SEYFARTH SHAW

Health Care Reform Management Alert Series

DOL Issues Proposed Rules On Association Health Plans

Issue 117

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This is the one hundred and seventeenth issue in our series of alerts for employers on selected topics on health care reform. (Click here to access our general summary of health care reform and other issues in our series.) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

In October 2017, President Trump issued Executive Order 13813 directing the Department of Labor (DOL) to propose rules expanding access to health coverage by allowing more employers to form association health plans (AHPs). On January 4, 2018, in response to this directive, the DOL proposed rules which would allow employers to form an AHP on the basis of geography or industry. In general, the rules would benefit small employers, but large employers could potentially realize cost savings or administrative efficiencies from using an AHP.

An employee welfare benefit plan is defined in ERISA to include a plan, fund or program established or maintained by an "employer or by an employer organization" for the purpose of providing for its participants or their beneficiaries, medical, surgical or hospital care or benefits….Thus, in order to be an employee welfare benefit plan, a plan must be established or maintained by an employer or employee organization. Under the current definition of "employer," groups of employers can participate in a single plan if they are part of the same controlled group, or if they are part of a bona fide employer group or association. Under existing guidance, a bona fide group of employers must share "some common economic or representation interest or genuine organizational relationship unrelated to the provision of benefits". (See ERISA Opinion Letter No. 2008-07A.)

The proposed rules would redefine "employer" and broaden the common interest requirement to remove the condition that employers must have a purpose other than offering health coverage. In other words, employers could join together for the sole purpose of providing health coverage to employees, if the employer members have a "commonality of interest", defined as either: i) being in the same trade, industry, line of business or profession; or ii) having a principal place of business in a region that does not exceed the boundaries of the same State or metropolitan area.

In addition, the rules would require each employer member be the common law employer of at least one employee who is participating in the plan, and the group to:

- exist for the purpose, in whole or in part, of sponsoring a group health plan that it offers to its employer members;

- have a formal organizational structure with a governing body and by-laws or other similar indications of formality;
- make health coverage available only to employees and former employees (and family members or other beneficiaries);
- control the establishment and maintenance of the group health plan;
- comply with various HIPAA nondiscrimination provisions to prevent discrimination based on health status; and
- not be a health insurance issuer.

Finally, the rules provide that a working owner of a trade or business could qualify both as an employer and employee. This would give sole proprietors the opportunity to join together to provide health plans to their employees.

Although the new AHPs would arguably provide more affordable health care to small employers, critics say that the plans would be considered "large-group plans" and, thus, employees would lose certain protections. Additional ACA requirements apply in the small group market that do not apply in the large group or self-insured markets, such as required coverage for essential health benefits.

Notably, AHPs are a type of multiple employer welfare arrangement (MEWA). Accordingly, the Department points out that AHPs would be subject to existing rules governing ERISA plans and MEWAs. For example, AHP MEWAs would be generally subject to State insurance regulation. Specifically, if an AHP is self-insured, then any State insurance law that regulates insurance may apply to the extent that such State law is not inconsistent with ERISA. If, on the other hand, an AHP is fully-insured, only those State insurance laws that regulate the maintenance of specified contribution and reserve levels may apply to the AHP. (The Department notes that State rules vary widely in practice, and many States regulate AHPs less stringently than the individual or small group market.) With respect to reporting requirements, AHP MEWAs that have 100 participants or more would be required to file a Form 5500 annual report, and would be required to file a Form M-1.

Comments on the proposed rules are due on or before March 6, 2018. The Department specifically invites comments on whether additional provisions should be added to the final rule to assist existing employer associations, including MEWAs that do not now constitute AHPs, in making adjustments to their business structures, governing documents, or group health coverage to become AHPs under the final rule.

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