group or association’s employer members.¹⁰ Additionally, because AHPs will generally be insured in the large group market or will be self-insured, AHPs would not be required to provide essential health benefits (EHBs) to its participants pursuant to the Affordable Care Act.¹¹

If a group or association of employers does not satisfy the ERISA definition of an “employer” on a combined basis, each employer that participates in the group or association is considered to have established a separate group health plan for ERISA purposes, and each employer is therefore required to comply with the ERISA regulations at the individual plan level, including annual filings.¹² Additionally, each employer will be evaluated individually and will be subject to the small group rate or the large group rate based on such employer’s total number of employees.¹³ Furthermore, these plans generally must provide EHBs to its participants.¹⁴ Thus, if a group of employers join together to purchase health insurance but they cannot satisfy the ERISA definition of a single “employer,” then there is generally little benefit for them to join together in the first place.

In order to expand access to AHPs, President Trump issued Executive Order 13813, “Promoting Healthcare Choice and Competition Across the United States,” stating that “[i]t shall be the policy of the executive branch, to the extent consistent with law, to facilitate the purchase of

insurance across State lines and the development and operation of a healthcare system that provides high quality care at affordable prices for the American people.”¹⁵ Specifically, the Executive Order directs the Secretary of Labor to consider issuing regulations or revising its current guidance that would expand access to more affordable health coverage by permitting more employers to establish AHPs.¹⁶ The Executive Order directs the Secretary of Labor to “consider expanding the conditions that satisfy the commonality-of-interest requirements . . . [and] promot[ing] AHP formation on the basis of common geography or industry.”¹⁷

As directed in the Executive Order 13813, on January 5, 2018, the Secretary of Labor issued proposed regulations to expand the definition of employer under Section 3(5) of ERISA.¹⁸ After reviewing comments on the proposed regulation from across the country, the Secretary of Labor issued the Final Regulation.¹⁹

Changes Imposed by the Final Regulation

In determining whether a group or association of employers constitutes an “employer” capable of sponsoring an ERISA plan under Section 3(5) of ERISA, the DOL historically has applied a three-prong facts-and-circumstances test that focuses on: (1) whether a group or association of employers is a bona fide organization with business or organizational purposes and functions that are unrelated to the provision of benefits; (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 a benefit program, either directly or indirectly, exercise control over the program, both in form and substance.²⁰ The Final Regulation amends the definition of “employer” and addresses how a group or association of employers may satisfy each prong of this test.

“Bona Fide Group or Association” Standard

Under previous guidance, a group or association of employers was required to have business or organizational purposes and functions unrelated to the provision of benefits, and a group or association of employers was not allowed to join together for the primary purpose of offering health coverage to its employee.²¹

The Final Regulation establishes a new standard for determining whether a group or association of employers is “bona fide” for the purposes of establishing an AHP. Under the Final Regulation, the primary purpose of a group or association of employers may be offering health coverage to its employee, provided that such group or association of employers has at least one substantial business purpose unrelated to offering health coverage.²² Although the Final Regulation does not define “substantial business purpose,” it states that a group or association of

employers is considered to have a “substantial business purpose” if it could exist as a viable entity absent offering a group health plan.²³ A business purpose is not required to be a for-profit activity and may include promoting common business interests of the members of a group or association of employers or the common economic interests in a given trade or employer community.²⁴

The Final Regulation also includes a provision that establishes criteria under which working owners without common law employees may qualify as both an employer and as an employee for purposes of forming a bona fide group or association of employers.²⁵ Certain working owners of an incorporated or unincorporated trade or business, including partners in a partnership, without any common law employees, may now qualify as employers for purposes of participating in a bona fide group or association of employers sponsoring an AHP and as employees with respect to a trade, business, or partnership for purposes of being covered by the AHP.²⁶

Commonality of Interest Test

The commonality of interest test is intended to distinguish bona fide groups or associations of employers that provide coverage to their employees from arrangements that more closely resemble State-regulated private insurance offered to the market at large.²⁷

Under prior guidance, the commonality of interest test required that the entity maintaining the plan and the individuals benefitting from it were tied by a common economic or representational interest beyond the provision and receipt of welfare benefits.²⁸ Common size and/or geographic location of employer members were not sufficient to satisfy the commonality of interest requirement.

The Final Regulation establishes a new “commonality of interest” requirement, under which a group or association of employers will meet the commonality of interest test if: “(1) the employer members of the group or association are in the same trade, industry, line of business or profession; or (2) each employer member 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).”²⁹ In recognizing the sufficiency of a geographic commonality of interest—as an alternative to focusing on a common trade or industry—the Final Regulation relaxes the prior standard for determining whether a sufficiently close economic or representational relationship exists in order to form a group or an association of employers.³⁰

Control Test

In order to qualify as an “employer” under ERISA, a group or association of employers must maintain “control” over the group or association

offering an AHP to ensure that the group or association acts in the interests of employer members in relation to the employee benefit plan as required.³¹ The control test is also necessary to prevent the formation of commercial enterprises that claim to be AHPs but, in reality, merely operate similar to traditional insurers selling insurance in the group market.³²

Under prior guidance, members of a group or association of employers offering an employee benefit plan was required to control the functions and activities of the employee benefit plan in order for the group or association of employers to qualify as a bona fide employer.³³

