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January 9, 2018 www.groom.com

If you have questions, please contact your regular Groom attorney or one of the attorneys listed below:

Jon Breyfogle
jbreyfogle@groom.com
(202) 861-6641

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

Tamara Killion
tkillion@groom.com
(202) 861-6328

Emily Lucco
elucco@groom.com
(202) 861-9386

Seth Perretta
sperretta@groom.com
(202) 861-6600

Ryan Temme
rtemme@groom.com
(202) 861-6659

Brigen Winters
bwinters@groom.com
(202) 861-6618

DOL Proposes Sweeping Changes to Allow for Expanded Availability of Association Health Plans

On Thursday, January 4, the Department of Labor ("DOL") released a proposed rule, "Definition of 'Employer' Under Section 3(5) of ERISA—Association Health Plans" ("AHP Proposed Rule"). 83 Fed. Reg. 614 (Jan. 5, 2018). The AHP Proposed Rule, which is the result of President Trump's October 12, 2017 executive order, expands the universe of arrangements that can qualify as an association health plan ("AHP") for purposes of ERISA and also applies large group treatment to qualifying AHP coverage. The AHP Proposed Rule achieves this by broadening the criteria under ERISA for determining when employers may join together in an association that is treated as the ERISA "employer" of a single group health plan. According to the Preamble, these changes are intended to "expand employer and employee access to more affordable, high-quality coverage." **Comments are due March 6, 2018.**

The AHP Proposed Rule, if finalized, would essentially result in two classes of association-based plans: (1) association-based plans that do not meet all of the conditions of the proposal (which would be subject to "look-through" treatment, as explained further below); and (2) AHPs that meet all of the conditions of the proposal (which could then receive treatment as large group coverage for purposes of federal law, such as under the Affordable Care Act ("ACA")). Notably, entities that are considered to be "acting…indirectly in the interest" of an employer under section 3(5) of ERISA in any context other than as applied to an employer group or association sponsoring an AHP are **not** covered under the AHP Proposed Rule.

The AHP Proposed Rule does not indicate an effective or applicability date for a final rule, but because the rule is "economically significant," absent good cause for having an accelerated effective date, we expect it will not be made effective for at least 60 days after the final rule is published.

Critical provisions and issues include the following:

- **Expanded "commonality of interest" test**. The AHP Proposed Rule expands the current test to determine whether an association is the plan sponsor of group coverage by allowing any employer, including a working owner (which, as discussed in greater detail below, can be a sole proprietor who lacks any distinct common law employees), to join an AHP if
    - The employers are in the same trade, industry, line of business or profession (regardless of geographic location), **OR**
    - The employers are in geographically limited areas, such as a single state or a certain metropolitan area (even if it crosses state lines).

In addition, associations will be able to sponsor qualifying AHPs even if the association exists solely for the purpose of offering health coverage to its member employers.

- **Organizational requirement and functional control**. The AHP Proposed Rule would require the AHP to have a formal organizational structure with a governing body and bylaws (or other similar indications of formality), and – consistent with the current test – it would need to be controlled by the association's or group's employer members, including the establishment and maintenance of the group health plan itself.

- **Sole proprietors**. In a significant departure from current law, the AHP Proposed Rule allows for inclusion of sole proprietors and other business owners that do not employ other individuals (including those who lack any distinct common law employees, i.e., FormW-2 employees) in AHPs as "working owners." The Proposed AHP Rule includes a definition of "working owner" that, in part, requires that the individual either work at least 30 hours per week or 120 hours per month providing services to the trade or business, or has earned income from such trade or business that at least equals the working owner's cost of coverage for participation in the group health plan.

- **Nondiscrimination rule**. Generally, the AHP Proposed Rule prohibits conditioning employer membership in the association based on an employee's health status and requires that the AHP comply with the HIPAA/ACA nondiscrimination rules on eligibility for benefits and premiums. Notably, the AHP Proposed Rule states that the AHP cannot treat different employer members as distinct groups of similarly situated individuals for purposes of complying with the HIPAA/ACA nondiscrimination rules. This means that an AHP cannot charge specific employer members higher premiums based on an individual's health status.

