MARSH & McLENNAN AGENCY

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DOL RELEASES PROPOSED RULE EXPANDING ASSOCIATION HEALTH PLANS

Earlier this month, the U.S. Department of Labor (DOL) issued a proposed rule to expand the opportunity of unrelated employers of all sizes (but particularly small employers) to offer employment-based health insurance through Association Health Plans (AHPs). This rulemaking follows President Trump's October 12, 2017 Executive Order 13813, "Promoting Healthcare Choice and Competition Across the United States," which stated the Administration's intention to prioritize the expansion of access to AHPs.

OVERVIEW

If adopted, the proposed rule would expand the definition of "employer" within the meaning of ERISA section 3(5) to broaden the criteria for determining when ***unrelated*** employers, ***including sole proprietors and self-employed individuals***, may join together in a "bona fide group or association of employers" that is treated as the "employer" sponsor of a single multiple employer "employee welfare benefit plan" and "group health plan."

By treating the association itself as the "employer" sponsor of a single plan, the regulation would facilitate the adoption and administration of such arrangements. The proposed rule does not appear to limit the size of employers who may participate in an AHP.

Significantly, the proposed rule would ***apply "large group" coverage rules*** under the Affordable Care Act (ACA) to qualifying AHPs. AHPs that buy insurance would not be subject to the insurance "look-through" doctrine (i.e., the concept that the size of each individual employer participating in the association determines whether that employer's coverage is subject to the small group market or the large group market rules). Instead, because an AHP would constitute a single plan, whether the plan would be buying insurance as a large or small group plan would be determined by reference to the number of employees in the entire AHP. This would offer a key advantage to participating sole proprietors and small employers as it would exempt them from rules that apply to individual and small groups under the ACA, such as those related to the coverage of essential health benefits and to certain rating rules.

Under the proposed rule, a "bona fide group or association of employers" must meet the following requirements:

1. The group or association exists for the purpose, in whole or in part, of sponsoring a group health plan that it offers to its employer members;
2. Each employer member of the group or association participating in the group health plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan;
3. The group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality;
4. The functions and activities of the group or association, including the establishment and maintenance of the group health plan, are controlled by its employer members, either directly or indirectly through the regular nomination and election of directors, officers, or other similar representatives that control the group or association and the establishment and maintenance of the plan;
5. The employer members have a "commonality of interest;"
6. The group or association does not make health coverage through the association available other than to employees and former employees of employer members and family members or other beneficiaries of those employees and former employees;
7. The group or association and health coverage offered by the group or association complies with HIPAA (as amended by ACA nondiscrimination requirements; and
8. The group or association is not a health insurance issuer, or owned or controlled by a health insurance issuer.

ANALYSIS

Expanded Commonality of Interest Test

The proposed rule would amend ERISA section 3(5) to create a broader "commonality of interest" test for determining which groups or associations of employers (including "working owners") could create AHPs.

The current definition of a "bona fide association" provides that an association may be treated as a single employer only if it has a bona fide purpose apart from the provision of health care. The proposed rule would allow employers to band together in new organizations whose ***sole purpose*** is to provide group health coverage to member employers and their employees even if their ***only*** connection is based on "common industry" or "common geography." The determination of whether there is a "commonality of interest" is facts and circumstances test.

Specifically, employers could join together to offer health coverage if they either are:

1. in the same trade, industry, line or businesses, or profession; or
2. have a principal place of business within a region that does not exceed the boundaries of the same State or same metropolitan area (even if the metropolitan area includes more than one State).

Examples of a metropolitan area in the proposed rule include the "Greater New York city Area/Tri-State Region covering portions of New York, New Jersey and Connecticut; the Washington Metropolitan Area of the District of Columbia and portions of Maryland and Virginia; and the Kansas City Metropolitan Area covering portions of Missouri and Kansas." A single city or county could also qualify.

The DOL is seeking public comment on whether additional clarification is needed to define a "metropolitan area;" whether there is any reason for concern that associations could manipulate geographic classifications to avoiding offering coverage to employers expected to incur more costly health claims; and whether there should be a special process established to obtain a determination from the DOL that all an association's members have a principal place of business in a metropolitan area.

The proposed rule would allow associations to rely on other characteristics upon which they previously relied to satisfy the commonality provision. The DOL also is seeking comment on whether the final rule, if adopted, should also recognize other bases for finding a commonality of interest.

Self-Employed Individuals and Dual Treatment of "Working Owners"

The proposed rule would require that only employees and former employees of employer members (and family/ beneficiaries of those employees and former employees) may participate in a group health plan sponsored by the association and that the group or association does not make health coverage offered through the association available to anybody other than to employees and former employees of employer members and their families or other beneficiaries.

Since this rule could arguably be construed to exclude individuals from enrolling in AHPs, the proposed rule expressly provides that "working owners," such as sole proprietors and other self-employed individuals, may elect to act as employers for purposes of participating in an employer group or association and also be treated as employees of their businesses for purposes of being covered by the group or association's health plan.

The proposed rule defines a "working owner" any individual:

1. Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including partners and other self-employed individuals;
2. Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business;
3. Who is not eligible to participate in any subsidized group health plan maintained by any other employer of the individual or of the spouse of the individual; and
4. Who either:
    - Works at least 30 hours per week or at least 120 hours per month providing personal services to the trade or business, or
    - Has earned income from such trade or business that at least equals the working owner's cost of coverage for participation by the working owner and any covered beneficiaries in the group health plan sponsored by the group or association in which the individual is participating.

