GROOM LAW GROUP

Publications

DOL Proposes Rescinding Prior Rule Relating to Association Health Plans

ATTORNEYS & PROFESSIONALS

Kathryn Bjornstad Amin
kamin@groom.com
202-861-2604

Lisa Campbell
lcampbell@groom.com
202-861-6612

Seth Perretta
sperretta@groom.com
202-861-6335

Malcolm Slee
mslee@groom.com
202-861-6337

Ryan C. Temme
rtemme@groom.com
202-861-6659

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On December 19, 2023, the Department of Labor ("DOL") issued a proposed rule rescinding a Trump Administration rule that expanded the availability of association health plans ("AHPs") (the "Proposed Rule").

As described in detail in our previous alert from 2018, the Trump Administration DOL AHP Rule (the "AHP Rule") would have made it easier for an AHP to qualify for single plan status under ERISA (albeit as a multiple employer welfare arrangement ("MEWA"), allowed certain self-employed individuals to participate in AHPs, and permitted geographic commonality to serve as the basis for a bona fide association. With this expansion, broader groups of individuals and small employers were able to access large group treatment if covered by a qualifying AHP.

Subsequent Litigation

After the Trump Administration DOL released the AHP Rule, eleven states and the District of Columbia sued the DOL, raising claims 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 the 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 AHP Rule's expansion of the definition of "employer" to include working owners without employees was inconsistent with ERISA.

The 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, the DOL essentially put the appeal on hold and filed repeated status reports with the Circuit Court indicating that the matter was "under consideration." The release of the Proposed Rule suggests

the DOL will almost certainly drop any appeal, although the last status report (filed with the Circuit Court on December 27, 2023) notes that the DOL is proposing to rescind the AHP Rule, but that the "rulemaking process remains ongoing."

Proposed Rule

The preamble to the Proposed Rule indicates that that the DOL considered revising the rule to strip out the provisions the District Court vacated, but concluded the AHP Rule could not be applied in any meaningful way without those provisions. However, large portions of the preamble argue against the conclusions reached by the Trump Administration DOL in support of the AHP Rule, and the preamble also states the DOL is not aware of any AHPs that currently exist in reliance of the AHP Rule. Thus, it appears the DOL may have arrived at its decision to rescind the rule in its entirety for several reasons.

If the Proposed Rule is finalized, it would seem that the impact to the regulated community should be minimal given the earlier litigation vacating key components of the AHP 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 prior to the AHP 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 MEWA) that covers its employer members. Specifically, the DOL's analysis focuses on whether the association is a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits; whether 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 whether the employers that participate in a benefit program exercise control over the program, both in form and substance.

If an association does not meet the 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 the Centers for Medicare and Medicaid Services' guidance that has been endorsed by the 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 self-employed persons can be treated as "employers" for purposes of participating in an AHP. Finally, the Proposed Rule specifically provides that it does not in any way impact the association retirement plan rule issued during the Trump administration, so association retirement plans operating under prior DOL guidance are unaffected notwithstanding any changes to DOL's positions.

Impact on Current AHPs

While the Proposed Rule's full rescission of the AHP Rule might have little practical impact on the scope of existing AHPs in the marketplace, there is discussion in the preamble that could signal a significant shift in the approach taken by the DOL with respect to AHPs that were operating prior to the AHP Rule and continue to operate today.

First, the DOL asks if it should propose a rule that codifies its prior guidance regarding when an association can act as an "ERISA employer," as referenced above (which has typically been issued through advisory opinions).

Second, the DOL asks if it should provide any new additional guidance (it specifically references the application of HIPAA nondiscrimination rules to AHPs, discussed in more detail below) or propose revised alternative criteria for AHPs. This suggests that additional guidance impacting the operation of AHPs could be forthcoming.

With regard to the application of HIPAA nondiscrimination rules to AHPs, the general starting principle (applicable to all group health plans) is that a health plan generally cannot discriminate in eligibility, benefits, or premiums against an individual based on a health factor. However, a health plan can make distinctions between groups of individuals based on bona fide employment-based classifications, provided the distinction is not directed at individual participants or beneficiaries based on a health factor.

The AHP Rule provided that an AHP whose existence was based on the expanded definitions in the AHP Rule could not treat individual employers in the AHP as distinct groups for purposes of the AHP Rule. In other words, such an AHP could not charge different employer members different premiums based on the health status of its employees and members. Very importantly, however, there was a footnote in the preamble to the AHP Rule that provided that bona fide employer groups or associations that qualified as

"single plans" based on the DOL's previous guidance are not subject to these same HIPAA nondiscrimination rules. Therefore, such plans could continue to charge different premium rates for different employers based on the specific claims experience of the employer without running afoul of HIPAA nondiscrimination.

The footnote in the Proposed Rule states:

The preamble [to the Final Rule] noted that AHPs, like other group health plans, generally may make distinctions between groups of individuals based on bona fide employment-based classifications consistent with the employer's usual business practice, provided such distinction is not directed at individual participants or beneficiaries based on a health factor… The Department notes that no inference should be drawn based on this proposal to rescind the 2018 AHP Rule as to whether treating the employees of each employer member of an AHP as a distinct group of similarly situated individuals is a bona fide employment-based classification for purposes of the HIPAA nondiscrimination rules.

GROOM INSIGHT: While not entirely clear, one reading is that the DOL is indicating that, even if the AHP Rule is ultimately rescinded, it does not intend to abandon its position that only AHPs that qualify as "single plans" under prior DOL guidance (i.e., DOL Advisory Opinions) can price the cost of coverage on an individual employer-by-employer basis. Another is that DOL may be revisiting its position on HIPAA non-discrimination and its application to multiple employer plans generally. But, given this footnote and the specific request for comments on the potential application of HIPAA non-discrimination to these types of arrangements, this is an issue that warrants close attention by all associations that offer health coverage.

GROOM INSIGHT: Notably, the preamble to the Proposed Rule veers from the DOL's typical focus of what is an "employer" under ERISA for purposes of sponsoring single employer group health plan into health policy. For example, the preamble discusses concerns about how "skinny plans" offered by AHPs might impact Medicaid unwinding, and the potential damage that AHPs might pose to the individual and small group markets. This could be a signal that the DOL is paving the way to impose more restrictions on AHPs, which could impact existing AHPs and other MEWAs.

The deadline for submitting comments on the Proposed Rule is February 20, 2024. If you are interested in making comments or have any questions about the Proposed Rule, please don't hesitate to reach out to your Groom attorney or any of the authors.