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LEGAL UPDATES

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Purpose. *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent 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 a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.*

ASSOCIATION HEALTH PLANS

United States Department of Labor - Employee Benefits Security Administration Final Rule Published June 21, 2018 (Federal Register)

Definition of "Employer" Under Section 3(5) of ERISA - Association Health Plans
www.federalregister.gov/documents/2018/06/21/2018-12992/definition-of-employer-under-section-35-of-erisa-association-health-plans

Background. An association health plan (AHP) is a multiple employer welfare arrangement (MEWA), as defined in the Employee Retirement Income Security Act (ERISA) (codified at 29 U.S.C. §1001 et seq.), in which two or more small employers band together to sponsor a group health plan to provide health insurance for the employees of the AHP's employer members.

On October 12, 2017, President Trump issued Executive Order No. 13813 directing the Secretary of Labor to consider revising prior United States Department of Labor (DOL) guidance (regulations and DOL advisory opinions) to permit more small employers to join together to form an AHP by expanding the conditions that satisfy "commonality-of-interest" requirements and that promote AHP formation on the basis of common geography or industry.

Under prior DOL guidance, many existing associations do not meet the commonality-of-interest requirements and the regulatory framework requires application of the insurance "look-through" doctrine under which employer members of an AHP are individually rated to determine if they are subject to large group, small group, or individual market rules.

The DOL's final rule expands the commonality-of-interest test in the definition of "employer" under Section 3(5) of ERISA, providing an additional mechanism for groups or associations of employers to be eligible to sponsor a single ERISA-covered group health plan and to be rated based on the number of employees in the entire group or association. All employer members will have access to a large group health plan and the same rates as all other employer members in the group or association.

Choice of Final Rule or Prior Guidance. The DOL's final rule is in addition to prior DOL guidance and does not supplant it. Existing AHPs that are in compliance with the DOL's prior guidance are not required to comply with the final rule unless they choose to expand membership in the AHP as permitted by the final rule. AHPs that are established after the final rule may elect to follow either prior DOL guidance or the final rule. An AHP must elect to comply with either prior DOL guidance or the final rule and cannot use a combination of both.

Significant Changes for Association Health Plan Compliance Under the Department of Labor's Final Rule Versus Compliance Under Prior Guidance.

Association Health Plan Purpose. 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. A safe harbor in the final rule provides that a substantial business purpose is considered to exist if the group or association would be a viable entity even in the absence of sponsoring an employee benefit plan. The business purpose does not have to be a for-profit purpose.

Prior DOL guidance prohibits employers from forming an association solely for the purpose of providing health benefits.

Commonality-of-Interest. 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 or the same state. The metropolitan area, however, may include more than one state.

Prior DOL guidance does not allow the commonality-of-interest to be satisfied solely by a geographical nexus.

Working Owners. A "working owner" 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. A working owner is defined as an individual who a responsible plan fiduciary reasonably determines has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner or other self-employed individual; who is earning wages or self-employment income from the trade or business for the provision of personal services to the trade or business; and who either works at least 20 hours per week or 80 hours per month or earns wages or self-employment 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 AHP.

Under prior DOL guidance, working owners such as sole proprietors and other self-employed individuals must have at least one common law employee to be eligible to participate in an AHP. Under United States Internal Revenue Service (IRS) guidance, an individual is considered to be a common law employee if an employer can control what work the individual will do and how the individual will do it.

Nondiscrimination. An AHP is prohibited from charging different rates to different employer members based on health factors (as defined in 29 C.F.R. §2590.702(a)) of their employees and from varying premiums for individual participants based on a health factor of the participant. Separate groups can be created and experience-rated separately, however, as long as the groups created are legitimate (e.g., full-time versus part-time employees) and are not based on a health factor of one or more individual participants. Examples of legitimate and prohibited groups are provided in 29 C.F.R. §2510.3-5(d)(5).

Prior DOL guidance allows AHPs to condition each employer member's premiums on its employees' collective health factors, as long as such rating complies with HIPAA nondiscrimination requirements (29 C.F.R. §2590.702), including the requirement that the AHP does not single out one or more individuals based on a health factor.

State Authority. The DOL's new final rule does not change a state's ability to regulate fully insured AHPs or to regulate self-insured AHPs to the extent such regulation is not inconsistent with ERISA.

Effective Date. The DOL's new final rule was effective August 20, 2018.

Staggered Applicability Dates.

1. New or existing AHPs may establish a fully insured AHP under the new DOL final rule starting on September 1, 2018.
2. Existing AHPs that sponsored a self-insured AHP on or before June 21, 2018, may choose to operate in compliance with the new DOL final rule starting on January 1, 2019.
3. All other new or existing AHPs may establish a self-funded AHP in compliance with the new DOL final rule starting on April 1, 2019.

Applicability to Iowa Law. Iowa Code section 507A.4 and 191 IAC 77 establish the State's authority over and regulatory oversight of MEWAs. Senate File 2349, signed into law by Governor Reynolds on April 2, 2018, requires the Commissioner of Insurance to adopt rules for the creation of AHPs that are consistent with the DOL's final rule. The Commissioner must submit a Notice of Intended Action to create new or revised rules to the Administrative Rules Coordinator and the Administrative Code Editor for publication in the Iowa Administrative Bulletin.

The Iowa Insurance Division also has statutory authority to invoke the emergency rulemaking process which allows rules to become effective prior to public participation.

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