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Legal Sidebar

# Association Health Plans: Some Key Aspects of the Labor Department's Proposed Rule

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Association health plans (AHPs) are in the spotlight due to a recent Labor Department proposed rule that aims to broaden access to this type of health insurance coverage. The proposed rule responds to an October 2017 executive order issued by President Trump, which directed his Administration to consider administrative initiatives that "expand choices and alternatives to Obamacare plans and increase competition to bring down costs for consumers." Some have applauded the Trump Administration's efforts to make health coverage more affordable and readily available through AHPs. Others have raised concerns that the proposed rule would promote coverage that lacks important consumer protections and detrimentally impact other segments of the insurance market. As the debate continues over the merits of the proposed rule, the legal framework behind this regulatory change may be examined. This Sidebar provides brief background on AHPs and the executive order, an overview of some of the key aspects of the proposed rule, and a discussion of certain legal issues that may be considered if the rule is finalized.

## Background

AHPs are a common type of insurance arrangement allowing groups of individuals or small employers to band together to purchase health coverage. Sponsors of these plans include various organizations, such as trade associations and chambers of commerce. The basic idea behind AHPs is to enable its members to obtain health insurance on similar terms as large entities. While advocates of AHP coverage assert that these health plans allow small groups and individuals to pool their resources and purchase coverage at better rates than they would be able to do on their own, others note numerous instances where multiple-employer AHPs failed to pay claims because of fraud or mismanagement. Critics also argue that if AHPs are permitted to provide skimpier benefits (and cheaper coverage) compared to rest of the individual and small group insurance market, healthier groups of individuals may gravitate to AHPs, but a disproportionate number of sicker individuals will stay with insurers offering more comprehensive benefits. Some claim such a scenario would drive up health care costs overall.

President Trump's executive order tasked the Labor Secretary with evaluating measures that would address AHPs under the Employee Retirement Income Security Act (ERISA), a comprehensive federal scheme for the regulation of employee benefit plans established or maintained by private-sector

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employers. The executive order indicated that the Secretary "should consider" AHPs and ERISA's definition of "employer." ERISA defines an "employer" as the following:

> [A]ny person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and *includes a group or association of employers acting for an employer in such capacity*.

In the past, questions have arisen about whether a "group or association" comprised of smaller employer-members, such as an AHP sponsor, constitutes an "employer" for purposes of offering a plan under ERISA. In other words, can the AHP sponsor be treated under ERISA as one large "employer" itself? Or is the organization a vehicle for providing health benefits to numerous smaller "employers"? The answer to this question is critical in terms of how the plan is regulated pursuant to ERISA and other federal laws amended by the Patient Protection and Affordable Care Act (ACA). The ACA established numerous private health insurance market reforms, and application of these provisions varies based on whether the coverage is offered through a small or large employer. Coverage offered by large employers (i.e., in general, more than 50 employees) is not as comprehensively regulated as coverage offered by small employers. For example, group health plans of large employers do not have to provide certain "essential health benefits" to plan participants. In other words, if a sponsor of an AHP can be recognized under ERISA as one large "employer" that offers an employee welfare benefit plan, the small employer-members of the group could purchase coverage through the association that is not subject to the essential health benefits requirements and certain other ACA provisions.

In order to promote the offering of AHPs, in which the association sponsoring health coverage is regarded as a single, large employer, the executive order instructed the Labor Secretary to consider expanding the conditions that satisfy the "commonality of interest requirements" under agency opinions that interpret ERISA's definition of employer. In the past, in various agency documents and advisory opinions, the Labor Department has concluded that only in limited circumstances can a "group or association" be considered a large employer itself. In these advisory opinions, the Labor Department has also articulated that in order for an AHP sponsor or other group to be considered an "employer" that offers a single ERISA employee benefit plan, there must be a common nexus and a "genuine organizational relationship" between the association and participating employees – a connection that is unrelated to the provision of benefits. When the Labor Department has not found this connection between these entities, the agency has concluded that the applicable health coverage is likely offered by a collection of separate, smaller ERISA-regulated employee benefit plans.

