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Federal District Court Vacates Key Provisions of DOL's Association Health Plan Rule

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On March 28, a federal district court – the District Court for the District of Columbia – vacated the key provisions of the Department of Labor's ("DOL") final rule, "Definition of 'Employer' Under Section 3(5) of ERISA—Association Health Plans" ("AHP Final Rule"). *New York v. United States Dep't of Labor*, No. CV 18-1747, 2019 WL 1410370 (D.D.C. Mar. 28, 2019). The AHP Final Rule, finalized in June 2018, was a cornerstone of President Trump's health care policy. The DOL issued the AHP Final Rule in response to the President's 2017 Executive Order, which directed the DOL to expand access to AHPs in order "to avoid many of the [Affordable Care Act's ("ACA")] costly requirements." Exec. Order 13813, 82 Fed. Reg. at 48385. The AHP Final Rule expands the universe of arrangements that can qualify as an AHP for purposes of ERISA and applies large group treatment at the federal level to qualifying AHP coverage.

In response to the AHP Final Rule, eleven states and the District of Columbia (the "States") sued the DOL, raising claims under the Administrative Procedure Act ("APA"). The States argued that the AHP Final Rule's bona fide association and working owner provisions conflict with the text and purpose of the ACA and ERISA and exceed DOL's statutory authority and, as such, the AHP Final Rule is arbitrary and capricious under the APA.

The Court agreed with the States. It found that the DOL unreasonably expanded the definition of "employer" to include associations of disparate employers (connected only by common geography). The Court also found the DOL's inclusion of working owners (*i.e.*, owners without common law employees) as "employers" to be unreasonable and contrary to ERISA.

GROOM COMMENT: *The Court's conclusion on the working owner provision is not entirely surprising, as many commenters had thought that the DOL position allowing sole proprietors was aggressive. Many had viewed the DOL's position on commonality – allowing unrelated employers in a common geography to form an AHP – as more supportable, particularly under the deferential standard applied by courts to agency rulemaking.*

Key takeaways from (and questions raised by) the Court's decision include the following:

- **Court vacated "bona fide association" and working owner provisions.** The Court vacated the key provisions of the AHP Final Rule, the "bona fide association" and working owner provisions. It appears that the only provision left standing is the nondiscrimination rule. We note that vacatur is presumptively national in scope. As such, it would have the effect of setting aside the AHP Final Rule nationwide.
- **Court remanded to the DOL to consider severability.** The Court noted that the AHP Final Rule includes a severability provision, and remanded to the DOL to consider how the severability provision affects the remaining parts of the AHP Final Rule.
- **No stay – decision effective immediately.** The decision was not stayed by the District Court. We would expect that the Department of Justice will seek a stay either while it appeals the Court's decision, or in the event that DOL takes up the severability issue on remand.
- **Appealability.** Generally, when a case is remanded to an agency, the agency cannot appeal, because the decision is not final. There are exceptions to the general rule. We expect that the DOL is considering all of the available options and assume they will seek an appeal due to the uncertainty created by the decision and the limited substantive discretion they have if they were to accept the remand.
- **Potential federal and/or state nonenforcement policies.** With respect to insured association coverage under the AHP Final Rule, it is possible that the Department of Health and Human Services ("HHS") or state departments of insurance could provide "non-enforcement" relief from the ACA market rules that will spring back into effect based on the challenged provisions of the AHP Final Rule being found invalid and there is no stay of the decision.

Court's Decision

The Court applied *Chevron* deference to the DOL's interpretation of "employer" in ERISA. The *Chevron* framework consists of two steps. First, courts determine whether the statute is ambiguous. If the statute is ambiguous, courts consider whether the agency's interpretation is reasonable. Here, the Court found that ERISA's definition of "employer" is ambiguous, so the Court moved to the next question: whether the DOL's interpretation is reasonable. *United States Dep't of Labor*, 2019 WL 1410370, at *10-11.

The Court concluded that the AHP Final Rule does not reasonably interpret ERISA, because it "stretches the definitions of 'employer' beyond what the statute can bear." *Id.* at *11. The Court reached four conclusions:

A. ERISA limits its scope to benefit plans arising from employment relationships.

The Court explained that ERISA regulates *only* benefit plans arising from an employment relationship. It is not intended to "expand citizen access to healthcare benefits outside of an employment relationship" or to "directly regulate commercial healthcare insurance providers." *Id.*

B. Only associations acting "in the interest of" employers can qualify as ERISA employers.

The Court explained that ERISA authorizes some employer associations to qualify as "employers" who can sponsor an employee benefit plan, but only if they act "in the interest of" an employer. The Court noted that the legislative history of ERISA reveals Congress's intent that entrepreneurs selling insurance for a profit to unrelated groups is outside of ERISA's scope. *Id.* at *12.

