

Association Health Plan Final Rule

OVERVIEW

On June 19th, the Department of Labor (DOL) finalized its rule to ease requirements for the formation of Small Business Health Plans, also known as Association Health Plans (AHPs). The rule will modify the definitions of “employer” and “employee” under the Employee Retirement Income Security Act (ERISA). This change will make it easier for multiple employers to form a single AHP and purchase coverage in the large group market and to allow working owners without other employees (including sole-proprietors) and their families to join AHPs. New and existing plans may elect to follow either the pre-rule guidance on AHPs or the requirements of this final rule. The applicability date of the rule will vary based on the type of AHP and whether it is existing or newly-formed:

- Fully-insured AHPs: September 1, 2018;
- Existing self-insured AHPs that elect to expand in accordance with the final rule: January 1, 2019; and
- New self-insured AHPs formed in accordance with the final rule: April 1, 2019.

This document summarizes key provisions of the rule. The final rule is available [here](#).

State Oversight

Under current law, fully-insured AHPs are subject to oversight by State insurance commissioners and the Department of Health and Human Services, while self-insured AHPs have generally been exempt from most, but not all State regulations. Under the final rule, self-insured AHPs that elect to operate pursuant to the final rule will be subject to State law, so long as those laws are “not inconsistent” with ERISA.

Upon initial review of the final rule, the New York State’s Department of Financial Services indicated that the rule will not preempt its authority to regulate the State’s insurance market, but other experts have expressed concern about the State’s authority to oversee self-insured AHPs.

Commonality Requirements

Under current law, AHPs must share a commonality of industry or economic interest. The final rule will loosen the interpretation of this requirement to allow AHPs to be formed using shared geographic location to establish common economic interest. The shared geography may be defined at the state, city, county, or multi-state metro area-level (such as a Metropolitan Statistical Area). Under the new regulations, AHPs will be able to offer coverage to some or all employers within a municipality or to nationwide businesses in a trade or industry group.

Affordable Care Act (ACA) Consumer Protections

Under the final rule, AHPs will generally be insured in the large group market or be self-insured. As such, AHPs will be exempt from the ACA's individual market and small group market requirements for Essential Health Benefits (EHBs), risk adjustments, and unified risk pools.

On June 20th, New York Attorney General Barbara Underwood and Massachusetts Attorney General Maura Healey announced their intent to sue the Trump Administration over the final rule. Underwood and Healey assert that the rule is unlawful and will sue to safeguard the ACA's consumer protections. Earlier this year a coalition of Attorneys General from 17 states, including New York, issued a letter urging HHS to withdraw the AHP proposed rule. The Attorneys General argued that the AHP rule would be harmful to consumers, undermine the ACA's small group and individual markets, and violate ERISA and the ACA.

The announcement from Underwood and Healey is available [here](#) and the March 2018 comment letter from 17 Attorneys General is available [here](#).

Sole Proprietors

Under current law, self-employed individuals who employ other individuals are able to join an AHP. The final rule will expand this to allow self-employed individuals with no employees to join AHPs. This expansion may lead to decreased enrollment in the ACA's Health Insurance Marketplaces.

Nondiscrimination

The rule finalized its proposal to include protections against discrimination for the following health factors: health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability. Specifically, AHPs will not be able to charge employers different rates based on the health status of employees. However, the rule will allow AHPs to adjust premiums based on "non-health factors," including age, gender, industry, occupation, tobacco use and geography.

While an AHP under the new rules could not base eligibility or premiums for an individual employer on the health status or claims history of the employer's workers, it could offer different insurance plans at different premiums to subsets of the association membership. For example, a metropolitan AHP may offer different plans and pricing to retailers than to restaurateurs. Thus, AHPs could be structured to attract firms with healthier-than-average workforces (or healthier-than-average self-employed individuals). In addition, existing AHPs can continue to exclude individuals with pre-existing conditions.