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DOL Finalizes Association Health Plan Rule, Allowing for Expanded Availability of Association Health Plans

On June 19, the Department of Labor ("DOL") released a final rule, "Definition of 'Employer' Under Section 3(5) of ERISA—Association Health Plans" ("AHP Final Rule"). 83 Fed. Reg. 28912 (June 21, 2018). The AHP Final Rule – which largely follows the proposed rule – 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 Final 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 (and by allowing certain self-employed persons to be treated as employers for this purpose). According to the Preamble, the AHP Final Rule "facilitates the adoption and administration of AHPs and expands access to affordable health coverage, especially for employees of small employers and certain self-employed individuals."

Significantly, the AHP Final Rule creates "two tracks" for AHPs, by allowing both new and existing associations to sponsor AHPs under either the current set of DOL sub-regulatory guidance, or the new AHP Final Rule. The most important consequence for federal law purposes is that AHPs that qualify under existing DOL guidance (limited to the same industry and no "working owners," i.e., no self-employed persons) may be able to continue to set premium rates employer-by-employer based on the claims experience of each employer.

Critical issues or changes from the proposed rule include the following:

- **Finalizes expanded "commonality of interest" test**. The AHP Final Rule largely finalizes the proposed rule's expanded test to determine whether an association is the plan sponsor of group coverage by allowing any employer, including a "working owner," (i.e., certain self-employed persons) 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 a departure from the proposed rule, requires associations to have at least one "substantial business purpose" unrelated to offering health coverage.** Under the AHP Final Rule, the primary purpose of the group or association may be to offer and provide health coverage to its employer members and their employees; however – in a departure from the proposed rule – the group or association also must have at least one "substantial business purpose" unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees.

- **Finalizes inclusion of sole proprietors in AHPs**. In a significant departure from current law, the AHP Final Rule allows for inclusion in AHPs 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) as "working owners." The Final AHP Rule includes a definition of "working owner" that, in part, requires the individual either (i) work at least 20 hours per week or 80 hours per month providing services to the trade or business – a reduction in the number of hours set forth in the proposed rule, or (ii) or have 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.

- **Relaxes applicable nondiscrimination rule**. Generally, like the proposed rule, the AHP Final 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 Final 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 that sponsors coverage under the new rule cannot charge specific employer members higher premiums based on an individual's health status. However, the AHP Final Rule provides guidance indicating that age and gender are permissible rating criteria. Additionally, because of the "two tracks" noted above, AHPs that can qualify under the existing DOL sub-regulatory guidance will have additional flexibility regarding the nondiscrimination standards.

    - **Age and gender.** The Preamble (in the regulatory impact section) states that age and gender are not health factors and therefore can be considered in rating. This is a significant interpretive choice by the Department in that the Department could potentially have interpreted age and gender as close proxies for health status, and thus prohibited their use in employer by employer rate setting. Note that other federal or state laws may prohibit rating based on age and/or gender and the Agencies expressly declined to opine on the applicability of other laws, including nondiscrimination laws, on AHPs.

    - **AHPs that rely on prior guidance.** Notably, with respect to AHPs that can rely on existing DOL sub-regulatory guidance, the Preamble indicates that employer-by-employer rating based on health experience is permitted under existing HIPAA nondiscrimination rules. This is a significant interpretive issue, and one that creates much more flexibility in rating practices for AHPs that rely on pre-existing DOL guidance.

- **Creates two tracks for AHPs**. In a significant change from the proposed rule, the AHP Final Rule creates "two tracks" for AHPs, by allowing both new and existing associations to sponsor AHPs under either the current set of DOL sub-regulatory guidance, or the new regulation. It appears the Department chose this option in lieu of "grandfathering" or "transitioning" existing AHPs formed under the existing DOL sub-regulatory guidance.

