Published: June 28, 2018

Association Health Plans Final Rules

James Morrison I James M Morrison Insurance Services Inc. I 760-438-9311 I jim@misbenefits.com

CA Insurance License 0D87966

The Department of Labor published a final rule on June 21, 2018 creating flexibilities for employers and working owners to band together to sponsor a single Association Health Plan (AHP). The final rule allows multiple employers to jointly sponsor a single group health plan by expanding ERISA's definition of "employer." An AHP may provide coverage to the owners and employees of participating employers and their families.

By collectively forming a single plan, multiple employers may avoid small group market rating, maintain greater flexibility in benefits, and reduce premiums and administrative expenses. An AHP is a multiple employer welfare arrangement (MEWA) and is subject to the same federal and state rules as any other MEWAs.

Applicability of the Final Rules

The Department outlines a rolling applicability period (i.e., effective dates) in order to allow states time to modify and/or implement rules in reaction to the federal changes.

- All associations (new or existing) may establish a fully insured AHP on September 1, 2018.
- Existing self-insured association programs established before June 21, 2018 and comply with federal rules prior to the final regulations, may rely on these rules January 1, 2019.
- New self-insured AHPs formed pursuant to this rule may rely on the guidance as of April 1, 2019.

This document is designed to highlight various employee benefit matters of general interest to our readers. It is not intended to interpret laws or regulations, or to address specific client situations. You should not act or rely on any information contained herein without seeking the advice of an attorney or tax professional. CA Insurance License #0C94240.

Any AHP arrangement permitted before the final rules will remain valid. The final rules merely relax the definition of "employer" allowing more arrangements to qualify as a single plan.

Under existing law, most existing association programs do not qualify as a "single plan" under ERISA and each employer accessing coverage through the arrangement is treated as a single ERISA plan. This also means the size of each employer (and not the aggregate size of the plan) controls how the plan is rated by insurance companies for purposes of premiums and benefits. For example, an insured association plan with an employer that has 30 employees would be required to comply with the ACA's small market rules (e.g., EHBs, age-banded rates, bronze level of coverage) even if, when looked at in the aggregate, the number of employees getting coverage through the association would otherwise qualify as a "large group."

Nothing in these rules change any existing state laws that may impose limitations, restrictions or prohibitions on creating these arrangements on a fully insured or self-funded basis. So, while federal law has become more relaxed, it will be up to each state (and applicable carriers) whether to follow along.

Ahp Formation

A bona fide group or association ("association") may form an AHP if:

- all employer members are engaged in the same trade, industry, line of business, or profession; or
- have a principle place of business in the same state or metropolitan area.

The association sponsoring the AHP must be a viable entity in the absence of providing health coverage and demonstrate a substantial business purpose for existing such as educating its members or promoting an industry. The rules specifically exclude certain entities from controlling an AHP including a health insurance issuer, subsidiary or affiliate, a provider network, health care organization, or other part of a health delivery system.

Association members must sufficiently control the association and the AHP in form and substance, but not necessarily conduct the day-to-day affairs. Members may demonstrate sufficient control over the AHP by regularly nominating and electing the officials who operate the governing body, retaining authority to remove those officials with or without cause; and maintaining approval and veto power over decisions regarding plan design, amendments or plan termination.

Eligible Participants

An employee or former employee of a current employer association member, working owner (one that works 20 hours/ week or 80 hours/month), sole proprietor, partner, and their beneficiaries (e.g., spouses and dependent children) may all be eligible participants in an AHP. Independent contractors, such as those working in the "gig" economy, that possess a sufficient relationship with the association may aggregate their hours to allow participation in the AHP. Once members

This document is designed to highlight various employee benefit matters of general interest to our readers. It is not intended to interpret laws or regulations, or to address specific client situations. You should not act or rely on any information contained herein without seeking the advice of an attorney or tax professional. CA Insurance License #0C94240.

(including working owners) cease membership in the association, they can no longer be covered by the AHP because they have lost a significant connection to the group.

Keep in mind, these rules did not change the tax implications when group coverage is provided to certain self-employed individuals. Sole proprietors, partners and independent contractors who obtain coverage through a group plan will have the same tax restrictions and consequences that existed prior to the DOL guidance. Individuals holding greater than 2% of shares in an S-corporation and their family members, sole proprietors, partners, non-employee directors, non-employee independent contractors will continue to be restricted from participating in a Section 125 cafeteria plan (pre-tax premium payments). Contributions made by an employer toward the cost of group coverage to these individuals is generally taxable.

Plan Coverage

These rules do not require the underlying medical coverage to be of a "Bronze" level. This means, assuming it is permissible under state law, an AHP could offer a plan that does not meet minimum value. This could include "skinny" coverage (e.g., preventive care only). Applicable large employers (ALEs) considering coverage through an AHP should be mindful as to the potential penalty implications in the event the coverage does not meet minimum value requirements.

Nondiscrimination

AHPs are subject to the same HIPAA nondiscrimination rules as other large group health plans. The AHP cannot discriminate in eligibility, benefits or premiums against individuals within a group of similarly situated individuals based on a health factor. The AHP may make distinctions between groups of individuals based on bona-fide employment-based classification consistent with the employer's usual business practices. Notably, absent a bona fide business classification, all employers within an AHP will have the same benefits, premiums and eligibility rules. The Department's rule does not allow experience rating at each employer level.

