

ACA UPDATE: Proposed Rule Issued for Association Health Plans



On January 4, 2018, the Department of Labor (DOL) [issued a proposed rule](#) regarding Association Health Plans (AHPs). The proposed rule is in response to President Trump's [Executive Order 13813](#) issued on October 12, 2017 requesting the agency draft rules expanding access to affordable health coverage, especially among small employers and self-employed individuals.

The proposed rule is designed to allow more employers to join together to create an employer group or association for the purposes of purchasing group health plans. The proposal would modify the definition of an "employer", permit working owners of a trade or business to participate in an Association Health Plan (AHP) and includes nondiscrimination requirements applicable to these plans to prohibit membership based on any health factor.

Overview of Provisions

Commonality of Interest: The proposed rule broadens the definition of "employer" under ERISA 3(5), allowing more employers to organize for purposes of purchasing group health insurance. Previously, groups had to be organized for purposes other than benefits, with employees sharing some genuine organizational relationship unrelated to benefits.

The proposed rule allows for the following changes:

- Associations could exist for the sole purpose of providing benefits;
- Employers participating in an AHP would need to be in the same trade, industry, line of business or profession OR have a principal place of business within a region that does not go beyond the boundaries of the same State or the same metropolitan area (even if that area includes more than one State);
- Associations must have an organizational structure (governing body and by-laws) and be functionally controlled by employer members;
- AHP coverage must be limited to employees/families of employer members (and former employees) and "working owners".

Group size: Previous guidance from the Center for Medicare and Medicaid Services (CMS) did not allow for the distinction of association coverage as a meaningful category of health insurance coverage. CMS looked directly to each association member to determine the status of each member organization's coverage. In practice, association coverage could be compromised of individual, small group and large group coverage.

Under the proposed rule, Associations that buy insurance would not be subject to this "look through" doctrine as set forth in the 2011 CMS guidance. Rather, the AHP would be a single plan and the determination of whether it is a small or large group plan would be determined by reference to the number of employees participating in the entire AHP.



Working Owners: Working owners are defined as sole proprietors and other self-employed individuals. These types of individuals may elect to act as an employer for the purpose of participating in an employer group or association and also be treated as employees of their own businesses for purposes of being covered by an AHP. The proposed rules have the following requirements for working owners:

- Requires that working owners are earning income from the trade or business and work an average of 30 hours per week or 120 hours per month OR have earned income derived from such trade or business that at least equals the cost of coverage under the AHP.
- Requires that the working owner not be eligible for other subsidized group health plan coverage under a group health plan sponsored by any other employer of the individual or by a spouse's employer.

MEWA Issue – AHPs are a form of a multi-employer welfare arrangement (MEWA). Self-funded MEWAs are subject to any state law that regulates insurance due to an exception to ERISA's preemption provisions. Therefore any self-funded AHP would be subject to state requirements and regulations. A fully insured AHP would be subject to any state laws requiring the maintenance of specified contribution and reserve levels, but other state laws are preempted.

Nondiscrimination Rules – Existing health nondiscrimination rules under HIPAA will be clarified as they pertain to AHPs. Current rules prohibit health discrimination within groups of similarly situated individuals, but do not prohibit discrimination across different groups of similarly situated individuals. Distinct groups are groups that are based on a bona fide employment classification consistent with the employer's usual business practice. Distinctions are not permitted if the classification is directed at individual participants or beneficiaries based on a health factor.

- Association membership cannot be restricted based on any health factor (health status, medical condition, claims experience, receipt of healthcare, medical history, genetic information, evidence of insurability and disability)
- Associations cannot treat member employers as distinct groups of similarly situated individuals.
- AHPs will need to accept all employers who fit their geographic, industry or any other non-health based selection criteria as chosen by the Association.

Key Takeaway:

The rule regarding Association Health Plans (AHPs) issued by the Department of Labor (DOL) is a proposed rule. As such, the DOL will be accepting public comment until March 6, 2018 as part of their normal process. Once public comment is finalized, the Department will begin drafting final regulations regarding AHPs. If you have questions about AHPs, we encourage you to discuss them with your M3 Account Team.

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