- **Confirms applicability of state law.** In the Preamble, DOL states that the final rule does not modify or otherwise limit existing state authority as established under section 514 of ERISA. Thus, states will be able to continue to regulate AHPs as they currently do with respect to multiple employer welfare arrangements ("MEWAs"). This is a major feature of the final rule because the advocates of expansive authorization for AHPs sought a uniform federal standard. But the Final Rule preserves the status quo and allows states to regulate AHPs, apparently in the same manner in which they regulate other MEWAs.

- Under the AHP Final 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), states could adopt rules that restrict the flexibility that AHPs may enjoy under the rule.

- **Permits open enrollment periods.** The Preamble clarifies that AHPs are permitted to use open enrollment periods. This will be an important mechanism for AHPs to control adverse selection risk.

- **Adds severability provision.** The AHP Final Rule adds a severability provision stating that individual provisions in the final rule are independent of, and severable from, other provisions of the final rule. DOL may be anticipating a possible Administrative Procedure Act challenge to the rule.

- **Does not apply to other MEWA coverage or PEO-sponsored coverage.** The AHP Final 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, like the proposed rule, the AHP Final 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.

- **Staggers applicability dates.** The AHP Final Rule will take effect on August 20, 2018, which is 60 days after publication. The applicability dates are staggered as follows:

  - **September 1, 2018:** Applicability date for fully-insured AHPs.

  - **January 1, 2019:** Applicability date for *existing* self-insured AHPs that are in compliance with the Department's previous sub-regulatory guidance on bona fide groups or associations, and that choose to expand the group or association and its plan pursuant to the terms of the AHP Final Rule.

  - **April 1, 2019:** Applicability date for *new* self-insured AHPs formed pursuant to the final rule.

I. Background on AHP Final 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"). A plan offered by associations to employer members of that association 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"). This guidance generally adopts a "look through" approach for MEWAs. See, e.g., 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. Association coverage was only treated as existing at the arrangement level if the association of employers was sponsoring the group health plan and the association itself was deemed the "employer."

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 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 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."

C. Proposed Rule

On January 5, 2018, DOL published a proposed rule in response to President Trump's October 12, 2017 executive order. For additional information about the proposed rule, please consult our January 9, 2018, client alert, available at: https://www.groom.com/resources/dol-proposes-sweeping-changes-allow-expanded-availability-association-health-plans/

II. Final Rule Provisions

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

"Commonality of Interest" Test

The AHP Final Rule finalizes the proposed rule's "commonality of interest" test without substantial change. Specifically, the AHP Final 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; **OR**
- Each employer has a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area (even if the metropolitan area includes more than one State).

The Preamble states that the Department intends for these terms to be construed broadly to expand employer and employee access to AHP coverage. The Preamble also states that DOL will consider the use of any generally-accepted classification system of the sort identified by the commenters above, as sufficient to meet the commonality condition in the AHP Final Rule. At the same time, the AHP Final Rule adds a subterfuge provision, prohibiting the standards from being implemented in a manner that is a subterfuge for discrimination.

> **GROOM COMMENT**: This provision marks a significant departure from DOL's existing sub-regulatory guidance, which restricts AHPs to employers in the same industry. Under the AHP Final Rule, AHPs may be made available either to employers in the same industry (the current standard) or employers in the same geographic location (regardless of industry).

Substantial Business Purpose Unrelated to Offering Health Coverage

Under the proposed rule, associations would have been able to sponsor an AHP even if the association existed solely for the purpose of offering health coverage to its employer members. Under the AHP Final Rule, the primary purpose of the group or association may be to offer and provide health coverage to its employer members and their employees. However, the group or association also must have *at least one "substantial business purpose" unrelated to offering and providing health coverage* or other employee benefits to its employer members and their employees.

The AHP Final Rule provides a safe harbor for this purpose. Under the safe harbor, a "substantial business purpose" is considered to exist if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan. A "business purpose" includes promoting common business interests of its members or the common economic interests in a given trade or employer community, and is not required to be a for-profit activity.

GROOM COMMENT: This provision is very similar to DOL's existing sub-regulatory guidance, which requires the association to exist for a purpose other than merely offering insurance. This will make it difficult for entrepreneurial MEWAs (i.e., associations established solely for the purpose of generating profits through the offering of health insurance) to utilize the rule for purposes of accessing large group plan treatment at the federal level.

