

update

Compliance News for Multiemployer Plans

July 18, 2018

Final Rule on Association Health Plans

The Department of Labor (DOL) recently published a final rule broadening the criteria for how employers can join to form an Association Health Plan (AHP).¹ This rule will allow more small employers and working owners (including sole proprietors) to form an AHP, which can be considered a large group health plan for purposes of applying other laws, including state insurance laws. Small employers and working owners can then avoid small group or individual rating rules and take advantage of the large group health plan rules under laws such as the Affordable Care Act and the Employee Retirement Income Security Act (ERISA).

The AHP rule was published to implement Presidential Executive Order 13813, which directed the Secretary of Labor to propose regulations or revise guidance to expand access to health coverage by allowing more employers to form AHPs.² The rule has several staggered effective dates, discussed below, and it provides that AHPs organized under existing regulations may continue to operate under current rules.

Summary of the New Rule for AHPs

Under the new rule, AHPs may be created by multiple employers who are members of a group or association. The group or association must satisfy a list of criteria in order to be a “bona fide association,” which includes factors such as the employers having a “commonality of interest” and the organization being controlled by the employer-members of the association. In addition, the association may be organized primarily for the purpose of providing health insurance coverage, but it must also have at least one other substantial business purpose. If the association is a “bona fide association,” it may offer insurance to employer-members and their employees, former employees, and their family members. Employer-members can include working owners, sole proprietors, and partners, even if they do not employ other individuals.

The commonality-of-interest rule may be met if the employers in the association are in a common trade, industry, line of business or profession. It may also be met by employers who have a principle 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).

¹ The final rule was published in the [June 21, 2018 Federal Register](#).

² [Presidential Executive Order 13813](#), which was issued on October 12, 2017, is available on the White House website.



Health Compliance News Highlights:

- The new rule makes it easier for employers to join together to form an AHP.
- Working owners without employees will also be able to join AHPs.
- Plans sponsored by large employers or multiemployer plans are already able to either self-insure or purchase large group coverage from a health insurer. As a result, there would be no benefit to organizing as an AHP to offer health coverage for employees already participating in a multiemployer plan.

Non-Discrimination

Under the new rule, AHPs may not discriminate against employer-members or covered individuals on the basis of health status. The group or association may not treat different employer members differently or charge different premiums to the employers, unless the difference is based on a legitimate business distinction (e.g., geography). It may not underwrite individual premiums on the basis of the individual's health. However, the rule does not prevent underwriting based on age or gender, although other state or federal laws may affect that type of premium setting. Examples in the rule provide clarification regarding setting premiums, particularly related to sole proprietors.

Applicability of State Law

Although the AHP rule governs how these entities are established under federal law, the DOL states that state law continues to apply to AHPs. AHPs are still considered a type of Multiple Employer Welfare Arrangement (MEWA), and the federal and state rules regarding the operation of MEWAs apply to AHPs. However, under the new rule, if the AHP is made up of enough employers and employees, it may be treated as a large group health plan under state law. Consequently, the AHP could obtain fully insured coverage for the group as a large group health plan and avoid state small group or individual insurance laws. AHPs that wish to offer self-insured health coverage would be subject to state laws governing self-insured MEWAs. State laws that are not inconsistent with ERISA, such as state solvency, rating and reporting requirements, apply to self-funded MEWAs that are also ERISA plans and thereby to self-funded AHPs.

Effective Dates

The AHP rule has three effective dates:

- September 1, 2018, for fully-insured AHPs;
- January 1, 2019, for existing self-insured AHPs complying with the DOL's pre-rule test that may wish to expand the type of employers in their organization; and
- April 1, 2019, for new self-insured AHPs formed under this final rule.

With respect to the September 1, 2018 date, any AHP which meets the new criteria would be able to purchase fully-insured large group health coverage for its members.

Impact on Plan Sponsors

Large employers and employers that contribute to multiemployer plans are unlikely to reap new benefits from the AHP rule. Plans sponsored by large employers (generally those with more than 50 employees) or multiemployer plans are already able to either self-insure or purchase large group coverage from a health insurance issuer. There would be no benefit to organizing as an AHP to offer health coverage for employees already participating in a multiemployer plan.

Many commenters have argued that AHPs could be organized by fraudulent entrepreneurs and could destabilize the health insurance market. The DOL requires that an AHP be organized for a substantial business purpose other than providing health insurance, but this is likely an easy test to meet. However, AHPs will not be unregulated entities.

The chart on the next page notes which important Affordable Care Act protections AHPs must meet and compares those requirements to requirements for large groups and small groups. AHPs will also be subject to other federal laws affecting large group plans such as ERISA, the Mental Health Parity and Addiction Equity Act (MHPAEA) and the Consolidated Omnibus Budget Reconciliation Act (COBRA).

Multiemployer plans themselves are not affected by the new rule. Multiemployer plans already provide their contributing employers with the advantages of being treated as a large group under federal and state law.

Affordable Care Act Requirements and Which Groups Must Meet Them

Requirement	AHPs	Large Groups	Small Groups
Does the plan have to cover Essential Health Benefits (EHBs)?*	No	No	Yes
If the plan covers an EHB, may it impose an annual or lifetime dollar maximum?*	No	No	No
Does the plan have to cover preventive services at no cost in network (if non-grandfathered)?	Yes	Yes	Yes
Does the plan have to provide minimum value and affordable coverage under the ACA's employer penalty rule?	The AHP itself is not required to do this, but large employers joining the AHP will want the AHP to meet these standards.	Yes, to protect the large employer from the employer penalty	No

* EHB include a list of 10 benefits in the Affordable Care Act that together make up comprehensive health coverage, including hospital, physician, mental health, drug and rehabilitation services.

** In addition, non-grandfathered plans must count all out of pocket spending on EHBs toward the Affordable Care Act's out-of-pocket maximum.

Outlook

Litigation over this DOL final rule is expected. Several Attorneys General have announced that they will challenge the rule. In addition, it is possible that states may impose restrictions on MEWAs and AHPs in their state, in order to blunt the efforts of fraudulent operators to take advantage of the new rules.

How Segal Can Help

Segal can assist multiemployer plan trustees in understanding the new AHP rules and the potential impact on their health care benefits.

Questions?

For more information about this new rule, please contact your Segal consultant or the [Segal office nearest you](#).

Update is Segal Consulting's electronic newsletter summarizing compliance news. *Update* is for informational purposes only and should not be construed as legal advice. It is not intended to provide guidance on current laws or pending legislation. On all issues involving the interpretation or application of laws and regulations, trustees should rely on their fund counsel for legal advice.



Segal Consulting is a member of [The Segal Group](#).

To receive *Update* and other Segal publications, [join our email list](#).

Follow us:

