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FINAL ASSOCIATION HEALTH PLAN RULE OFFERS NEW OPTIONS FOR EMPLOYERS

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Nov. 8, 2018

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A Department of Labor (DOL) [final rule](#) gives employers a new route to form "bona fide" association health plans (AHPs) that enjoy certain advantages relative to other AHPs under the Affordable Care Act (ACA) and ERISA. Bona fide AHPs will still be multiple-employer welfare arrangements (MEWAs) subject to both state and federal law. Some states are already using their regulatory authority to limit the expansion of bona fide AHPs, and ongoing litigation could further limit the application of the rule. This GRIST offers background on AHPs, identifies why employers may be interested in them, and then reviews the final rule's requirements and limitations.

RELAXED RULE FOR EMPLOYERS TO JOIN AHPs

Only employers and "employee organizations" (typically labor unions) can establish and maintain ERISA plans. ERISA defines an employer to include "a group or association of employers" that acts on their behalf with respect to an employee benefit plan ([29 USC § 1002\(5\)](#)). When such a group or association sponsors a health plan, it's known as an AHP.

Prior DOL guidance distinguished between "bona fide" AHPs, which have a single plan at the association level, and other AHPs, under which each participating employer separately sponsors its own ERISA plan. In general, that guidance sets a high bar for bona fide AHP status: Members must not only control the plan but also have a common interest and a shared economic or representation purpose — unrelated to benefits — for forming the association.

What's Changed

The final DOL rule offers an alternate and somewhat easier path for groups or associations of employers to offer bona fide AHPs. Key changes in the final rule include:

- Unrelated employers in the same geographic location — in addition to employers in the same trade, industry, line of business or profession — can form an AHP.
- "Working owners" can participate in an AHP.

- The primary purpose of the employer group or association can be to provide health benefits, although it must also exist for another substantial business purpose.
- As required under prior DOL guidance, employer members must control the AHP in form and operation.

For now, this broadened definition of "employer" applies only to ERISA health plans — not to retirement plans or other welfare benefits. However, [proposed DOL rules](#) would allow similar expansions of defined contribution multiple-employer plans (MEPs) sponsored by bona fide associations or professional employer organizations (PEOs).

Effective date. Insured AHPs could operate under the final rule as of Sept. 1, 2018. Self-funded plans that were bona fide AHPs under the prior guidance can operate under the final rule as of Jan. 1, 2019. All self-funded plans can operate under the new rule on April 1, 2019.

What Hasn't Changed

As discussed later, employers can still rely on DOL's earlier [guidance](#), which continues to apply to existing AHPs and is available as alternative to the final rule for creating AHPs. In addition, AHPs remain subject to numerous other federal and state regulations.

AHPs and the ACA. Under the ACA, small group plans (generally 50 or fewer employees) and individual policies must satisfy certain requirements, such as the mandates to cover 10 essential health benefits (EHBs) and use community rating. Large group plans, whether insured or self-funded, don't have to comply with these requirements. A 2011 [bulletin](#) from the Centers for Medicare and Medicaid Services (CMS) explains how these ACA rules apply to AHPs:

- If an AHP isn't considered bona fide, the size of each participating employer determines whether that employer's plan is small or large.
- In contrast, a bona fide AHP can combine the employees of all participating employers to determine its ACA status as a small or large group plan.

The final DOL rule reiterates the CMS guidance: A bona fide AHP can combine participants from all employers — including the new category of working owner (discussed below) — to determine whether the plan is large or small under the ACA rules.

AHPs and ERISA. Because bona fide AHPs are one plan with participants from a combined group of participating employers, ERISA's plan document, disclosure and similar requirements apply to the association or plan — not separately to each participating employer. For this reason, the final DOL rule, in a seeming oxymoron, refers to bona fide AHPs as "single multiple-employer" plans. DOL [guidance](#) released in August emphasizes that AHPs are subject to ERISA's general disclosure, reporting, claims and fiduciary rules. Bona fide AHPs can consolidate many of these obligations at the association or plan level, easing compliance burdens for participating employers.