The Final Regulation clarifies the language of the previous control test.³⁴ As revised, the control test provides that the functions and activities of a group or association of employers must be controlled by its members, and the members of a group or association of employer that participate in the group health plan must control the plan. Control must be present in both form and substance.³⁵ The Final Regulation does not, however, require that the members of a group or association of employers manage the day-to-day affairs of the group or association to qualify as bona fide employer.³⁶

Considerations for Employers

Under the new AHP regulations established by the Final Regulation, more employers and self-employed individuals may be interested in forming or joining a group or association of employers to obtain health insurance coverage through an AHP. Associations of groups of employers that wish to establish a new self-insured AHP under the Final Regulation must wait to do so until April 1, 2019.³⁷

Although the Final Regulation makes it easier to form AHPs, significant hurdles remain. Particularly, AHPs are still subject to both state and federal MEWA regulations, including DOL Forms M-1 and 5500 filing requirements, as well as the individual state MEWA registration and disclosure requirements.³⁸ State rules governing MEWAs may limit the desirability of AHPs that operate across multiple state lines since MEWAs may be subject to different regulatory requirements of each state in which its employer members reside.³⁹ Having to satisfy the multiple regulatory schemes can be costly and difficult to manage for a group or association of employers that wishes to establish an AHP.

MEWAs have a checkered past for being underfunded and being operated in a fraudulent manner.⁴⁰ Employers should be on the lookout for newly formed groups and associations of employers that may lack the knowledge and expertise necessary to prudently operate an AHP in accordance with federal and state regulations.⁴¹ Additionally, certain employers may not be sophisticated purchasers of group health coverage and may confront challenges in evaluating AHP options. As a result, these employers may make imprudent decisions that would drive them

to select plans with the lowest premiums without understanding the impact on access to care, the rights of their employees, and risks associated with fraud and insolvency.⁴²

Therefore, employers that wish to join a group or association of employers to provide its employee's health coverage through an AHP should consider contacting its ERISA counsel to help it assess whether such AHP has been properly established and to learn more about its obligations as a member of a group or association of employers.

Conclusion

The Final Regulation modifies the criteria for employers to form or join a group or association of employers, which may enable more employers to obtain health insurance coverage through an AHP. Due to the complex nature of state and federal MEWA regulations and MEWA's checkered past, an employer that is interested in obtaining health insurance coverage through an AHP should reach out to its ERISA counsel to help it navigate the challenges that it may encounter when forming or joining a group or association of employers.

Notes

1. See 83 Fed. Reg. 28912, 28912 (June 21, 2018).
 2. See *id.*
 3. See *id.*
 4. Dep't of Lab. Op. Ltr. 2017-02AC.
 5. Dep't of Lab. Op. Ltr. 2008-07a.
 6. See 83 Fed. Reg. 28912, 28912 (June 21, 2018).
 7. See *id.*
 8. See 29 U.S.C. § 1002(1).
 9. 29 U.S.C. § 1002(5).
 10. See 83 Fed. Reg. 28912, 28913.
 11. 42 U.S.C. § 18021(b)(1)(B).
 12. See 83 Fed. Reg. 28912, 28913.
 13. See *id.*
 14. See 42 U.S.C. § 18021(a).
 15. Executive Order 13813 at 82 Fed. Reg. 48385 (Oct. 17, 2017).
 16. See *id.*
 17. *Id.* at 49386.
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18. *See* 83 Fed. Reg. 614, 614.
 19. *See* 83 Fed. Reg. 28912, 28913.
 20. *See id.* at 28914.
 21. *See id.* at 28955.
 22. *See id.* at 28962.
 23. *See id.*
 24. *See id.*
 25. *See id.* at 28964.
 26. *See id.* at 28964.
 27. *See id.* at 28913.
 28. *See* Wisconsin Educ. Assn. Ins. Trust v. Iowa State Bd. of Public Instruction, 804 F.2d 1059, 1063-4 (8th Cir. 1986); *see also* MD Physicians & Associates, Inc. v. State Bd. of Ins., 957 F.2d 178, 183-6 (5th Cir. 1992); National Business Assn. Trust v. Morgan, 770 F. Supp. 1169 (W.D. Ky. 1991).
 29. *See* 83 Fed. Reg. 28912, 28962.
 30. *See id.* at 28914.
 31. *See id.*
 32. *See id.* at 28955.
 33. *See id.* at 28913
 34. *See id.* at 28955.
 35. *See id.* at 28920.
 36. *See id.* (“The following factors, although not exclusive, are particularly relevant for this analysis: 1) whether employer members regularly nominate and elect directors, officers, trustees, or other similar persons that constitute the governing body or authority of the employer group or association and plan; 2) whether employer members have authority to remove any such director, officer, trustees, or other similar person with or without cause; and 3) whether employer members that participate in the plan have the authority and opportunity to approve or veto decisions or activities which relate to the formation, design, amendment, and termination of the plan, for example, material amendments to the plan, including changes in coverage, benefits, and premiums. The Department ordinarily will consider sufficient control to be established if these three conditions are met.”)
 37. *See id.* at 28912.
 38. *See* ERISA Section 514(a), 29 U.S.C. § 1144(a); ERISA Section 514(b), 29 U.S.C. § 1144(b); *see also*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-7 (1983).
 39. *See* 83 Fed. Reg. 28912, 28936; *see also* N.Y. Dep’t of Fin. Servs. Ins. Circular Ltr. No. 10 (July 27, 2018).
 40. *See* 83 Fed. Reg. 28912, 28917.
 41. *See id.*
 42. *See id.*