Examples

Example 1

Association A offers group health coverage to all members. According to the bylaws of Association A, membership is subject to the following criteria: All members must be restaurants located in a specified area. Restaurant B, which is located within the specified area, has several employees with large health claims. Restaurant B applies for membership in Association A, and is denied membership based on the claims experience of its employees.

In this Example 1, Association A's exclusion of Restaurant B from Association A discriminates on the basis of claims history, which is a health factor. Association A does not meet the definition of a bona fide group or association of employers.

This document is designed to highlight various employee benefit matters of general interest to our readers. It is not intended to interpret laws or regulations, or to address specific client situations. You should not act or rely on any information contained herein without seeking the advice of an attorney or tax professional. CA Insurance License #0C94240.

Example 2

Association F offers group health coverage to all plumbers working for plumbing companies in a state, if the plumbing company employer chooses to join the association. Plumbers employed by a plumbing company on a full-time basis (which is defined under the terms of the arrangement as regularly working at least 30 hours a week) are eligible for health coverage without a waiting period. Plumbers employed by a plumbing company on a part-time basis (which is defined under the terms of the arrangement as regularly working at least 10 hours per week, but less than 30 hours per week) are eligible for health coverage after a 60-day waiting period.

In this Example 2, making a distinction between part-time versus full-time employment status is a permitted distinction between similarly-situated individuals provided the distinction is not directed at individuals. Accordingly, the requirement that plumbers working part time must satisfy a waiting period for coverage is a rule for eligibility that is permissible under the nondiscrimination rules.

Example 3

Association G sponsors a group health plan, available to all employers doing business in Town H. Association G charges Business I more for premiums than it charges other members because Business I employs several individuals with chronic illnesses.

The employees of Business I cannot be treated as a separate group of similarly-situated individuals from other members based on a health factor of one or more individuals. Therefore, charging Business I more for premiums based on one or more health factors of the employees of Business I does not satisfy these requirements.

Example 4

Association Q is a retail industry association. It sponsors a group health plan that charges employees of employers different premiums based on their occupation: Cashier, stockers, and sales associates. The distinction is not directed at individual participants or beneficiaries based on a health factor.

The premium distinction is permissible because it is not based on a health factor and is not directed at individual participants and beneficiaries based on a health factor.

ERISA Reporting and Disclosure Requirements

An AHP is treated as a single plan with the association as the plan sponsor. Existing rules generally require AHPs to file both a Form M-1 and Form 5500 with the DOL. Small AHPs (generally under 100 participants) are not eligible for the filing exemption available for insured and unfunded plans with fewer than 100 participants.

This document is designed to highlight various employee benefit matters of general interest to our readers. It is not intended to interpret laws or regulations, or to address specific client situations. You should not act or rely on any information contained herein without seeking the advice of an attorney or tax professional. CA Insurance License #0C94240.

AHPs will likely have to put in place appropriate safeguards for handling plan assets. To the extent participant and employer contributions are being transmitted to the association, who then pays benefits out of the AHPs assets or forwards them to the insurance carrier, those contributions are considered plan assets and must be held in a trust.
An AHP must comply with all ERISA disclosure requirements such as maintaining a written plan document and providing disclosures to plan participants including, but not limited to, a Summary Plan Description (SPD) and a Summary of Benefits and Coverage (SBC). Also, each member employer of the AHP must ensure new hires receive a Marketplace notice as required by the Fair Labor Standards Act.

Application of other Federal and State Laws

AHPs remain subject to all ACA requirements that would otherwise apply to a plan of the same size and funding method. As stated earlier, ALEs remain subject to Employer Shared Responsibility rules and risk penalty if the AHP does not provide minimum essential coverage that is affordable and meets minimum value requirements.

The Mental Health Parity and Addiction Equity Act (MHPAEA) and Mental Health Parity Act (MHPA) (collectively known as the "Mental Health Parity" laws) apply to employers with more than 50 employees. Mental Health Parity laws will apply to an AHP if the number of employees across all member employers in the preceding calendar year exceeds 50 in the aggregate.

COBRA continuation coverage requirements generally apply to employers with 20 or more employees. It is unclear whether all AHP member employers will be required to offer COBRA if the number of employees exceed 20 in the aggregate across all employers. No IRS guidance has been announced yet.

State Involvement

States are permitted to regulate self-insured and fully-insured AHPs to the extent the AHP is marketing to employers within the state. AHPs are subject to the same regulatory requirements, funding concerns, and state licensing restrictions which may have hindered formation at the state level in the past. States may require an AHP obtain a certification or license to operate in the state. The state may also require the AHP to purchase an insurance policy from another state-licensed insurance company. Careful review of state rules will be important if considering establishing an AHP.

Conclusion

We anticipate existing associations, carriers and TPAs will carefully review these rules to determine whether to establish AHPs. Additionally, industry groups currently not providing an insurance option to its employer population may consider creating one of these AHPs. Further analysis is needed on a state-by-state level to understand the state laws that may affect the establishment and administration of these programs.

Also, the Attorneys General ("AGs") in New York and Massachusetts have initiated a lawsuit against the administration challenging the validity of these rules. Depending on how quickly the AGs move, the effective dates outlined above could be affected.

This document is designed to highlight various employee benefit matters of general interest to our readers. It is not intended to interpret laws or regulations, or to address specific client situations. You should not act or rely on any information contained herein without seeking the advice of an attorney or tax professional. CA Insurance License #0C94240.