Absent knowledge to the contrary, the group or association sponsoring the group health plan may reasonably rely on written representations from the individual seeking to participate as a working owner as a basis for concluding that these conditions are satisfied.

The DOL invites comments on this provision, including whether an individual must not be eligible for other subsidized group health plan coverage under another employer or a spouse's employer.

Formal Organizational Structure

The proposed rule would require that the AHP have a formal organizational structure with a governing body and have by-laws or other similar indications of formality appropriate for the legal form in which the AHP operates, and that the AHP's member employers control its functions and activities, including the establishment and maintenance of the group health plan, either directly or through the regular election of directors, officers, or other similar representatives.

These requirements largely duplicate conditions in the DOL's existing sub-regulatory guidance under ERISA section 3(5), and ensure that the organizations are genuine organizations with the organizational structure necessary to act "in the interest" of participating employers with respect to employee benefit plans as required by ERISA. They are also intended to prevent formation of commercial enterprises that claim to be AHPs but, in reality, merely operate similar to traditional insurers selling insurance in the group market.

Nondiscrimination Requirements

An AHP must not condition employer membership in the group or association based on any health factor (such as health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability) of an employee or employees or a former employee or former employees of the employer member (or any employee's family members or other beneficiaries).

AHP eligibility for benefits and premiums for group health plan coverage must comply with the HIPAA/ACA health nondiscrimination rules. In applying these nondiscrimination requirements, the AHP may not treat different employer members of the group or association as distinct groups of similarly-situated individuals. This provision is intended to avoid AHPs from "employer-by-employer risk-rating." The concern is that if an AHP could treat different employer-members as different bona fide employment classifications, the nondiscrimination protections would be "ineffective," as AHPs could offer membership to all employers meeting the association's membership criteria, but then charge specific employer members higher premiums, based on the health status of those employers' employees and dependents.

The proposed rule provides a series of examples illustrating how the rules are intended to apply.

The DOL has asked for comment on whether this structure could potentially represent an expansion of current regulations or would create involuntary cross-subsidization across employers that would discourage formation of AHPs.

POTENTIAL IMPACT ON EMPLOYERS

New Opportunities

The proposed rule is intended to allow small employers to enjoy some of the advantages of larger employers. In its News Release, the DOL claims that the proposed rule "may reduce [employers'] administrative costs through economies of scale, strengthen their bargaining position to obtain more favorable deals, enhance their ability to self-insure, and offer a wider array of insurance options."

If adopted, the proposed rule could create more opportunity for unrelated employers of all sizes, however, it is primarily geared to enable small employers to join an AHP and it would allow sole proprietors for the first time to join AHPs.

Potential Limits Based on State Regulation of AHPs

Currently, coverage offered by an association is typically considered a multiple employer welfare arrangement (MEWA), which is an arrangement that is established to provide welfare benefits to two or more unrelated employers (i.e., not part of the same "controlled group").

Although ERISA generally preempts state laws, there is an exception to ERISA preemption for MEWAs. Currently, many states regulate self-funded MEWAs as commercial insurance companies and others prohibit them altogether. A state's ability to regulate fully-insured MEWAs directly is limited to establishing reserve and contribution levels to ensure the solvency of the MEWA. However, states are free to regulate the underlying insurance contacts or policies, which are subject to state insurance laws.

It is unclear whether the flexibility added in the proposed rule will be hampered by state regulation of AHPs as MEWAs. AHPs will continue to be MEWAs to the extent that they provide coverage to employees of multiple unrelated employers. There is nothing in the proposed rule that provides that state insurance law is otherwise preempted with respect to AHPs. Nor is there anything in the proposed rule that creates an individual or class exemption from existing state regulation for self-funded MEWAs (although, the DOL did request public comments on whether to use its exemption authority).

In the past there has been opposition to AHPs because of consumer protection concerns. Under the proposed rule, AHPs cannot charge individuals higher premiums based on health factors or refuse to admit employees to a plan because of health factors. However, they can vary premiums based on other factors, such as gender, age, industry or occupation, or business size. Since qualifying AHPs would be subject to "large group" coverage rules, some have raised questions as to whether AHPs would be marketed toward the healthiest and youngest individuals, thus, undermining the individual and "small group" marketplace. It is likely that these concerns, as well as others relating to government oversight and fraud protection from unscrupulous promoters, will be raised as part of the public rulemaking process. It also remains to be seen the extent to which states will impose standards to protect consumers and guard against adverse selection, which may cause AHPs to be less attractive to employers.

NEXT STEPS

The DOL is soliciting comments on its proposal, which are due **on or before March 6, 2018**.

The proposed rule does not include an effective date for a final rule. Since the rules are only in proposed form, employers should not currently take action in reliance on them, but await adoption of any final rule.

About The Authors. This alert was prepared for Marsh & McLennan Agency by Marathas Barrow Weatherhead Lent LLP, a national law firm with recognized experts on the Affordable Care Act. Contact Peter Marathas or Stacy Barrow at pmarathas@marbarlaw.com or sbarrow@marbarlaw.com.