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Department of Labor Issues Final Rule Expanding Access to More Affordable Health Insurance for Small Employers and Sole Proprietors

Department of Labor (DOL) published its Final Rule, adding the new Section 2510.3-5 to CFR Title 29. This new section, promulgated in response to President Trump's [Executive Order 13813](#), provides an expanded definition of "employer" under Section 3(5) of the Employee Retirement Income Security Act (ERISA), which will change the regulatory requirements for Association Health Plans (AHPs) and likely reduce the cost of providing health care coverage to the association's members. However, AHPs structured to meet the criteria under the DOL's sub-regulatory guidance in place prior to the Final Rule can continue under the prior rules, which required a much closer organizational relationship and prohibited coverage of owner employees.

Regulatory Background

Prior to the Final Rule, AHPs would only be treated as a single plan that could be large group rated if the association sponsoring the plan was limited to employers with a "genuine organizational relationship," which required common economic or other interests unrelated to the provision of benefits. DOL rulings required a common industry, such as realtors or CPAs, and in some cases also a limited geographic area. Otherwise, pursuant to ERISA's "look through" doctrine, the requirements for health care coverage provided by each employer participating in the association depended upon facts particular to that employer, such as the number of employees in the employer group obtaining coverage. For example, health care coverage provided through an association to individuals or to small employers had to comply with requirements for individual and small employer group markets under the Patient Protection and Affordable Care Act (ACA) as well as applicable state laws. This was the case, even if the number of

individual participants from all members in aggregate exceeded the small employer group maximum number of employees.

New Rules

An AHP that meets the requirements of the Final Rule will enable working owners, small businesses, and large employers to obtain coverage through the AHP without being rated and otherwise regulated based on the size of each employer. Because each person covered through the AHP can be part of one large group, the AHP can benefit from the larger pool of insureds to negotiate lower health insurance premiums for participating employers and their covered employees.

Commonality of Interest

Under the Final Rule, employer members of an association will have commonality of interest if either (a) the employers are in the same trade, industry, line of business or profession, or (b) 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). This will permit nationwide AHPs organized around particular industry groups as well as regional AHPs that may provide benefits to any employers within the area, regardless of trade industry.

In the case of AHPs organized around a particular trade or industry, the association itself will be deemed to be in the same trade, industry, line of business, or profession as the other employer members of the association, permitting any employees of the association to participate in the coverage offered through the AHP.

Organizational Relationship

Under the Final Rule, the primary purpose of an employer association may be to offer and provide health coverage to its employer members and their employees through an AHP, so long as the association has at least one substantial business purpose unrelated to offering and providing health coverage or other employee benefits. If an association would be a viable entity

without sponsoring an AHP, the association is deemed to have a substantial business purpose. The Preamble to the Final Rule notes that a substantial business purpose could be convening conferences, offering classes or educational materials, or engaging in public relations and advertising. The association must engage in these activities, apart from sponsoring a health plan, in form and substance based on all the facts and circumstances.

The association must have a formal organizational structure with a governing body and by-laws or other similar indications of formality, and the functions and activities of the association must be controlled by its employer members. The bylaws or other governing documents must provide for employer members participating in the AHP to control the welfare benefit plan. The association cannot be a health insurance issuer and cannot be owned or controlled by such an issuer.

Non-Discrimination

An AHP under the Final Rule must not restrict participation in the AHP by employers or employees based on any health factor. The examples included within the Final Rule make it clear that AHP's may make premium distinctions between subsets of employer members based on factors that are not health factors, including industry, location, group size, age, gender or occupation. Employers and AHPs can also continue to set premiums for individual employees based on factors other than health factors, such as part-time versus full-time employment status.

AHPs that comply with the guidance in effect prior to the Final Rule can continue to set each participating employer's premiums separately based on the experience of that employer's employees. Many existing AHPs experience rate employers separately in this way, and can continue to do so, but they cannot take advantage of the expanded commonality of interest rules, and they cannot cover owner-employees.

Employee Status and Owner Employees

Each employer member of the association participating in the AHP must be a person acting directly as an employer of at least one employee who is a participant covered under the plan. The Final Rule provides that an individual person may qualify as both an employer and as an employee of a trade or business so long as they have some ownership right, of any nature, in the trade or business and earn wages or self-employment income from the trade or business. However, to protect against participation by owners who are not ongoing employees, the Final Rule has several requirements for “working owners.” An owner will not be eligible as a working owner unless the individual:

(A) Works on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner’s trade or business, or

(B) Has wages or self-employment 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.

This provision explicitly permits small business owners and sole proprietors to obtain coverage through an AHP, even if they do not have any common law employees.

Effective Date

The Final Rule is technically effective 60 days after its publication, but it becomes “applicable” on staggered dates for various types of AHPs, as follows:

<u>Type of AHP</u>	<u>Applicability Date</u>
Fully Insured AHPs	September 1, 2018
Existing Self-Insured AHPs	January 1, 2019
New Self-Insured AHPs	April 1, 2019

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