

## CLIENT ALERT

### Running with Scissors – and Association Health Plans

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As a kid, I didn't run through the house with scissors. Instead, I'd try to toss them from a window into a glass of water held by my sister on the driveway below. Two lessons – 1) anything that starts with “don't tell mom” is a bad idea, and 2) some things in life just work out.

After a few weeks contemplating the final rules for Association Health Plans (AHPs) it's still hard to tell whether AHPs will be like running with scissors or a concept that just might work out well. Several national franchise organizations are enthusiastically exploring the new rules for their members. On the other hand, the attorneys general for New York and Massachusetts announced June 20<sup>th</sup> that they would sue the Trump administration over the final rule.

Implementation of the new rules commences September 1, 2018 through to April 1, 2019 depending on the type of AHP. It's worth noting that where AHPs operate across state lines they may find themselves subject to competing state law compliance obligations - in addition to the Employee Retirement Income Security Act (ERISA).

#### Brief Background

The Department of Labor (DOL) issued final rules for AHPs on June 19<sup>th</sup> following the Administration's directive to liberalize this avenue of health care coverage for small business owners and self-employed individuals. In announcing the new rules, President Trump commented that AHPs would “result in very low prices, much more choice, much more freedom, including in many cases new opportunities to purchase health insurance....including across state lines.”

Under the final regulations AHPs are treated the same as large single-employer health plans under the Affordable Care Act (ACA). As such, they are not subject to the same stringent federal and state regulations that small group and individual plans face that can drive up costs for employers. For example, AHPs are not required to provide essential health benefits - a core package of health care services required by the ACA for individual and small group health plans.

#### New “Commonality of Interest” Test

The new final regulations expand the definition of “employer” under ERISA. Different types of employers can now join together to form an “association,” which can purchase health insurance as one ERISA “employer” if that group has a “commonality of interest.” In forming these associations, commonality of interest occurs where members share either a common geography or a common industry. Common geography for an association depends on the members' principal place of business, which must be within the same state or common metropolitan area (even if that area crosses state lines). Common industry, trade, or profession can be located anywhere in the US including across state lines.

### New “Substantial Business Purpose” Test

The new rule also requires that associations have at least one substantial purpose unrelated to the provision of health benefits. The bar for a “substantial business purpose” is not high: “[advancing] the well-being of the industry” is sufficient. A substantial business purpose exists whenever the association would be a viable entity without sponsoring an AHP.

This was a significant change from the proposed rule published in January, which did **not** require associations to have a business purpose unrelated to providing benefits. In deciding to adjust the final rule, the DOL stated that the *primary* purpose of an association can still be the provision of health benefits.

### New Factors in Determining Premiums

The new rule also allows insurers to use factors such as age, gender, industry, and geography when setting rates for employers. For example, insurance cost could be set higher for employers with older employees, women of child-bearing years, or employees working in certain locales or occupations.

### Rights and Protections Preserved

Finally, the rule confirms that several protections remain in place for both employers and employees. Under the final rule:

- Participation in an AHP will not subject employers to **joint employer liability** under any federal or state law, rule, or regulation.
- Businesses with **independent contractors** will not be considered an employer of those individuals due to participation in an AHP.
- Existing **state authority** to regulate AHPs remains unchanged. Pursuant to ERISA, the DOL and states have joint authority over MEWAs (AHPs). The final rule affirms this joint authority. It’s worth noting, however, that under ERISA certain state law MEWA regulation may limit employers’ flexibility to exclude certain essential health benefits and such laws may also extend benefit mandates to self-funded AHPs. Where an AHP operates across state lines, it may find itself subject to competing MEWA state law compliance obligations.
- AHPs cannot deny coverage or charge higher premiums to participants with **pre-existing health conditions** (but can charge higher premiums based on age, gender, location or occupation).
- AHP coverage of dependents must extend to **dependent children** up to age 26.
- AHPs cannot impose annual or lifetime **dollar limits** on covered essential health benefits.
- Caps on **out-of-pocket expenses** for covered essential health benefits still apply.

### Hopes and Fears

Proponents of the new rule argue that AHPs will provide lower cost coverage for an estimated 4 million small business workers over the next 5 years including approximately 400,000 individuals who currently do not have coverage. Critics counter that without regulations requiring the inclusion of essential health benefits, such as maternity care, mental health, or prescription drugs, new AHPs will exclude important benefits and ultimately create significant and costly gaps in health coverage. They

further argue that young, healthy individuals will flee the individual market for lower-cost AHPs, thereby leaving the sickest in the individual and small-group market to further drive up premiums.

### **Implementation**

New and existing fully insured AHPs can begin to operate under the new rule as of September 1, 2018. Existing self-insured AHPs can begin operating under the new rule effective January 1, 2019. New self-insured AHPs can begin on April 1, 2019.

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