Association Health Plans (AHPs)… Full Steam Ahead, or a Grinding Halt?

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On January 1, 2019, portions of the U.S. Department of Labor's (DOL) Final Rule expanding the availability of Association Health Plans (AHPs) went into effect. AHPs allow small businesses to band together and negotiate better deals when buying insurance for their members.

States have reacted to the final rule in dramatically divergent ways. Some states believe that AHPs will make it finally possible for small employers to offer affordable healthcare options for their employees. Other states worry that AHPs will destabilize the individual insurance marketplace. They predict that healthy people will join AHPs because they are less expensive than other insurance options, and this shift will leave sicker people in a smaller pool with higher premiums.

AHPs Possible Because of a Broader Definition of "Employer"
To increase the availability of AHPs, the Final Rule adopts a new definition of "employer" under the Employee Retirement Income Security Act of 1974 (ERISA), for purposes of determining when employers can join together to form an AHP that is treated as a group health plan under ERISA. The new definition of employer now includes sole proprietors with no employees.

In order to be considered an employer under ERISA traditionally, an association was required to have a bona fide economic or other common purpose other than offering health coverage. The Final Rule now provides that an association need only share a "commonality of interest" which can be satisfied on the basis of common geography or industry or line of business or profession. Further, the principal purpose of the association may be to provide members with insurance.

An association must additionally have at least one "substantial business purpose," such as holding conferences, offering classes or educational materials, or promoting common business or economic interests to qualify. When an association is treated as an employer under ERISA, it can be regulated as a large group health plan. As a large group health plan, an AHP does not have to comply with many of the ACA's most significant consumer protections, such as the law's rating rules and essential health benefits.

Some States Enthusiastic About AHPs
Proponents of AHPs argue that their flexibility is necessary for organizations to provide meaningful health coverage to small employer and self-employed individuals.

Iowa has also proactively embraced AHPs. In anticipation of the federal rule, the Iowa Legislature granted the Iowa Insurance Commissioner emergency rule-making authority over AHPs. This authority allows rules to become effective prior to public participation in the rulemaking process.

On September 6, 2018, the Iowa Insurance Division used this power to adopt Rule 4040C which allows AHPs to form in the state. Rule 4040C builds upon a state law passed April 2, 2018 to allow small groups and agricultural associations to create AHPs.

Other States Move to Tightly Regulate AHPs
Critics of AHPs argue that the DOL's final rule will result in a vast expansion of associations that qualify as single, large employers capable of evading core ACA protections. For example, while AHPs that cover employers with at least 15 employees have to offer essential health benefits like maternity coverage, now smaller businesses that buy AHPs will be exempt from that requirement. Whether or not states have the power to mandate that AHPs comply with stricter state laws is an open question. Several states have asserted their power to regulate AHPs, and intend to do so until the federal government forces them to stop.

Eleven States and the District of Columbia Challenge AHPs in Court
Last summer, state attorneys general from eleven states and the District of Columbia filed a lawsuit against the Department of Labor challenging the Final Rule on the grounds that expanding the definition of employer is inconsistent with the ACA and ERISA, a violation of the Administrative Procedure Act. *(State of New York et al. v. United States Department of Labor et al.)* The suit, led by New York, alleges that the final rule was an arbitrary and capricious effort to override the market structure established by the Affordable Care Act. New York is joined by Massachusetts, the District of Columbia, California, Delaware, Kentucky, Maryland, New Jersey, Oregon, Pennsylvania, Virginia, and Washington.

The suit attracted significant outside support and opposition. The American Medical Association and a group of Democratic lawmakers submitted comments in support of the lawsuit and in opposition to the DOL's rule. The U.S. Chamber of Commerce, attorneys general for Texas, Nebraska, Georgia and Louisiana, the Restaurant Law Center, and a coalition of 23 organizations that represent over one million small employers have submitted amici briefs in support of DOL's rule.

The lawsuit made four claims. First, the states claim that treating self-employed individuals with no other employees as an employer capable of being in an association of employers creating an AHP is contrary to ERISA's statutory definition of an employer, which is an entity "with two or more employees" 42 U.S.C. § 300gg-91(g)(6). Second, the states argue that the final rule's loose standard of what constitutes a "commonality of interest" (which may be satisfied where the main purpose of the association is merely to sell insurance), is insufficient to meet the established commonality test under ERISA. Third, the states allege that treating AHPs comprised of small employers as "large employers," but not necessitating that they meet the coverage requirements mandated of large employers through the shared responsibility protection – which requires any company that has at least 50 full-time employees to offer full-time employees the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan – violates the ACA. Lastly, the states' argue that the DOL failed to take into account the stark history of fraud and abuse when drafting the Final Rule and exceeded their statutory authority in changing the definition of AHPs.

Conclusion
On March 28, 2019, the Court ruled that the DOL Final rule was intended and designed to be an end run of the requirements of the ACA, by ignoring the language and purpose of both ERISA and the ACA. Further, the DOL expands the definition of "employer" to include groups without any real commonality of interest and to bring working owners without employees within ERISA's scope despite Congress's clear intent that ERISA cover benefits arising out of employment relationships. Accordingly, the provisions of the DOL Final Rule are unlawful and must be set aside, and the Final Rule's bona fide association and working owner provisions are therefore vacated. The Court has sent the regulations back to the DOL to consider how its ruling would affect the remaining provisions.

Action Plan
For AHPs operating under the regulations, and their participating employers, this ruling could affect obligations under both ERISA and the ACA. And while some ERISA compliance responsibilities (such as Form 5500 filing) may be addressed relatively easily, the ACA issues (such as whether the employer is offering the required level of coverage) will likely prove more challenging. The DOL has issued a set of FAQs indicating that it is considering how to proceed, and reassuring AHP participants that they retain their rights to plan benefits.