

Health Reform Bulletin



Subject: **Association Health Plans – Final Rules**
Date: June 22, 2018

It has been the goal of the current Administration to expand the availability of association health plans (AHP) to small employers and the self-employed, driven, at least in part, by the growth of the so-called gig economy.

As background, a welfare benefit plan subject to ERISA must be sponsored by an employer for the exclusive benefit of its employees and their beneficiaries. The ERISA definition of employer includes an association acting on behalf of participating employers. Historically, the definition of association has been a difficult standard to meet in that it includes a strict commonality of interest test requiring the association to have a primary existence based on common economic and representational interests among the participating employers beyond the offering of employee benefits. Further, self-employed individuals could not participate in an association unless the self-employed individual employed common law employees.

The Department of Labor published **final regulations** on June 21, 2018 that expand the definition of association by loosening the commonality of interest standard, and by allowing self-employed individuals to participate, as more fully described below. Notably, an AHP established in accordance with these rules avoids some of the small group health insurance rules imposed by the Affordable Care Act (ACA), such as rate restrictions and the obligation to provide essential health benefits.

Who can sponsor an Association Health Plan?

A bona fide group or association of employers can establish an association group health plan (AHP) as long as it meets the following requirements:

1. The primary purpose of the group or association can be for the purpose of offering and providing health coverage to its employer members and their employees. While the primary purpose of an AHP can be to offer members health coverage, it must also have at least one *substantial business purpose* unrelated to offering and providing health coverage or other employee benefits, such as promoting common business or economic interest in a given trade or employer community. The business purpose need not be a for-profit activity. In addition, employer members must meet a *commonality of interest standard*. This means that the employers must be:
 - ♦ In the same trade, industry, line of business or profession; or
 - ♦ Each employer has a principal place of business in the same region within the boundaries of a single state or a metropolitan area, even if the metropolitan area includes more than one state, such as Kansas City.
2. Each employer member of the group or association participating in the group health plan is a person who directly acts as an employer of at least one employee who is a participant covered under the plan.
3. The group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality.
4. The functions and activities of the group or association, as well as the plan itself, is controlled by its participating employer members. For this purpose, “control” is determined by a facts and circumstances test.

While an insurer or its subsidiary or affiliate cannot establish an AHP, it can participate as a member of the group or association.

Who is eligible to participate in AHP coverage?

An employer-member would be eligible to participate in the AHP, as well as its current and former employees and their spouses and dependent children.

A working owner of a trade or business is eligible to participate in an AHP. For this purpose, a “working owner” is an individual who:

1. Has ownership rights in the trade or business, including a partner and other self-employed individual;
2. Receives wages or income from the trade or business; and
3. Either:
 - ♦ Works on average, a minimum of 20 hours per week, or a minimum of 80 hours per month for the trade or business, or
 - ♦ Receives wages or income from the trade or business in an amount that equals the working owner's cost of AHP coverage for working owner and his/her covered beneficiaries.

This determination must be made when the working owner first becomes eligible for coverage under the group health plan; continued eligibility must be periodically confirmed.

Put simply, a self-employed individual can participate in an AHP even if the self-employed individual does not employ a common law employee.

Is an AHP subject to health status-based discrimination rules?

Yes. These regulations impose nondiscrimination based on health status rules that prohibit associations from red-lining individuals or groups based on their health status. Specifically, employer eligibility to the AHP cannot be conditioned on any health factor of any individual who is or may become eligible to participate in the AHP. Further, employees of different employer members of a group or association cannot be treated differently based on a health factor of one or more individuals of the group. In addition, an AHP plan must comply with the current HIPAA-ACA nondiscrimination rules relating to eligibility for benefits, as well as the rate restriction rules relating to premium and contributions.

Is an AHP a multiple employer welfare arrangement (MEWA)?

Yes. An AHP is a multiple employer welfare arrangement (MEWA) in that it is comprised of two or more unrelated employers including self-employed individuals. This means the rules applicable to MEWAs likewise apply to an AHP. Specifically, a plan administrator or sponsor of a MEWA is required to file an annual Form M-1 with the Department of Labor by March 1st of each year. The Form is intended to ensure that such plans are complying with the Affordable Care Act, the Health Insurance Portability and Accountability Act, and other federal related laws. In addition, plans required to file a Form M-1 must also file the Form 5500 regardless of plan size or type of funding.

Can states continue to regulate AHPs?

Yes, states can continue to regulate MEWAs, including this type of AHP. This means, at this point, an AHP would have to comply with the regulations in each state in which it operates. At this time, because some states prohibit or heavily restrict self-funded MEWAs, it is anticipated that any newly established AHPs will likely be insured, at least initially.

Do federal and state laws continue to apply to the entities participating in the AHP?

Yes. Federal and state laws such as discrimination laws, COBRA, HIPAA, the mental health parity laws, and the like, apply to AHPs. Time will tell how various requirements will be imposed. For example, will COBRA applicability be determined based on the size of the AHP, or the size of the participating employer?

A concern has been raised that certain very small employers participating in an AHP may no longer provide coverage for maternity care. For example, this could result when a very small employer is exempt from the Pregnancy Discrimination Act (applies to employer employing 15 or more employees) and the AHP to which it participates excludes essential health benefits, which would include coverage for maternity-related expenses.

Also, notably, some states, such as Massachusetts and New Jersey, have enacted an individual mandate that requires individuals to be covered by minimum essential coverage or pay a state tax. Other states, such as the

District of Columbia, are considering similar measures. In particular, the New Jersey law specifically contains a provision stating that AHP coverage will not satisfy the individual health coverage mandate unless the AHP meets certain standards.

When do the regulations take effect?

The AHP regulations take effect on August 20, 2018.

When can AHPs be established?

The final rules set forth a staggered schedule for purposes of establishing an AHP, as follows:

- All associations (new or existing) may establish a fully-insured AHP on September 1, 2018;
- Existing associations that sponsored an AHP on or before the date the final rule was published may establish a self-funded AHP on January 1, 2019;
- All other associations (new or existing) may establish a self-funded AHP on April 1, 2019.

Who might find AHPs useful?

It is expected that organizations such as chambers of commerce, trade associations, franchise entities and the like will consider this type of arrangement.

Are there legal challenges to creating an AHP?

There are a number of legal challenges being raised to these rules. In particular, the Massachusetts and New York Attorneys General are questioning the legality of AHPs based on these rules. There are also concerns that have plagued AHPs historically, e.g., misdeeds by the plan or its sponsor or administrator could cause a rise in fraudulent entities, leaving people with unpaid claims.

Where can I find more information about AHPs?

Additional information about association health plans is available from Department of Labor:

- ♦ [Dedicated DOL webpage: Association Health Plans](#)
- ♦ [Fact Sheet](#)
- ♦ [FAQs](#)
- ♦ [Final rule, Definition of “Employer” Under Section 3\(5\) of ERISA-Association Health Plans](#)

In closing, as is so often the case with new rules, there will be growing pains and lack of certainty that will need to be clarified in future guidance.

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