SEYFARTH SHAW

Health Care Reform Management Alert Series

Court Vacates New Rules on Association Health Plans

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This is the one hundred and nineteenth 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 a blow to the Trump administration's efforts to weaken the Affordable Care Act, on March 28, 2019, in response to a challenge filed by eleven Democratic state attorneys general, a judge in the United States District Court for the District of Columbia found that the Department of Labor had unreasonably expanded ERISA's definition of "employers" to "end run the requirements of the ACA". As a result, in *State of New York et al. v. U.S. Department of Labor et al.*, No. 1:18-cv-01747 (D.D.C Mar. 28, 2019) the Court struck down portions of the DOL's association health plan rule—finalized in June of 2018—that had expanded the ability of small businesses and owners to buy health insurance on the large group market that was not subject to the ACA requirements that apply in the small group market (such as requirements related to coverage for essential health benefits and limitations on premium rates).

History

ERISA has long provided that some health plans offered by "bona fide associations" can qualify as single-employer ERISA plans if the association members have close enough ties to qualify as an "employer." Participating in a plan offered by a bona fide association allows small employers to avoid many of the ACA requirements imposed on individual and small group health plans, because the association members' employees are counted in the aggregate, as if the association was their "employer." To determine whether an association was a "bona fide association," the DOL traditionally considered three factors: (1) whether the association had a business or organizational purpose unrelated to the provision of benefits; (2) whether the association members had some common interest beyond the provision of benefits; and (3) whether the participating employers exercised some degree of control over the benefit program. These requirements were narrowly construed, such that the majority of association health plans did not qualify as "bona fide associations" that satisfied ERISA's definition of employer. For ACA purposes, this meant that small employers purchasing health insurance through an association would still need to meet ACA requirements for small employers, even if the association members, in the aggregate, employed large numbers of employees.

Final Rules

In October of 2017, President Trump issued an Executive Order directing the DOL to expand access to association health plans (AHPs), suggesting that they do so by loosening the criteria used to determine whether an association is a "bona fide association." Because the ACA adopted ERISA's definition of "employer," the DOL followed this directive by issuing a Final Rule that allowed associations to satisfy the traditional "commonality of interest" test discussed above if their members were either in the same trade or business or in the same geographic area, and the DOL allowed the formation of associations even if their primary purpose was "to offer and provide health coverage to [their] employer members and their employees" so long as there was "at least one substantial business purpose" unrelated to the provision of health care. 29 C.F.R. § 2510.3-5(b)(1). The Final Rule also allowed sole proprietors to count as both employers and employees, such that they could satisfy ERISA's requirement that AHPs only offer health plans to employees.

Court's Decision

In striking down this rule, the Court ruled that the DOL had unreasonably interpreted ERISA and taken it beyond its focus on employer benefit plans to instead cover commercial insurance transactions between unrelated parties. The Court concluded that the 2018 Final Rule provided no meaningful limit on what associations needed to demonstrate to qualify as "employers" under ERISA, failed to show why geographic proximity was connected to common employer interest essential for coverage under ERISA, did not require members of associations to be sufficiently aligned, and allowed owners without any employees to "absurdly" count themselves as both employers and employees in order to suggest an employment relationship justifying coverage under ERISA. The Court found these interpretations were contrary to ERISA's text and purpose and, as a result, found the Final Rule was not a reasonable, or lawful, interpretation of ERISA.

Citing to a severability provision in the Final Rule, the Court remanded the rule to the DOL to determine whether it could be saved without the invalidated provisions. To the extent the decision is not reversed on appeal, this decision will replace the restrictions on establishing AHPs under ERISA. It will, however, only impact a narrow subset of employers, as there was relatively little growth in AHPs following the DOL's Final Rule (perhaps due to many of them being subject to state MEWA regulations and thus burdensome to administer). Nonetheless this decision is significant as it reflects that nearly a decade after the passage of the ACA, the battle over what (if any provisions) of the law are lawful continues unabated.

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