- **State law interaction.** Importantly, nothing in the rule suggests that state law is otherwise preempted with respect to the proposed AHPs. As a result, it appears that states will be able to continue to regulate AHPs as they currently do with respect to multiple employer welfare arrangements ("MEWAs"). Under the AHP Proposed Rule, if an AHP meets all of the requirements, there is no "look through" at the federal level to the size of the participating employer – i.e., the entire group receives large group treatment. However, because state law continues to apply to the insurance contract (in the case of a fully insured AHP) or the AHP itself (in the case of a self-funded AHP), it appears that states could adopt rules that restrict the flexibility that AHPs may enjoy under the proposal.

- **No exemption for self-funded MEWAs**. Somewhat surprisingly, the DOL did not create an individual or class exemption from existing state regulation for self-funded MEWAs as permitted by Congress's 1983 amendments to ERISA (*see* ERISA section 514(b)(6)(B)). DOL did, however, request comments on whether to utilize this exemption authority.

- **Implications for other MEWA coverage or PEO-sponsored coverage.** The Proposed AHP Rule does **not** apply to an entity that is considered to be acting indirectly in the interest of an employer under section 3(5) of ERISA in any context other than an employer group or association sponsoring an AHP. Notably, the AHP Proposed Rule does not specifically reference PEOs or PEO-sponsored coverage, and accordingly, does not directly implicate or call into question a PEO's ability to sponsor health coverage. Additionally, the Preamble makes clear that the provisions set forth in the Proposed AHP Rule only apply to the type of AHP described therein. That said, the proposed nondiscrimination provisions may establish a precedent for other types of

coverage and may reflect the Administration's interpretation of the nondiscrimination rules in other contexts.

I. Background on Proposed Rule

A. Legal Framework

A MEWA is an arrangement established to provide welfare benefits to employees of two or more employers (unless the employers are part of the same "controlled group"). Coverage offered by associations is typically considered a MEWA.

The ACA amended the Public Health Service Act ("PHSA") to impose various insurance market reforms on health insurance issuers and group health plans. The applicability of these insurance market reforms varies based on the type of coverage and whether the coverage is sold in the small group or large group markets. Coverage sold in the large group market is exempt from many of the insurance market reforms, including the modified community rating rules, essential health benefits, and rate review.

The PHSA defines "large group market" as the health insurance market in which individuals obtain health insurance coverage through a "group health plan" maintained by a "large employer." A "large employer," in turn, is an employer that employs at least 51 employees. The PHSA defines "small group market" as the health insurance market in which individuals obtain health insurance coverage through a "group health plan" maintained by a "small employer." A "small employer" is an employer that employs at least one but not more than 50 employees.

Under current law, insurance coverage sold to, or through, arrangements comprised of groups of employers is subject to guidance by the Centers for Medicare and Medicaid Services ("CMS"). These bulletins generally adopt a "look through" approach for MEWAs. CMS Insurance Standards Bulletin (Sept. 2011); Insurance Standards Bulletin Transmittal No. 02-02 (Aug. 2002). The CMS guidance explains that a group health plan may exist at either the individual employer level or the arrangement level.

Under the guidance, if the group health plan exists at the participating employer level, the size of each individual employer participating in the arrangement determines whether that employer's coverage is subject to the small group or the large group market rules (the "look through"). CMS' view has been that for most association coverage, the group health plan exists at the individual employer level.

If the group health plan exists at the arrangement level, the arrangement coverage is considered a single group health plan, and the number of employees employed by all of the employers participating in the arrangement determines whether the coverage is subject to the small group or large group market rules.