## ERISA's Definition of "Employer" and the Proposed Rule

To allow more leeway for AHP sponsors to be considered a large employer under ERISA (and be immune from certain ACA requirements that apply to health insurance offered to individuals and small employers), the proposed rule sets forth certain criteria under which a group or association shall be considered an employer and establish an ERISA-regulated group health plan. Key components of the proposed rule include the following:

- ***Commonality of Interest***: Compared to the Department's prior sub-regulatory guidance, the proposed rule would adopt a more relaxed "commonality of interest" standard. More specifically, under the proposed rule, an "employer" under ERISA would include a group or association whose members are employers (1) in the same trade, industry, line of business, or profession or (2) with their principal place of business in a particular geographic region, such as the same state or metropolitan area (even if the metropolitan area crosses state lines). Prior to the proposed rule, the Labor Department had determined that these types of groups or associations did not meet the commonality of interest requirements and were not considered employers under ERISA (*see* here and here; *but see* here).

- ***Establishment of AHP**:* Under the proposed rule, an AHP would be treated as a single ERISA plan if the group exists for the purpose, *in whole* or in part, of sponsoring a group health plan. In earlier advisory opinions, the Labor Department generally took the position that for an association to be an employer under ERISA, it had to exist for some other reason besides offering insurance.
- ***"Working Owners"*:** The proposed rule would generally allow "working owners" (e.g., certain sole proprietors and self-employed individuals) to be considered *both* an employer and an employee for purposes of both participating in the association and receiving coverage from the association's health plan. In the past, the Labor Department generally took the position that ERISA's definition of "employer" only included groups where membership consisted of employers with common-law employees.

## Legal Considerations

For a number of years, Congress has considered legislation to expand access to AHPs, including as part of recent efforts to repeal or replace the ACA. Similar to these legislative proposals, the proposed rule, if finalized, would appear to establish a new legal framework for the offering of AHPs, under which a broad swath of organizations could offer health insurance to small employers and self-employed individuals. Commentators note that the coverage offered by these organizations may be less expensive that what is offered in the individual and small group market, but it also may not provide some of the benefits and other existing consumer protections that would otherwise be required by federal law.

Going forward, one central question is how this new federal framework, if finalized, could impact the application of state law to AHP coverage. It appears that for the Trump Administration and other AHP supporters, a desired outcome of the proposed rule is to allow these plans to be offered "across state lines," without having to comply with certain state health benefit mandates or other state standards that may be considered burdensome or expensive. The legal mechanism behind making this happen is through self-insurance. In general, because of ERISA's express preemption clause, self-insured health plans are not subject to state law. The basic concept is that by promoting AHP coverage and making it easier for small groups to join together, it will be easier for these groups to have the resources to self-insure and offer the same health plan nationwide.

But when it comes to AHPs and state law, the issue is somewhat complicated. Under one exception to ERISA's preemption provision, states currently have some regulatory authority over both self-insured and fully-insured AHPs and other types of similar plans. Congress created this exception in 1983, in light of numerous cases of fraud, insolvency, and perceived inadequacies in the oversight of these insurance arrangements. Pursuant to this exception, states may regulate AHPs, though applicable state laws vary in scope and detail.

While the preamble to the proposed rule indicates that states' authority to regulate AHPs and similar arrangements is not altered by the proposed rule, it is possible the Labor Department may take additional steps to restrict this authority in the future. ERISA generally authorizes the Secretary of Labor to limit this exemption from ERISA's preemptive scheme and restrict the types of state laws that may apply to self-insured AHPs and other insurance arrangements. In the preamble to the proposed rule, the agency has requested information about the merits of a possible exemption. If such an exemption is established by the Labor Department, self-insured AHPs may have greater flexibility to offer benefits without having to comply with the particulars of each relevant state's insurance laws.

## Author Information

Jennifer A. Staman
Legislative Attorney

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