

### **DOL Issues Notice of Proposed Rulemaking Expanding Association Health Plans**

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The Department of Labor (DOL) has released a Notice of Proposed Rulemaking (NPRM) that would allow for the expansion of Association Health Plans (AHPs). The proposed rules are in response to an executive order issued by President Trump instructing regulators to find ways to make it easier for small employers to join together to purchase health insurance. The new rules would treat qualified AHPs as large group health plans, allowing them to avoid some small group rules such as coverage for essential health benefits, and modified community rating. It may also be possible to offer AHPs through a self-insured arrangement. However, under the proposed rules, states will continue to have the right to regulate self-insured AHPs as Multiple Employer Welfare Arrangements (MEWAs)

The NPRM is only a notice of possible rules, and there are no actual regulatory changes until further guidance is issued. However, the NPRM contains information about key elements of what is likely to be included in future regulations.

#### **What Employer Groups Could Form an AHP?**

##### Commonality of Interest

Under existing association plan rules, employers must meet a narrow “commonality of interest” test to form an AHP that can be treated as a large group health plan. Very few groups meet this strict test, so each employer offering benefits through most existing association plans is subject to the rules applicable to that particular employer (e.g. small group or individual health insurance rules).

The DOL is proposing to expand the definition of “commonality of interest” so that more employers would be able to form large group AHPs. The NPRM proposes two different types of AHPs: An AHP could be formed by businesses in the same trade, industry, or profession, or by businesses located in the same state or a common metropolitan area. Most sole proprietors and independent contractors would also be allowed to join an AHP even if they do not have any other employees.

##### Organizational Requirements

Existing rules require that an association exist for other business purposes before it can sponsor a health plan for member employers. The proposed rules would allow an association to sponsor a plan even if the association exists solely for the purpose of offering health coverage. However, an association set up to sponsor an AHP would need to be controlled by its employer members and have a formal organizational structure (including a governing body, bylaws, etc.).

#### **Interaction with State Laws**

The NPRM suggests that AHPs will still be subject to applicable state insurance laws, including states’ right to regulate self-insured MEWAs. Because of fraudulent MEWA-related practices in the 1980s, ERISA was amended to give states more authority to regulate self-insured MEWAs. Many states impose significant financial and reporting requirements and other restrictions on these plans, making it very difficult to offer a self-insured MEWA in some jurisdictions. Interestingly, the NPRM asks for comments regarding exceptions that may be available to AHPs to avoid state MEWA regulations. How this rule unfolds will be important to AHPs that want to provide benefits through a self-insured plan.

#### **Nondiscrimination Rules**

Most current HIPAA and ACA health nondiscrimination rules would apply to AHPs. An AHP could not condition association membership on a health factor, and the AHP would need to comply with nondiscrimination rules related to eligibility, special enrollments, premiums, and other factors. The rules would also prohibit associations

from treating separate employers differently. This will limit the ability of an association to do employer-by-employer underwriting or rating.

## **Summary**

It is important to note that nothing has changed yet, and new AHPs will not be available for a while. If the proposed rule is finalized, formal guidance will need to be issued, and associations and vendors will need some time to set up these new arrangements. The expansion of AHPs may provide employers with new choices when looking to provide health insurance to their employees; but as always, the devil will be in the details. How much flexibility AHPs will be given to avoid state laws and regulations will be particularly important. The DOL comment period runs through March 6<sup>th</sup>, and additional guidance is expected later in 2018.

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