Importantly, the PHSA definitions incorporate ERISA. For example, the PHSA's definition of "group health plan" incorporates ERISA's definition of an "employee welfare benefit plan." ERISA, in turn, defines an "employee welfare benefit plan," in pertinent part, as "any plan, fund, or program . . . established or maintained by an *employer* or by an employee organization, or by both," that was established or maintained for the purpose of providing (among other things) medical, surgical or hospital care benefits for its participants or their beneficiaries (emphasis added).

The term "employer," is defined in ERISA to include "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers

acting for an employer in such capacity." Thus, in certain circumstances, a group or association can act as an "employer" to maintain a single ERISA plan.

B. Executive Order

On October 12, 2017, President Trump issued an executive order, entitled "Promoting Healthcare Choice and Competition Across the United States" (the "Executive Order"). The Executive Order directed the DOL, within 60 days, to consider proposing rules or revising guidance to permit more employers, including small businesses, to participate in AHPs.

Specifically, the Executive Order directed the Secretary to "consider expanding the conditions that satisfy the commonality-of-interest requirements under current Department of Labor advisory opinions. . . ." It also noted that the DOL should consider ways to promote AHP formation on the basis of common geography or industry.

A set of questions and answers accompanying the Executive Order noted that these changes could result in "employers in the same line of business anywhere in the country [being able] to join together to offer healthcare coverage to their employees and any employers within a single state or a multi-state metropolitan area [being able] to join together to offer healthcare coverage to their employees." The Executive Order also contemplated both fully-insured and self-insured AHPs, and mentioned that expanding access to AHPs can help small businesses "by allowing them to group together to self-insure or to purchase large group health insurance."

II. Proposed Rule Provisions

Below, we include a summary of the key provisions of the AHP Proposed Rule.

"Commonality of Interest" Test

The AHP Proposed Rule expands the current test to determine whether an association is the employer plan sponsor of group coverage by allowing any size employer, including a working owner, to join a self-funded or insured AHP if

- The employers are in the same trade, industry, line of business or profession (regardless of geographic location), **OR**

- The employers are in geographically limited areas, such as a single state or a certain metropolitan area (even if it crosses state lines, *e.g.*, the New York Metropolitan area includes parts of NY, CT, and NJ).

Importantly, under the AHP Proposed Rule, associations will be able to sponsor plans even if the association exists solely for the purpose of offering health coverage to its employer members. DOL believes that a sufficient employment relationship/employment-based nexus is required in other aspects of the rule (*e.g.*, the nondiscrimination rules) to meet the requirements of ERISA. In addition, the Preamble states that the group or association sponsoring the plan can be newly formed, rather than pre-existing. The AHP Proposed Rule would not restrict the size of the employers that are able to participate in the AHP.

The DOL asks for comments on these issues, including whether to establish additional bases on which an association of employers could show commonality of interest sufficient to create an association plan; how to clarify the definition

of a "metropolitan area"; and whether associations could manipulate geographic classification to avoid offering coverage to employers in more costly areas or industries.

> **GROOM Comment**: Under *current law*, for an association to be treated as the "employer," in part, the association must exist for a purpose other than merely offering insurance and employers must be in the same industry. In a significant departure, the AHP Proposed Rule – if finalized in its current form – would permit an association to exist for the sole purpose of sponsoring a group health plan for its employer members. In addition, under the AHP Proposed Rule, AHPs would be available either to employers in the same industry (the current standard) or employers in the same geographic location (regardless of industry). The DOL appears to be on firm legal ground here, because the statute does not contain a commonality of interest requirement.

Organizational Requirement and Functional Control

The AHP Proposed Rule would require the AHP to have a formal organizational structure with a governing body and bylaws (or other similar indications of formality), and it would need to be controlled by the association's or group's employer members, including the establishment and maintenance of the group health plan itself, either directly or through the regular election of directors, officers, or other representatives.

The DOL notes that this requirement is necessary to satisfy ERISA's requirement that the group or association act "in the interest of" the direct employers in relation to the plan, and to prevent formation of commercial enterprises that merely operate similar to traditional insurers selling insurance in the group market.