AHPs and MEWAs. Whether bona fide or not, AHPs are multiple-employer welfare arrangements (MEWAs) because they cover employees of more than one unrelated employer. Under ERISA, if employers are in the “same control group,” they are treated as single employers and not as a MEWA. But employers participating in AHPs don't have the requisite common ownership or other relationships to create a single employer plan. Two key points to keep in mind include:

- **MEWA controlled-group rules.** ERISA Section [3\(40\)](#) directs the DOL to develop controlled-group rules for MEWAs similar to the IRS rules that apply to retirement plans. Although DOL has never published controlled-group rules for MEWAs, informal agency guidance says employers should follow Internal Revenue Code Section [414](#), which generally requires 80% common ownership.
- **Federal/state regulation.** The new AHP rule doesn't change federal or state regulation of MEWAs (see this [DOL guide](#) for more information). States continue to have significant authority over AHPs, and many states strictly limit or prohibit self-funded MEWAs. In particular, states can impose reserve and contribution requirements on both self-funded and insured MEWAs, and even self-funded MEWAs can be subject to state insurance laws. Because of state restrictions on self-funded MEWAs, many AHPs are insured.

WHICH EMPLOYERS SHOULD CONSIDER AHPs?

Small employers, “working owners,” and certain large employers might benefit from the final rule's new ERISA definition of employer.

Small Employers

Small employers participating in bona fide AHPs can offer coverage that complies with ACA's requirements for large group plans, as long as the combined size of AHP members is large. Because large group plans don't have to cover all EHBs or be community-rated, this type of coverage can lower premiums.

As an added benefit, an IRS [frequently asked question](#) (Q&A-18) says each employer participating in a bona fide AHP separately determines whether ACA's employer shared-responsibility (ESR) requirements apply. In other words, a bona fide AHP can be subject to large-employer ACA coverage rules, while a participating employer may be exempt from ESR if it had fewer than 50 full-time and full-time-equivalent employees in the prior year.

Working Owners

The final rule lets a new category of working owners participate in AHPs. In the past, self-employed workers (such as independent contractors) who don't employ any common-law employees have been unable to participate in ERISA plans. The final rule changes this for AHPs — but not for all ERISA plans or all health plans — by defining working owners with no common-law employees as both employers and employees. Like small employers, working owners participating in a bona fide AHP can avoid compliance with the ACA's EHB and community-rating rules that apply to individual coverage.

Large Employers

Large employers can already offer either insured or self-funded large group plans, avoiding the ACA's small group requirements, as well as the MEWA rules. However, certain large employers may have situations where an AHP might benefit a subset of their workers, such as:

- Franchisees of a common franchisor or other affiliated employers that don't meet the ownership threshold for a single employer under the IRS controlled-group rules may want to form an AHP. For example, a group of restaurant franchisees may want to form a bona fide AHP to offer health coverage to compete with other restaurants that are treated as a single employer for benefit purposes.
- Two or more employers who form a nonentity joint venture, such as a contractual joint venture or an alliance, may want to join an AHP to offer insured health coverage to employees assigned to the joint venture. This makes health benefits available without covering all those employees under the plan of one employer in the joint venture (which would make that plan a MEWA).
- Large employers may also want to make an AHP available to a group of independent contractors to provide more affordable health coverage to those workers than they could otherwise obtain.
- Employers providing coverage through a professional employer organization (PEO) may want to have their advisers compare that coverage to an insured AHP.

DIVING DEEPER INTO NEW RULE

Here are details on what the new AHP rule requires in terms of commonality among participating employers, working owners as members, the association's purpose and structure, members' control over the association and the plan, and nondiscrimination.

Commonality

Like the prior guidance, the new rule requires employers in a bona fide AHPs to have a "commonality of interest" but relaxes the definition of this term. Under the final rule, commonality can be established when employer members share a common geographic location or are in the same trade, industry, line of business or profession. The group sponsoring the AHP is deemed to be in the same line of business as the employer members, so the association itself may participate in the AHP.

