



WSC POLICY ALERT

PROPOSED RULE: ASSOCIATION HEALTH PLANS

Summary

This proposed rule would broaden the criteria under ERISA section 3(5) for determining when employers may join together in an employer group or association that is treated as the "employer" sponsor of a single multiple-employer "employee welfare benefit plan" and "group health plan" as those terms are defined in Title I of ERISA. By treating the association itself as the employer sponsor of a single plan, the regulation would facilitate the adoption and administration of such arrangements.

The proposed rule, which grew out of an executive order issued by President Trump in October, would broaden the definition of an employer under the Employee Retirement Income Security Act of 1974, or ERISA, to allow more employers to form association health plans and bypass ACA rules.

Agency: Department of Labor, Employee Benefits Security Administration

Comments Due: March 6, 2017

Significant Provisions

Multi-Employer Coverage

In distinguishing employer groups or associations that can act as an ERISA section 3(5) employer in sponsoring a multiple employer plan from those that cannot, the touchstone has long been whether the group or association has a sufficiently close economic or representational nexus to the employers and employees that participate in the plan (the "commonality of interest" requirement").

The proposed rule would remove existing restrictions to allow employers to more easily join together in organizations that offer group health coverage to member employers and their employees under one group health plan. Specifically, the regulation would allow employers to band together for the express purpose of offering health coverage if they either are:

- (1) in the same trade, industry, line of business, or profession; or



- (2) have a principal place of business within a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State – e.g., the Greater New York City Area/Tri-State Region covering portions of New York).

The proposal also would not include any requirement that the group or association be a pre-existing organization. Rather, employers could band together in new organizations whose sole purpose is to provide group health coverage to member employers and their employees.

Comments: The Department seeks comment on whether the final rule, if adopted, should also recognize other bases for finding a commonality of interest. The Department invites comments specifically on whether more clarification would be helpful regarding the definition of a metropolitan area (e.g., whether the OMB's definition of metropolitan/micropolitan statistical areas or another definition should be used).

Group Size Restrictions

One of the primary aims of this proposal is to give small employers (as well as sole proprietors and other working-owners) the opportunity to join together to provide more affordable healthcare to their employees; however, the proposed regulation would not restrict the size of the employers that are able to participate in a bona fide group or association of employers.

The Department expects minimal interest among large employers in establishing or joining an AHP as envisioned in this proposal because large employers already enjoy many of the large group market advantages that this proposal would afford small employers.

Organizational Structure

The proposal would require that the group or association have a formal organizational structure with a governing body and have by-laws or other similar indications of formality appropriate for the legal form in which the group or association operates, and that the group or association's member employers control its functions and activities.

This requirement is necessary to satisfy the statutory requirement in ERISA section 3(5) that the group or association must act "in the interest of" the direct employers in relation to the employee benefit plan, and to prevent formation of commercial enterprises that claim to be AHPs but, in reality, merely operate similar to traditional insurers selling insurance in the group market.

Coverage Limited to Employees

The proposed rule would require that only employees and former employees of employer members (and family/beneficiaries of those employees and former employees) may



participate in a group health plan sponsored by the association (as opposed to individuals not affiliated with the employer).

These criteria are intended to ensure that the groups or associations sponsoring the covered AHPs are bona fide employment-based associations and not more general membership organizations essentially operating as unlicensed health insurance providers.

Eligibility of Working Owners

The proposal would expressly provide that working owners, such as sole proprietors and other self-employed individuals, may elect to act as employers for purposes of participating in an employer group or association and also be treated as employees of their businesses for purposes of being covered by the group or association's health plan.

A working owner of a trade or business *without* employees may elect to act as an employer for purposes of participating in an employer group or association if the individual is earning income from the trade or business for providing personal services to the trade or business; and either:

- a) Provides on average at least 30 hours of personal services to the trade or business per week or 120 hours of such service per month, or
- b) Has earned income derived from such trade or business that at least equals the cost of coverage under the group or association's health plan.

In addition, the individual must not be eligible for other subsidized group health plan coverage under a group health plan sponsored by any other employer of the individual or by a spouse's employer.

Comments: The Department solicits comments on whether the proposed standard is workable and, if so, whether any additional clarifications would be helpful to address issues relating to how working owners could reasonably predict whether they will meet the earned income and hours worked requirements, and whether AHPs should be required to obtain any evidence in support of such a prediction beyond a representation from the working owner.

Health Nondiscrimination Protections

The proposed regulation would ensure the group or association does not restrict membership in the association itself based on any health factor, as defined in the HIPAA/ACA health nondiscrimination rules.

The HIPAA/ACA health nondiscrimination rules generally prohibit health discrimination within groups of similarly situated individuals, but they do not prohibit discrimination across different groups of similarly situated individuals.



Plans may, subject to an anti-abuse provision for discrimination directed at individuals, treat participants as distinct groups if the groups are defined by reference to a bona fide employment-based classification consistent with the employer's usual business practice. Examples include full-time versus part-time status, different geographic location, membership in a collective bargaining unit, date of hire, length of service, current employee versus former employee status, and different occupations.

A group or association which seeks treatment as an "employer" for purposes of sponsoring a single group health plan cannot simultaneously undermine that status by treating different employers as different groups based on a health factor of an individual or individuals within an employer member.

Comments: DOL seeks comment on whether this structure, which could potentially represent an expansion of current regulations, would create involuntary cross-subsidization across firms that would discourage formation and use of AHPs. The Department also solicits comments on the above described nondiscrimination requirements, including how they balance risk selection issues with the stability of the AHP market and the ability of employers to innovate and enter voluntary coverage arrangements. Finally, the Department solicits comments on the effect of additional or different nondiscrimination protections, such as further limitations on price flexibility.