Organizational Requirement and Functional Control

The AHP Final Rule retains the proposed rule's requirement that the group or organization have a formal organizational structure with a governing body and bylaws (or other similar indications of formality). The AHP Final Rule also largely retains the proposed rule's provisions regarding control, requiring that the functions and activities of the group or association are controlled by its employer members, and the group's or association's employer members that participate in the AHP control the AHP. The AHP Final Rule adds that control must be present both in form and in substance. Whether the requisite control exists is determined under a facts and circumstances test.

In the Preamble, DOL explains that the following factors are particularly relevant:

1. whether employer members regularly nominate and elect directors, officers, trustees, or other similar persons that constitute the governing body or authority of the employer group or association and plan;

2. whether employer members have authority to remove any such director, officer, trustees, or other similar person with or without cause; and

3. whether employer members that participate in the plan have the authority and opportunity to approve or veto decisions or activities which relate to the formation, design, amendment, and termination of the plan, for example, material amendments to the plan, including changes in coverage, benefits, and premiums.

The Preamble states that DOL ordinarily will consider sufficient control to be established if these three conditions are met.

GROOM COMMENT: This requirement is consistent with current law. Like the requirement to have a substantial business purpose unrelated to health insurance, this may also make it more difficult for entrepreneurial MEWAs to utilize the rule for purposes of accessing large group plan treatment at the federal level.

Association Cannot Be Controlled by, Or Be A, Health Insurance Issuer

The AHP Final Rule finalizes the proposed rule's requirement that the group/association cannot be a health insurance issuer, or owned or controlled by a health insurance issuer. It also adds that the group/association cannot be owned or controlled by a subsidiary or affiliate of a health insurance issuer. The Preamble also indicates that other health care related entities are also precluded from sponsoring an AHP, such as a hospital or provider network. However, a health insurance issuer can participate as an employer member of a bona fide association of insurers that sponsors an AHP, and a group or association of health insurance issuers may also sponsor an AHP for the benefit of their own employees (i.e., in their capacity as employers).

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

Like the proposed rule, the AHP Final 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 AHP Final 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; **AND**

3. who either works at least 20 hours per week or at least 80 hours per month providing personal services to the trade or business (a reduction from 30 hours per week/120 hours per month in the proposed rule) **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.

> **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. In addition, this provision could have a significant negative impact on the individual insurance markets because it could divert relatively healthier individuals from these markets to AHPs.

The AHP Final Rule removes the proposed rule's requirement that an individual may not be eligible to participate in any subsidized group health plan maintained by any other employer of the individual or the individual's spouse. It also removes the requirement for an attestation of eligibility from working owners, but clarifies that plan fiduciaries have a duty to reasonably determine that the eligibility conditions are satisfied and monitor continued eligibility.

Significantly, the Preamble states that AHPs *may* define eligibility criteria in such a way that excludes working owners. In addition, if AHPs decide to include working owners, they can set criteria for working owner participants that are more stringent than the minimum criteria in the final rule, provided such criteria are consistent with the applicable nondiscrimination provisions.

Two Tracks for AHPs

The AHP Final Rule creates "two tracks" for AHPs, by allowing both new and existing associations to sponsor AHPs under either (1) the current set of DOL sub-regulatory guidance or (2) the AHP Final Rule. Critically, this allows new AHPs to operate pursuant to either this new rule or the Department's pre-rule guidance, rather than simply grandfathering existing AHPs to continue operating as before, and ensures that new AHPs can compete with existing ones on an equal footing.

The existing sub-regulatory DOL guidance was largely issued through advisory opinions, and applied a facts-and-circumstances test in determining whether a group or association of employers could sponsor an AHP. DOL's analysis typically focused on whether the association was a bona fide organization with business/organizational purposes and functions unrelated to the provision of benefits; whether the employers shared some employment-based nexus or genuine organizational relationship unrelated to the provision of benefits; and whether the employers that participated in a benefit program exercised control over the program, both in form and substance.