Same trade, industry, line of business or profession. The DOL says that the terms "trade, industry, line of business or profession" should be construed broadly to expand employer and employee access to AHP coverage, but not so broadly as to include any type of business (e.g., all franchises or all corporations nationwide). The final rule suggests the following criteria can distinguish a bona fide group or association of employers from a commercial insurance issuer:

- **Business codes.** Bona fide AHPs can check the North American Industry Classification System (NAICS), the Standard Industrial Classification (SIC) and the Organization for Economic Cooperation and Development (OECD) International SIC to see if employer members have common business codes. In some cases, subcategories under these codes may be combined to show commonality.

- **VEBA line-of-business requirement.** An association or group of employers that satisfies the "same line of business" requirement for voluntary employees' beneficiary associations (VEBAs) would also satisfy the AHP commonality test.

The DOL also allows segmentation of a particular trade, industry or profession into smaller groups, provided it isn't a subterfuge for discrimination based on health status. For example, an AHP could cover only restaurant owners who are military veterans rather than all restaurant owners or only cloud storage companies rather than the entire information technology industry. In a similar manner, a nationwide association, such as a national affinity group or association of franchise owners, can establish subgroups and still meet the commonality requirement.

Common geographic location. Unlike the prior guidance, the new rule allows a group or association of employers to base its membership on a common geographic location, even if the members are otherwise unrelated. The employer members — not the association or the AHP — must have a principal place of business within the same state or metropolitan area (even if that includes more than one state). A [metropolitan statistical area](#), as defined by the US government, satisfies the rule.

Other geographic areas also might qualify, depending on the facts and circumstances. For example, the area from which a city regularly draws its commuters may form a metropolitan area, even if it is not a metropolitan statistical area. An AHP can even cover a smaller geographic area, as long as it's not a subterfuge for discrimination on the basis of a health factor — e.g., so-called insurance "redlining" to avoid high-cost areas.

Working Owners

Under the new rule, the group or association can include "working owners," such as independent contractors who don't employ anyone else. But the AHP can't provide benefits for arrangements without an employment context or any regard to the member's status as an employer. For example, professional associations (such as scientific, literary and educational organizations) whose members are not necessarily employers or self-employed can't have an AHP allowing participation based solely on association membership.

The term "working owner" means any person who meets three criteria:

- Has any type of ownership right in a trade or business, including a partner or other self-employed individual.
- Earns wages or self-employment income for providing personal services to the trade or business.
- Either (i) works on average at least 20 hours per week or 80 hours per month providing personal services to the trade or business, or (ii) has wages or self-employment income from the trade or business that at least equals the cost of the individual's (and any family members') AHP coverage.

A responsible plan fiduciary must determine whether an individual has met the criteria to qualify as a working owner. This determination must be made when the working owner first becomes eligible for AHP coverage and periodically confirmed using reasonable monitoring procedures. The DOL allows fiduciaries to establish their own prudent processes for making working owner and other eligibility determinations, including relying on the working owner's attestation or a verification process required for association membership or used by the health insurance issuer.

Purpose

Under the new rule, offering health coverage to members can serve as a primary purpose of the employer group or association. However, the group or association must also have at least one substantial business purpose unrelated to providing health coverage or other employee benefits for its members.

The DOL doesn't define "substantial business purpose" but notes that it doesn't have to be a for-profit business purpose. A pre-existing group or association could establish a wholly owned subsidiary solely to administer the AHP and rely on the parent's activities to satisfy the substantial business purpose.