> **GROOM Comment**: This requirement is consistent with current law. Indeed, the Preamble notes that an employer group or association that meets the current control requirement should also be treated as meeting the control requirement in the AHP Proposed Rule. Significantly, this may make it more difficult for entrepreneurial MEWAs (i.e., associations that exist for no other purpose than offering health insurance) to utilize the proposal for purposes of accessing large group plan treatment at the federal level.

"Working Owners" Given Dual Employer/Employee Status for Purposes of AHPs

Significantly, the AHP Proposed Rule provides that "working owners," such as sole proprietors and other self-employed individuals (even if they have no common law employees), can be treated as both employers who can participate in an AHP, and employees who can be covered by the AHP.

The Proposed AHP Rule defines a "working owner" as any individual:

1. who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including partners and other self-employed individuals;

2. who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business;

3. who is **not** eligible to participate in any subsidized group health plan maintained by any other employer of the individual or of the spouse of the individual; **AND**

4. who either works at least 30 hours per week or at least 120 hours per month providing personal services to the trade or business **or** has earned 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.

The group or association sponsoring the group health plan may reasonably rely on written representations from the individual seeking to participate as a working owner as a basis for concluding that these conditions are satisfied.

The Preamble states that an AHP can consist of participants who are (1) common law employees, (2) common law employees and working owners, or (3) only working owners. In this way, the Preamble makes clear that an AHP can consist solely of working owners.

The DOL seeks comments on whether the proposed definition of "working owner" is workable, and whether additional clarifications would be helpful; whether different criteria would be more appropriate to ensure that "working owners" are engaged in a legitimate trade or business with an employment relationship; and the requirement that the individual must not be eligible for other subsidized group health coverage under another employer or spouse's employer.

> **GROOM Comment:** Expanding AHPs to include sole proprietors and self-employed individuals – and even permitting an AHP to consist entirely of such individuals – is a significant departure from past DOL guidance. ERISA's definition of an "employee welfare benefit plan" is premised on the existence of an employer/employee relationship: it defines an "employee welfare benefit plan" as a plan established or maintained by an "employer" for the purpose of providing benefits to its participants (i.e., its "employees" or "former employees"). And the Supreme Court has held that whether an individual is an "employee" for purposes of ERISA generally must be determined by applying common law principles. *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992).
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> In addition, this proposal could have a significant negative impact on the individual insurance markets because it could divert relatively healthier individuals from these markets to AHPs.

Nondiscrimination

The AHP Proposed Rule requires that the group or association must not condition membership based on any health factor and applies the HIPAA/ACA health nondiscrimination rules to AHPs. Specifically, under the AHP Proposed Rule, membership in the group or association cannot be based on any health factor; the group or association must not establish eligibility rules that discriminate on the basis of a health factor; and the group or association must not discriminate with regard to premiums based on health factors.

As the Preamble notes, the HIPAA/ACA nondiscrimination rules prohibit health discrimination *within* groups of similarly situated individuals, but they do not prohibit discrimination *across* different groups of similarly situated individuals. Significantly, the AHP Proposed Rule states that in applying these nondiscrimination provisions, the group or association may not treat different employer members of the group or association as distinct groups of similarly situated individuals. In this way, the AHP Proposed Rule prohibits eligibility distinctions and premium differences between individual employers based on health status (including claims experience, for example). However, the proposal does allow associations to set rates based on bona fide employment-based classifications (such as part-time or full-time), geography, or based on industry type.

The DOL requests comments on whether this structure would create involuntary cross-subsidization across firms that would discourage the formation and use of AHPs; whether the non-discrimination rules balance risk selection issues with the stability of the AHP market and the ability of employers to innovate; and whether these safeguards and requirements are sufficient to distinguish AHPs from commercial insurance.

> **GROOM Comment:** The proposal's nondiscrimination provisions appear to require that AHPs seeking to fit within the rule apply the HIPAA/ACA nondiscrimination rules at the association or plan level – rather than at the level of each participating employer. If finalized, these nondiscrimination provisions might disrupt the current market practices of some associations.

