

## News

# DOL Finalizes Rescission of Association Health Plan Rule

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On April 29, 2024, the Department of Labor (“DOL”) released a final regulation (the “Final Rule”) that rescinded the Trump Administration rule that expanded the availability of association health plans (“AHPs”) (“Trump DOL Rule”). In a December 2023 [proposed regulation](#), DOL previously indicated its intent to take this action (the “Proposed Rule”).

In our [alert](#) from 2018, we described how the Trump DOL Rule would have made it easier for an AHP to qualify for single plan status under ERISA, allowed certain self-employed individuals to participate in AHPs, and permitted geographic commonality to serve as the basis for a bona fide association. By rescinding the Trump DOL Rule, analysis of an AHP’s status under ERISA will largely be based on DOL sub-regulatory guidance that preceded the Trump DOL Rule.

## Background

After DOL released the Trump DOL Rule, 11 states and the District of Columbia sued DOL, challenging the rule’s validity under the Administrative Procedure Act. In March of 2019, the District Court for the District of Columbia [vacated key provisions of the AHP Rule](#). Specifically, it found that DOL’s formulation of what constituted a “bona fide” association was overbroad and unreasonable, because, per ERISA’s statutory language, associations can only qualify as “employers” that can sponsor a benefit plan if they are acting “in the interest” of the employers in the association. The District Court determined that a shared common geography by participating employers does not ensure a sufficient commonality of interest exists to qualify as an AHP for purposes of ERISA. It also found that the Trump DOL Rule’s expansion of the definition of “employer” to include working owners without employees was inconsistent with ERISA.

DOL appealed this decision to the D.C. Circuit Court, but the appeal was still pending when President Biden succeeded President Trump in early 2021. Under the Biden Administration, DOL essentially put the appeal on hold and filed repeated status reports with the Circuit Court indicating that the matter was “under consideration.” In the preamble to the Final Rule, DOL noted that the appeal before the D.C. Circuit remains stayed. DOL submitted a status report to the D.C. Circuit on April 26, 2024 to note that the Final Rule would soon be published, after which the court ordered the

parties to file motions to govern future proceedings by May 28, 2024. On May 24, 2024, DOL filed an unopposed motion to dismiss, which the court granted on May 30, 2024.

## Final Rule

After consideration of public comments, DOL finalized the rescission of the Trump DOL Rule. The Final Rule's impacts on the regulated community should be minimal given the earlier litigation vacating key components of the Trump DOL Rule. Essentially, bona fide associations will only be able to take the position they are acting as an "ERISA employer" if they can support doing so under the guidance issued by the DOL (primarily in advisory opinions) prior to the Trump DOL Rule. The earlier DOL guidance is intensely fact-specific and only allows associations to be treated as an "employer" under limited conditions for purposes of sponsoring a single health plan (albeit a "multiple employer welfare arrangement" or "MEWA") that covers its employer members. Specifically, the DOL's analysis has focused on whether: (1) the association is a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits; (2) the employers share some employment-based nexus or genuine organizational relationship unrelated to the provision of benefits (*e.g.*, a common trade, industry, or profession); and (3) the employers that participate in a benefit program exercise control over the program, both in form and substance.

If an association does not meet DOL's test for being treated as an "employer," it could still operate a health plan, but the plan would be treated as a different type of MEWA – specifically, a MEWA whereby each participating employer is deemed to be sponsoring its own ERISA plan (note that all AHPs are still MEWAs and, therefore, subject to state law to varying degrees under ERISA's structure that provides for both federal and state regulation of MEWAs). Under the Centers for Medicare and Medicaid Services guidance (that was written in coordination with DOL), if a group health plan exists at the individual employer level, the size of each distinct individual employer participating in the arrangement determines whether that employer's coverage is subject to the small group or the large group market rules (referred to as "look through"). If "look through" applies, the association would not be able to cover small employers participating in the arrangement under a large group policy issued to the association.

Also, there will be no circumstances under which a self-employed person with no common law employees can be treated as an "employer" for purposes of participating in an AHP. Finally, the Final Rule specifically provides that it does not in any way impact the association retirement plan rule issued during the Trump administration. Therefore, association retirement plans operating under prior DOL guidance are unaffected.

## Related Issues

While the Final Rule's full rescission of the Trump DOL Rule might have little practical impact on the scope of existing AHPs in the marketplace, there is discussion in the preamble regarding possible future rulemaking that could impact MEWAs, including future guidance on the determination of what an "employer" is under ERISA and the application of HIPAA nondiscrimination rules to AHPs.

DOL asked in the Proposed Rule whether it should propose a rule that codifies its prior guidance regarding when an association can act as an "ERISA employer" (which has typically been issued through advisory opinions). However, in the preamble to the Final Rule, DOL ultimately decided it would be better to consider such changes as part of a comprehensive reevaluation of the definition of "employer" in the AHP context and would not seek to codify the pre-Trump DOL Rule guidance at this time. Additionally, DOL asked in the Proposed Rule if it should provide any new additional guidance, specifically referencing the application of HIPAA nondiscrimination rules to AHPs, or propose revised alternative criteria for AHPs. However, in the Final Rule, the DOL stated that it would not issue additional guidance at this time.

**GROOM INSIGHT:** DOL noted in the preamble to the Final Rule that it will take comments regarding future rulemaking related to the ERISA definition of "employer" under advisement. While it is not entirely clear what DOL's appetite is to conduct further rulemaking on this subject in the near future, it appears that DOL will first seek additional comments from interested parties before proceeding with a possible codification of the pre-Trump DOL Rule guidance.

If you have any questions regarding the Final Rule, please contact the authors of this alert or any of our Groom attorneys.