Under a safe harbor, if a group or association would be a viable entity even if it didn't sponsor an employee benefit plan, then it is considered to have a substantial business purpose other than providing health coverage. Examples of associations with the primary purpose of offering health coverage that would meet the substantial business purpose requirement include:

- An association that offers services like convening conferences, providing classes or supplying educational materials on business issues of interest to members
- A standard-setting organization that establishes business standards or practices
- An association that engages in public relations activities on business issues of interest to members

Control

Employer members must control — in form and substance — the functions and activities of the group or association and the AHP. Whether the requisite control exists is based on the facts and circumstances, including this nonexclusive list of factors that the DOL considers particularly relevant:

- Do employer members regularly nominate and elect directors, officers, trustees or other people that constitute the governing body or authority of the group or association and plan?
- Do employer members have the authority to remove directors, officers, trustees or other such people with or without cause?
- Do employer members that participate in the plan have the authority to approve or veto decisions or activities that relate to plan design, amendment or termination, including changes in coverage, benefits and premiums?

Related DOL [guidance](#) clarifies that employer members of the AHP generally have an ERISA fiduciary duty to monitor the plan and get periodic reports on the fiduciaries' plan management and administration. But employer members don't have to manage the day-to-day affairs of the group or association or the plan itself — those duties can be delegated to a third party, as long as there is appropriate oversight.

Association Requirements

The group or association doesn't have to be nonprofit or tax-exempt, but it must have a formal organizational structure with a governing body, along with bylaws or other similar formal policies appropriate for the group's or association's legal form. The group or association can't be a health insurance issuer or controlled by a health insurance issuer or an issuer's subsidiary or affiliate, although such entities may participate as employer members. State laws will also apply and can affect how associations must be formed.

Nondiscrimination

HIPAA's nondiscrimination rules apply to AHPs so they can't discriminate in eligibility, benefits or premiums based on health factors — for example, by charging different premiums based on the health factors of different people within a group of similarly situated participants. Under the new rule, AHPs also can't condition employer membership on an individual's health factor and must treat all participating employers as similarly situated when applying the HIPAA nondiscrimination rule. This appears to mean that AHPs can't separately rate each participating employer using its claims experience, since that would involve setting premiums based on health factors.

Certain rating distinctions using factors other than health status — such as profession, age or geography — are permitted. As a result, AHPs can charge different employer members different rates reflecting these nonhealth factors, so long as they are not a subterfuge for discrimination.

COMPARING EXISTING AHP GUIDANCE AND FINAL RULE

The DOL intends the new rule to be a new pathway for establishing AHPs without eliminating AHPs formed under earlier guidance. As a result, both existing and new employer groups can choose between the two paths for forming an AHP.

Employers considering an AHP will want to compare the requirements under the new rule and old guidance. In some cases, state law may preclude using the new rule; in others, AHPs may prefer the prior guidance because it appears to permit experience-rating each member employer. The following table compares key features of the new and old rules.

REQUIREMENT	EARLIER GUIDANCE	NEW RULE
Scope	Applies to ERISA-covered group health plans and other welfare benefits.	Applies only to group health plans.
Commonality	Member employers must have a common interest and genuine organizational purpose unrelated to providing benefits. Facts and circumstances determine commonality, which cannot rely solely on geography.	Member employers must share either the same geographic location (state or metropolitan area) or the same trade, industry, line of business or profession.
Working owners with no common-law employees	Not permitted to participate.	May participate if certain requirements met.
Purpose of association	Must have genuine business/organizational purpose and functions unrelated to providing benefits.	Can have a primary purpose of providing health coverage, but also must have a substantial business purpose.
Control	Members must exercise control over the association and members in plan must have control over the plan. Control must be in form and substance.	Members must exercise control over the association and members in plan must have control over the plan. Control must be in form and substance.
HIPAA nondiscrimination	Can't discriminate based on an individual's health status, but may experience-rate each employer member.	Can't discriminate based on an individual's health status. Must treat different employer members as similarly situated, so can't experience-rate each employer member based on its employees' claims experience.

REMAINING CHALLENGES

While the DOL rule eases some requirements for association health plans, employers interested in exploring this option should remain aware of potential obstacles, including differing state standards, litigation challenges to the new DOL rule and separate IRS requirements for VEBAs.