State Law Interaction

Importantly, nothing in the rule suggests that state law is otherwise preempted with respect to the proposed AHPs. As a result, states can continue to regulate AHPs as they currently do MEWAs.

Under ERISA section 514(b)(6), if the MEWA is self-insured, it may be subject to state insurance laws that are not inconsistent with Title I of ERISA (for example, ERISA's fiduciary rules will supersede any state law that is inconsistent with Title I of ERISA). As a result, states can still regulate self-insured AHPs (to the extent not inconsistent with Title I of ERISA), which could include prohibiting self-insured AHPs from operating, otherwise regulating self-insured AHPs, or expressly permitting self-insured AHPs to operate.

The DOL did not create an individual or class exemption from existing state regulation for self-funded MEWAs, but it did request comments on the relative merits of possible exemption approaches.

In addition, the Preamble specifically notes that the proposed rules would not modify the states' ability to regulate health insurance issuers or the insurance policies they sell to AHPs. Under ERISA's insurance savings clause, states have the ability to regulate the insurance contract sold to the MEWA. Thus, it appears that a state could effectively regulate any flexibility that these insured AHPs may have enjoyed under the proposal, including adopting "look-through" requirements.

Implications for other MEWA coverage or PEO-sponsored coverage

The AHP Proposed Rule, if finalized, would essentially result in different classes of association-based plans: (1) association-based plans that do not meet all of the conditions of the proposal (which would be subject to "look-through" treatment); and (2) AHPs that meet all of the conditions of the proposal (which could then receive treatment as single group health plan for purposes of federal law, such as under the ACA).

A third class of MEWAs or pooled arrangements that may continue to exist under the current ERISA framework are entities considered to be acting indirectly in the interest of the employer. In the Preamble, DOL clearly states that entities that are considered to be "acting…indirectly in the interest" of an employer under section 3(5) of ERISA in any context other than as applied to an employer group or association sponsoring an AHP are **not** covered under the AHP Proposed Rule. This would allow certain entities that are considered to be acting indirectly in the interest of the employer to exist without meeting the new AHP requirements. However, it is less clear whether such entities would need to comply with the HIPAA/ACA nondiscrimination requirements, as interpreted under the AHP Proposed Rule.

> **GROOM Comment:** The proposal allows for different kinds of AHPs, which would be subject to varying rules depending on whether the entity meets the conditions established in the proposal. For example, AHPs that

do not meet the new requirements could continue to exist, but would **not** have the benefit of being treated as a single large group plan and, therefore, the "look-through" rule would apply. Conversely, AHPs that meet the new requirements could be treated as a single group health plan without "look-through." However, other entities, such as PEOs, considered to be acting indirectly in the interest of the employer could continue to exist outside the AHP Proposed Rule if they are not an employer group or association sponsoring an AHP. The nondiscrimination requirements in ERISA section 702 apply to group health plans offering health coverage, and based on the AHP Proposed Rule, it appears as though DOL may consider the interpretation of the nondiscrimination requirements as it relates to eligibility for coverage and premium rating to apply broadly, and not only to the new category of AHPs that are allowed for under this rule.

III. Conclusion

The AHP Proposed Rule proposes sweeping changes to AHP coverage. One of the most significant changes is broadening the criteria for determining when employers may join together in an association that is treated as the ERISA "employer" of a single group health plan, including allowing employers of unrelated industries to join an AHP in a certain geographic region. In addition, the AHP Proposed Rule proposes allowing sole proprietors to join AHPs, which is a major departure from longstanding DOL ERISA guidance. Finally, under the AHP Proposed Rule, states can continue to regulate AHPs as they currently do MEWAs, which would continue the patchwork of state regulation of AHPs and potentially eliminate the flexibility provided under the AHP Proposed Rule in certain states. With comments due in early March, we expect that the rule would likely be finalized in late Spring/early Summer, allowing AHPs to potentially take advantage of this rule as early as late Summer/early Fall, unless DOL designates a different applicability date.