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DOL Proposes Rules Expanding Access to Association Health Plans

On January 5, 2018, the Department of Labor (DOL) issued Proposed Rules that broaden the criteria under the Employee Retirement Income Security Act (ERISA) for determining when and how employers may form an association for the purpose of offering a group health plan.

The intent of the Proposed Rules is to expand access to group health coverage by permitting businesses, sole proprietors and self-employed individuals to form association health plans (AHPs) based on common geography, industry or trade. Under the Proposed Rules, an association that meets certain requirements would be treated as the "employer" sponsor of a multiple-employer "group health plan" under ERISA. In short, the Proposed Rules broaden the conditions under which an association can act as an "employer" for the purpose of offering a group health plan.

Regulatory Authority

According to DOL guidance, the Proposed Rules would not change the status of AHPs as large group plans and multiple employer welfare plans (MEWAs) under ERISA, the Affordable Care Act and state laws. AHPs will continue to be subject to state insurance regulation because ERISA classifies AHPs as MEWAs. In this regard, if an AHP is not fully insured, then any state insurance law that regulates insurance may apply to the AHP to the extent that such state law is not inconsistent with ERISA.[1] If an AHP is fully insured, only those state insurance laws that regulate contributions and reserve levels may apply to the AHP.[2] The DOL is seeking comment from the states, as well as the National Association of Insurance Commissioners, regarding its assessment of applicable laws.

Association Requirements

Formerly, under prior interpretations, the DOL had limited single "multiple employer" plans to employer groups or associations where a close economic or representation "nexus" to the employers participating in the plan existed. Further, employer groups were prohibited from forming associations for the sole purpose of providing group health coverage.

Under the Proposed Rules, an association may establish a group health plan if it meets the following requirements:

1. The association exists for the purpose of sponsoring a group health plan for its employer members
2. Each member of the association acts directly as employer of at least one employee that participates in the plan
3. The association has an organizational structure with a governing body, bylaws or other indicia of formality
4. The functions of the association – including maintenance of the group health plan – are controlled by the employer members, with its members required to elect directors, officers or other representatives of the association
5. The employer members have a commonality of interest, such as being in the same trade, industry, line of business or profession, or have a principal place of business in the same state or metropolitan area
6. The group health coverage is not available other than to employees, former employees and family members or other beneficiaries
7. The association and health coverage offered comply with the nondiscrimination provisions, including eligibility for coverage
8. The association is not a health insurance issuer or controlled by one[3]

Dual Treatment of Working Owners

Notably, the Proposed Rules permit "dual treatment" of working owners as both "employer" and "employee," allowing the self-employed individual to join a group or association.[4] To qualify as a "working owner," the individual must have an ownership right in a trade or business, earn wages or self-employment income from the trade or business, not be eligible to participate in any subsidized group health plan offered by any other employer, and either work 30 hours per week or 120 hours per month providing personal services or have earned income at least equal to the cost of coverage for participation in the group health plan.[5]

1 83 Fed. Reg. 617 (Jan. 5, 2018), citing ERISA § 514(b)(6)(A)(ii).

2 83 Fed. Reg. 617 (Jan. 5, 2018), citing ERISA § 514(b)(6)(A)(i).

3 83 Fed. Reg. 635 (Jan. 5, 2018) (to be codified at 29 C.F.R. 2510.3-5(b)(1)-(8)).

4 83 Fed. Reg. 635 (Jan. 5, 2018) (to be codified at 29 C.F.R. 2510.3-5(e)).

5 83 Fed. Reg. 635 (Jan. 5, 2018) (to be codified at 29 C.F.R. 2510.3-5(e)(2)).

Nondiscrimination Provisions

In addition, an association health plan must comply with the following three nondiscrimination rules:[6]

First, the association may not condition employer membership based on any health factor of an employee, dependent or other beneficiary.[7] Health factors include medical condition, claims experience, receipt of healthcare, medical history, genetic information, evidence of insurability or disability.

Second, the association plan may not establish any rule for eligibility of any individual or dependent that discriminates based on any health factor.[8] Rules for eligibility include rules relating to enrollment, effective date of coverage, waiting periods, benefit packages, continuing eligibility and termination of coverage.

Third, the association plan may not require an individual – as a condition of enrollment or continued enrollment – to pay a premium or contribution greater than the premium or contribution for a similarly situated individual or dependent of the individual.[9]

In complying with the second and third nondiscrimination rules, the association may not treat different employer members as distinct groups of similarly situated individuals. This means an association plan may not reject an employer group for coverage or charge higher premium rates to one employer group in comparison to another, based on the health status of employees or dependents of such employers.

The comment period for the Proposed Rules is open, with the deadline for submission of comments March 6, 2018.

For more information about the Proposed Rules, please contact one of the lawyers listed in this publication.

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6 83 Fed. Reg. 635 (Jan. 5, 2018) (to be codified at 29 C.F.R. 2510.3-5(b)(7)).

7 83 Fed. Reg. 635 (Jan. 5, 2018) (to be codified at 29 C.F.R. 2510.3-5(d)(1)); "health factors" are defined under ERISA § 2590.702(a).

8 83 Fed. Reg. 635 (Jan. 5, 2018) (to be codified at 29 C.F.R. 2510.3-5(d)(2)), referring to 29 C.F.R. 2590.702(b) (rules prohibiting discrimination in rules for eligibility).

9 83 Fed. Reg. 635 (Jan. 5, 2018) (to be codified at 29 C.F.R. 2510.3-5(d)(3)), referring to 29 C.F.R. 2590.702(c) (rules prohibiting discrimination in premiums or contributions).