State AHP Standards

States may create stumbling blocks for AHPs. States can — and many do — impose requirements for AHPs to operate within the state's borders or cover its residents. A number of states have additional or different AHP requirements than the federal guidance or final rule impose. For example, different states may require an association to:

- Have existed for a certain period before offering an AHP.

- Continue to treat employer members as large or small groups, depending on the number of each member's employees, rather than aggregating employees into a single plan to spare small members' coverage from meeting EHB and community-rating requirements.
- Prohibit working owners without common-law employees from participating in an AHP.
- Allow AHPs to cover only residents of the state in which it is established.

As a practical matter, these state laws may cause hurdles for associations trying to establish an AHP within a particular state or nationwide under the new federal rule.

Litigation Challenging New Rule

Two cases could lead to invalidation of all or parts of the new AHP rule. Employers considering forming AHPs under the final rule should follow these cases and may wish to review their potential impact with their legal advisers:

- A lawsuit filed by 11 states and the District of Columbia challenges the new rule as arbitrary and capricious, contrary to law, and exceeding the DOL's authority ([*New York v. United States Dep't of Labor*](#), No. 18-1747 (D.D.C. filed July 26, 2018)).
- A second lawsuit brought by four cities challenges the Trump administration's efforts to weaken the ACA through various regulatory actions, including the final rule's AHP changes ([*Columbus v. Donald J. Trump*](#), No. 18-cv-2364 (D. Md. filed Aug. 2, 2018)).

VEBA Requirements

For some AHPs, participating employers may decide they want or need a trust to fund the plan, even if it's an insured plan. While self-funded health plans often use VEBAs, bona fide AHPs would have to satisfy both the DOL's final AHP rule and the IRS's VEBA rules.

Unfortunately, the IRS guidance on VEBAs differs from the final AHP rule in certain respects. For example, the VEBA rules don't allow members to show the requisite commonality of interest based solely on the same geographic location. In fact, the VEBA commonality rules go even further to require that employers have both the same line of business and the same "geographic locale."

The [*Internal Revenue Manual*](#) provides a safe harbor allowing a geographic locale within the boundaries of up to three contiguous states. But the IRS can recognize a geographic locale that exceeds the three-state safe harbor if two conditions are met:

- It would not be economically feasible to establish two or more VEBAs to cover employees of employers engaged in the same line of business in fewer than three states and still be able to offer VEBA membership to employees of employers in the covered states.
- Employment characteristics in that line of business, population characteristics or other regional factors support the particular states included; this is deemed satisfied if the states included are contiguous.

NEXT STEPS FOR EMPLOYERS

Interested employers should review final AHP rule and earlier guidance and see if an AHP could provide opportunities or solutions for their workforce. Beside reviewing these federal standards, employers will need to carefully review relevant state laws governing AHPs and track ongoing federal litigation which could limit the new rule.

RELATED RESOURCES

Non-Mercer Resources

- [Columbus v. Donald J. Trump](#), No. 18-cv-2364 (D. Md. filed Aug. 2, 2018)
- [New York v. United States Dep't of Labor](#), No. 18-1747 (D.D.C. filed July 26, 2018)
- [Final DOL Rule on Definition of "Employer" Under Section 3\(5\) of ERISA — Association Health](#) (Federal Register, June 21, 2018)
- [7.25.9 Voluntary Employees' Beneficiary Associations](#) (Internal Revenue Manual, revised Sept. 12, 2017)
- [Q&As on Employer Shared-Responsibility Provisions Under the Affordable Care Act](#) (IRS)
- [Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act \(ERISA\): A Guide to Federal and State Regulation](#) (DOL, revised August 2013)

Other Mercer Resources

- [DOL Eases Rules for Association Health Plans](#) (June 20, 2018)
- [New Association Health Plan Rules Present Opportunity for Small Businesses](#) (June 19, 2018)
- [Proposed Guidelines for Association Health Plans](#) (Jan. 8, 2018)

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