LEGAL UPDATE

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA COURT DECISION—ASSOCIATION HEALTH PLANS

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

New York v. United States Department of Labor
Filed March 28, 2019
No. 18-1050
law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2018cv01747/198818/79/

Background. The United States Department of Labor (DOL) published a final rule in the Federal Register on June 21, 2018, that interprets the definition of "employer" under Section 3(5) of the Employee Retirement Income Security Act (ERISA) to provide additional mechanisms for groups or associations of employers to be eligible to sponsor a single ERISA-covered group health plan. The DOL's final rule was effective August 20, 2018, and applied staggered applicability dates:

- New or existing association health plans (AHPs) could establish a fully-insured AHP under the DOL's final rule starting on September 1, 2018.
- Existing AHPs that sponsored a self-insured AHP on or before June 21, 2018, could choose to operate in compliance with the DOL's final rule starting on January 1, 2019.
- All other new or existing AHPs could establish a self-funded AHP in compliance with the DOL's final rule starting on April 1, 2019.

Several significant changes for AHP compliance under the DOL's final rule versus compliance under the DOL's guidance prior to the final rule include:

- A group or association of employers can form an AHP for the principal purpose of providing health benefits as long as the group or association has at least one "substantial business purpose" unrelated to the provision of health benefits. DOL guidance issued prior to the final rule prohibited employers from forming an association solely for the purpose of providing health benefits.
- Employer members of the group or association must have a commonality-of-interest based on the same trade, industry, line of business, or profession or maintain a principal place of business within the boundaries of the same metropolitan area (which may include more than one state) or the same state. DOL guidance issued prior to the final rule did not allow the commonality-of-interest test to be satisfied solely by a geographical nexus.
- A "working owner," such as a sole proprietor or other self-employed individual, may qualify as both an employer for membership in an AHP and as an employee for eligibility for participation in the group health

plan provided via the AHP. Under DOL guidance issued prior to the final rule, a working owner must have at least one common law employee to be eligible to participate in an AHP.

Iowa Law. The DOL's final rule did not change a state's ability to regulate fully-insured AHPs and self-insured AHPs to the extent such regulation is not inconsistent with ERISA. Iowa Code section 513D.1 requires the Commissioner of Insurance to adopt rules for the creation of association health plans that are consistent with the DOL's final rule. The current rules, effective September 12, 2018, for fully-insured and self-insured AHPs are found at 191 IAC 77.5 and 191 IAC 77.6.

For more details related to the DOL's August 20, 2018, final rule, see Iowa Legislative Services Agency, Legal Updates, Association Health Plans, available at www.legis.iowa.gov/docs/publications/LU/970063.pdf.

District Court Background Procedure. Eleven states and the District of Columbia filed an action on July 26, 2018, in the United States District Court for the District of Columbia (Court), alleging that the DOL's final rule is not a lawful interpretation of the definition of "employer" under ERISA and that the final rule frustrates the congressional intent of the Patient Protection and Affordable Care Act (ACA).

Standing. The Court determined that the states had standing to challenge the DOL's final rule due to the potential loss of tax revenues and the increased regulatory burden and associated costs required of state regulators to protect against fraud and abuse as a result of the DOL's final rule.

Analysis.

Interpretation of Employer. The Court applied the *Chevron* framework, first announced in *Chevron v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), to its analysis of the DOL's interpretation of "employer" under ERISA. The *Chevron* framework requires the Court to first determine whether the statute is ambiguous. If Congress has directly spoken to the questions at issue, and congressional intent is clear, the DOL is precluded from providing its own interpretation via promulgation of regulations. If the statute is unclear, the Court must defer to the DOL's interpretation unless the interpretation is procedurally defective, arbitrary or capricious, or manifestly contrary to the statute. The Court determined that the definition of "employer" under ERISA is ambiguous, and analyzed whether the DOL's interpretation is reasonable. The Court looked at the text and purpose of ERISA, which the Court determined to be limited in scope to benefit plans arising from employment relationships. The Court noted that ERISA does not include an intent to "expand citizen access to healthcare benefits outside of an employment relationship or to directly regulate commercial healthcare insurance providers." The Court also noted that ERISA authorizes some employer associations to qualify as employers for the purpose of sponsoring an employee benefit plan as long as the employer group or association acts "in the interest of an employer."

Bona Fide Association. The Court held that the DOL final rule's bona fide association provision is not a reasonable interpretation of ERISA because it unlawfully expands ERISA's scope. While the final rule uses the same three criteria as those used prior to the final rule (purpose, commonality-of-interest, and control) to determine which groups or associations qualify as bona fide, the Court determined that the three criteria, even if combined, do not meaningfully limit such associations to those that act "in the interest of" employers, unlawfully expand ERISA's scope, and conflict with its statutory text.

Purpose. The Court stated that allowing a group or association to form an AHP for the principal purpose of providing health benefits as long as the group or association has at least one substantial business purpose "fails to set meaningful limits on the character and activities of an association." The Court stated that providing a safe harbor that allows the purpose test to be met if the group or association "would be a viable entity in the absence

of sponsoring an employee benefit plan," reveals the purpose test to be merely an "ex post facto, perfunctory requirement—merely a box to check—that virtually any association may fulfill" to qualify as an AHP.