GROOM COMMENT: Perhaps the most important consequence for federal law purposes is that AHPs that qualify under the existing sub-regulatory DOL guidance (limited to the same industry and no working owners) may be able to continue to set premium rates employer by employer based on claims experience of each employer, as discussed below under "Nondiscrimination." However, relying on the existing DOL guidance will present more risk for some associations, since it is not based on a "bright line" rule, but is rather based on a facts and circumstances test. Whether or not DOL's facts-and-circumstances test is met likely will not be clear in many circumstances.

Nondiscrimination

The AHP Final Rule finalizes the proposed rule's requirement 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, 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, like the proposed rule, the AHP Final 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 Final Rule prohibits eligibility distinctions and premium differences between individual employers based on health status (including claims experience, for example).

However, the Preamble does clarify that distinctions based on a factor other than a health factor are permitted, provided they are not directed at individual participants or beneficiaries based on a health factor of one or more of those individuals. The Preamble specifically lists industry, occupation, and geography as permissible non-health factors. Significantly, age and gender are also not health factors.

Notably, with respect to AHPs that rely on the existing sub-regulatory DOL guidance (see the "Two Tracks" above), the preamble suggests that employer-by-employer rating based on health experience may be permitted under existing HIPAA nondiscrimination rules.

GROOM COMMENT: It is significant that the Preamble suggests that age and gender may be permissible non-health distinctions. It is also significant that with respect to AHPs that rely on the existing sub-regulatory DOL guidance – rather than the new AHP Final Rule – it appears that employer-by-employer rating based on health experience may be permitted.

State Law Interaction

The Preamble states that the final rule does not modify or otherwise limit existing State authority as established under section 514 of ERISA. If an AHP is fully insured, ERISA section 514(b)(6)(A)(i) provides that State laws that regulate the maintenance of specified contribution and reserve levels (and that enforce those standards) may apply, and State insurance laws are generally saved from preemption when applied to health insurance issuers that sell policies to AHPs and when applied to insurance policies that AHPs purchase to provide benefits.

In the case of fully-insured AHPs, the Preamble states that ERISA section 514(b)(6) clearly enables States to subject AHPs to licensing, registration, certification, financial reporting, examination, audit and any other requirement of State insurance law necessary to ensure compliance with the State insurance reserves, contributions and funding obligations.

In addition, the Preamble states that if an AHP established pursuant to this final rule is not fully insured, then, under section 514(b)(6)(A)(ii) of ERISA, any State law that regulates insurance may apply to the AHP to the extent that such State law is "not inconsistent" with 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 Preamble does leave the door open to future action and notes that ERISA section 514(b)(6) provides a potential future mechanism for preempting state insurance laws that go too far in regulating non-fully-insured AHPs in ways that interfere with the important policy goals advanced by the Final AHP Rule.

Implications for other MEWA coverage or PEO-sponsored coverage

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 Final Rule. This would allow certain entities that are considered to be acting indirectly in the interest of the employer – such as PEOs – to exist without meeting the new AHP requirements.

III. Conclusion

The AHP Final Rule finalizes 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 Final Rule allows sole proprietors to join AHPs, which is a major departure from longstanding DOL ERISA guidance.

Parts of the AHP Final Rule do impose restrictions on AHP coverage. Associations that sponsor AHPs must have at least one substantial business purpose unrelated to offering health coverage, and associations must have an organizational structure and be controlled by their members. Nondiscrimination provisions prohibit employer-by-employer rating based on health experience, age and gender appear to be permissible rating factors (absent other federal or state law prohibitions), and associations that rely on DOL's prior sub-regulatory guidance rather than this rule can apparently continue to rate employer-by-employer based on health experience. Finally, under the AHP Final Rule, states can continue to regulate AHPs as they currently do MEWAs, which will continue the patchwork of state regulation of AHPs and potentially eliminate the flexibility provided under the AHP Final Rule in certain states.