C. The AHP Final Rule's test for bona fide associations is not reasonable.

The Court considered whether the three criteria that the DOL adopted for determining which associations are "bona fide" – purpose, commonality of interest, and control – place "reasonable constraints" on the types of associations that act "in the interest of" employers. *Id.* at *13. Ultimately, the Court concluded that the bona fide association criteria fails to constrain bona fide associations to those acting "in the interest of" employers. The Court therefore held that this was not a reasonable interpretation of ERISA. *Id.* at *17.

The Court's discussion of "commonality of interest" is probably the most crucial aspect of its analysis because it is the primary means for expanding the availability of association coverage. Under the AHP Final Rule, commonality of interest can be met in one of two ways: (1) employers must either share a common "trade, industry, line of business, or profession," or (2) each employer must have "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)." *Id.* at *14. The States sued over the latter requirement, common geography.

The Court concluded that common geography does not ensure that sponsoring associations share a commonality of interest and, therefore, creates no "meaningful limit" on these associations. *Id.* at *15. The Court pointed out that the DOL did not provide a rationale that would connect geography and common employer interest. The DOL failed to explain how geography furthers the ERISA requirement that associations act "in the interest of employers," or why employers with a place of business in a state would share common interests. In the Court's view, geography is not a "logical proxy" for common interest. *Id.* at *14.

The Court found the DOL's choice of geography as an indicator of common interest especially perplexing in light of the other indicators the DOL rejected. The rejected indicators included ownership characteristics (*e.g.*, association of female or minority owners), business models, size of business, and shared religious and moral beliefs. The DOL rejected these indicators because it would be "impossible to define or limit." But the Court concluded that these same concerns apply equally to the DOL's geography test. *Id.* at *15.

GROOM COMMENT: *As the Court noted, ERISA authorizes some employer associations to qualify as "employers" who can sponsor an employee benefit plan, but only if they act "indirectly in the interest of" an employer. Yet ERISA itself does not require "commonality of interest." Courts and previous DOL guidance created the "commonality of interest" test as a way to distinguish an employee benefit plan from other entities that underwrite benefits or provide administrative services, e.g., typical commercial insurance arrangements. Although geography alone may be an imperfect proxy for shared employer interests, one could certainly imagine that employers in the same geographic area do share many common interests, particularly with respect to health care, including provider networks, the availability of urgent and emergency services, and the ability to leverage group size in order to bargain effectively with providers, not to mention more general business concerns like similar state and local tax codes and regulatory regimes. Given the traditionally deferential standards of Chevron review, this may be an area where the decision is more vulnerable on appeal than the Court's "working owner" conclusion.*

D. The AHP Final Rule's expansion of "employer" to include working owners is not reasonable.

Finally, the Court concluded that the AHP Final Rule's expansion of the definition of "employer" to include working owners without employees is "contrary to the text of ERISA." As the Court explained, the AHP Final Rule allows a working owner of a trade or business *without common law employees* to qualify as both an employer and as an employee of the trade or business, thus allowing them to qualify as both "employer members" of bona fide associations and as their owner "employees" that can join bona fide associations and participate in the AHP. The Court explained that the AHP Final Rule contemplates that an AHP could consist *solely* of working owners without common law employees. *Id.* at *17.

The Court concluded that a working owner without employees is "beyond ERISA's scope" when a sole proprietor establishes a benefit plan for himself. Moreover, adding a working owner without employees to an association does not change the sole proprietor's status under ERISA: it cannot "transform" a sole proprietor without employees into either an "employer" or "employee" under ERISA. *Id.* at *17-18.

The Court looked to both the text of ERISA and Supreme Court precedent to reach its conclusion. Looking first to the statutory text, the Court noted that the definition of "employee" under ERISA is limited to an "individual employed by an employer." The Court found that the text anticipates a relationship between two parties, employer and employee. Congress would not have drafted the statute with the intent to regulate a person's relationship with himself. The Court also looked to the Supreme Court's decision in *Yates*, in which the Supreme Court held that under ERISA, a working owner may have dual status as both an employee and an employer. *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004). The Court here explained that, critically, Yates' plan had always included at least one person *other than* the working owner and his wife. The *Yates* Court explained that plans that cover *only* sole owners and their spouses fall outside of ERISA, but plans that cover working owners *and* their non-working owner employees fall within ERISA. This "further confirm[ed]" the Court's conclusion that ERISA does not cover working owners without employees. *Id.* at *18.

GROOM COMMENT: *Many commenters had thought that the DOL position allowing sole proprietors was aggressive, given the statutory text and Supreme Court precedent. This view is highlighted in particular by the fact that the AHP Final Rule would permit an association consisting entirely of working owners without any common law employees. A more consistent approach under Yates would have been to permit working owners who are members of an association, to join the AHP, only if the AHP also covered the common law employees of other association members.*