Commonality-of-interest. The Court stated that the commonality-of-interest test may be the most important of the three criteria as it relates to an employer's interests, the core concern of ERISA. The final rule allows employers in multiple, unrelated industries to act "in the interest of" their employer members based solely on common geography. The Court noted that common geography alone does not necessarily translate into common employer interest, and that the DOL fails to provide any rationale that connects the two. The Court stated that geography "is not a legal proxy for common interest," and allowing shared geography to fulfill the statutory requirement of common interest improperly expands ERISA's scope.

Control. The control test places limitations on the types of associations that qualify as an employer under the final rule by requiring that employer members control the functions and activities of the group or association, and if employer members also participate in the AHP, they must also control the AHP. The Court agreed with other Court decisions that have concluded that the control test "complements and supplements the commonality-of-interest test, but cannot replace it." While the DOL's final rule did not materially change the control requirement, the Court noted that the control test is meaningful only if employer members already have aligned interests. If employer members share geography, but not a common interest, it is unlikely that the control test will further the interests of all employer members of the association.

Working Owners. The Court stated that the definition of "employee" under ERISA refers to a relationship between an employer and an employee and that the United States Supreme Court (SCOTUS) has concluded that traditional agency criteria for master-service relationships applies to the definition. SCOTUS has further determined that traditional agency criteria applies only in relationships between two different persons, such as employers and employees. The Court noted that working owners do not employ anyone and that "one does not have an employment relationship with oneself." The Court concluded that the DOL's final rule expansion of the term "employer" under ERISA to include working owners without employees is unreasonable because it is contrary to ERISA's purpose of focusing on benefits arising from employment relationships, unsupported by case law, and not supported by ERISA's 40-year history of excluding working owners without employees.

Affordable Care Act. The Court stated that the DOL's final rule creates "absurd results" under the ACA. While the ACA generally adopts ERISA's definitions of "employee" and "employer," under the ACA, "employer" is restricted to employers with two or more employees. The DOL includes an association as an employer under the ACA because two working owners also qualify as employees, thus, the requirement that an employer have two or more employees is satisfied. The Court noted that the ACA contemplates "two individuals employed by another," and that an association of two working owners without employees does not include employers or employees. The Court concluded that the DOL's explanation for how an ERISA bona fide association with two working owners and no employees qualifies as both an employer and employee under the ACA is "pure legerdemain."

Court's Decision. The Court held that the DOL's final rule unlawfully expanded ERISA's scope and exceeded the statutory authority delegated to the DOL by Congress under ERISA. The Court held that the provisions of the final rule defining "employer" to include associations of dissimilar employers and expanding association membership to include working owners without employees to be unlawful. The Court's order vacated specific provisions of the final rule regarding "bona fide group or association of employers," "commonality-of-interest," and the "dual treatment of working owners as employers and employees." The Court remanded the final rule to the DOL for consideration of the effect of the severability provision of the final rule on the remaining provisions of the final rule.

Implications for AHPs. Existing and new groups or associations that comply with the DOL's pre-final rule guidance can continue to sponsor an AHP. New or existing AHPs that established a fully-insured AHP under the DOL's final rule and existing AHPs that sponsored a self-insured AHP on or before June 21, 2018, that chose to operate in compliance with the DOL's final rule starting on or after January 1, 2019, cannot market to new enrollees. New or existing AHPs that had planned to establish a self-insured AHP on or after April 1, 2019, as allowed by the final rule, are prohibited from doing so. AHPs that offer coverage to working owners and small employers no longer qualify as ERISA plans under the final rule, bringing those AHPs under individual and small group market rules for purposes of the ACA and making them subject to state regulation.

DOL's Response to the Court's Decision. On April 26, 2019, the Department of Justice (DOJ) filed a Notice of Appeal to the Court of Appeals for the District of Columbia. On April 29, 2019, the DOL issued a statement regarding its enforcement of the final rule after the Court's decision. The DOL will not take enforcement action against employers and associations for potential violations for good-faith actions stemming from reliance on the final rule prior to March 28, 2019, as long as the employers and associations meet their obligations to their participants and beneficiaries.

The DOL will also not take enforcement action against existing AHPs for continuing to provide benefits through the remainder of the plan year or contract term that was in force on March 28, 2019, to members who enrolled in good-faith reliance on the final rule. At the end of the plan year or contract term, however, the issuer of the plan can only renew coverage for an employer member of an AHP formed pursuant to the final rule if the coverage complies with the DOL's pre-final rule guidance.

The DOL notes that AHPs formed under the DOL's pre-final rule guidance are not affected by the Court's decision, and that the Court's decision does not change a state's oversight of AHPs under state insurance laws and regulations. The DOL encourages persons with questions about how a state may apply state law after the Court's decision to contact the appropriate state insurance regulator. Additional DOL guidance may be found at: www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB85/ahp-statement-court-ruling, www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/ahp-q-and-a-court-ruling.pdf, and www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/ahp-q-and-a-court-ruling-part-2.pdf.

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