



COMPLIANCE BULLETIN

HIGHLIGHTS

- The final rule makes it easier for small employers to join together to purchase health insurance.
- According to the DOL, the changes expand access to affordable, high-quality health insurance coverage.
- Critics are concerned about potential risks to consumers and market stability.

IMPORTANT DATES

September 1, 2018

Final rule applies to fully insured AHPs.

April 1, 2019

Final rule applies to new self-insured AHPs.

DOL Finalizes Rule to Expand Association Health Plans

On June 19, 2018, the Department of Labor (DOL) released a [final rule](#) that gives small businesses more freedom to join together as a single group to purchase health insurance in the large group market or to self-insure. These benefit arrangements are called association health plans (AHPs).

By forming AHPs, small employers can avoid certain Affordable Care Act (ACA) reforms that apply to the small group market. According to the DOL, this will provide small employers with more affordable health insurance options.

However, in exchange for lower premiums, AHPs may cover fewer benefits. Most AHPs will not be subject to the ACA's essential health benefits (EHB) reform, which requires small group plans to cover a core set of items and services, such as mental health care and maternity and newborn care.

ACTION STEPS

Small employers may want to consider banding together to form an AHP as a more affordable health insurance option. Employers should carefully review the AHP's benefit design to make sure it is appropriate for their workforce. Because AHPs are regulated at the federal and state level, the availability of these plans will also depend on a state's regulatory approach.

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Background

On Oct. 12, 2017, President Donald Trump signed an [executive order](#) that directed the DOL to consider issuing regulations that would permit more employers to form AHPs as a way to expand access to more affordable health coverage. The DOL was specifically instructed to consider expanding the conditions that must be satisfied to form an AHP that is treated as a single plan under the Employee Retirement Income Security Act (ERISA).

Currently, the criteria that must be satisfied for a group of employers to sponsor a single ERISA plan are very narrow. As a result, most multiple employer health plans are treated as a collection of plans that are separately sponsored by each of the participating employers.

Under these current rules, the size of each participating employer determines whether the coverage is subject to the small group or large group market rules. Thus, to the extent the participating employers are small employers, the coverage is subject to the ACA's requirements for the small group market, including the EHB coverage requirement.

Under the final rule, AHPs will be expanded to allow more small employers to join together to purchase health coverage as a single group. According to the DOL, this approach will give small employers (as well as sole proprietors) access to more affordable, high-quality health coverage.

AHPs are a type of **multiple employer welfare arrangement (MEWA)**. Historically, some operators of MEWAs have taken advantage of gaps in the law and defrauded customers. The ACA includes provisions to target MEWA abuses, including improved reporting and stronger enforcement tools. Also, ERISA allows states to regulate MEWAs under their own insurance laws and regulations. For example, to guard against fraud and abuse, a number of states provide that self-insured MEWAs must be licensed, registered, have a minimum number of participating employers, obtain an actuarial opinion that the MEWA can meet promised benefits and keep a minimum level of reserves. Several states prohibit self-insured MEWAs altogether.

Critics of expanding AHPs have raised concerns about the potential for consumer fraud in connection with these arrangements. In the final rule, the DOL notes that it anticipates close cooperation with state regulators to guard against fraud and abuse.

Final Rule

The final rule expands current guidance to allow more employers to join together and sponsor AHPs that are treated as single plans under ERISA. When an AHP is treated as a single ERISA plan, all employees covered by the plan are considered when determining the insurance market rules (that is, small group or large group) that apply to the plan.

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According to the DOL, this reform provides small employers—many of whom are facing higher premiums and fewer coverage options—with a greater ability to join together and gain many of the regulatory advantages enjoyed by large employers, as well as increased bargaining power.

Some consumer groups, however, have expressed concern that AHPs will attract small employers with healthier workers, which could increase premiums in the small group and individual markets, including the ACA marketplaces.

Critics have also pointed out that, while AHPs may have lower premiums, they are also exempt from some key consumer protections under the ACA. For example, most AHPs will not be subject to the ACA's EHB requirement, which requires small group plans to cover a core set of items and services, such as mental health care, maternity and newborn care, prescription drugs and emergency services. Most AHPs will also be exempt from the ACA's rating restrictions for the small group market, which means that AHPs may base premiums on factors such as age, industry and gender.

Eligible Employers

The final rule allows employers to join together to form an AHP that is a single ERISA plan if either of the following requirements is satisfied:

- ✓ The employers are in the **same trade, industry, line of business or profession**; or
- ✓ The employers have a **principal place of business** within a region that does not exceed boundaries of the same state or the same metropolitan area (even if the metropolitan area includes more than one state).

In addition, the final rule allows working owners without other employees, such as sole proprietors and other self-employed individuals, to join AHPs.

Additional Requirements

To distinguish single plan AHPs from commercial insurance-type arrangements, the final rule requires AHPs to satisfy the following conditions:

- ✓ The primary purpose of the group or association may be to offer and provide health coverage to its employee members; however, the group or association also must have **at least one substantial business purpose** unrelated to offering and providing health coverage or other employee benefits to its members.
- ✓ Each employer member of the group or association participating in the group health plan must be the employer of at least one employee who is a plan participant.
- ✓ The group or association has a **formal organizational structure** with a governing body and has bylaws or other similar indications of formality.

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- ✓ The group or association's member employers control its functions and activities, including the establishment and maintenance of the group health plan.
- ✓ Only employees and former employees of the current employer members (and family members of those employees and former employees) may participate in the group health plan sponsored by the association.
- ✓ The group or association is **not a health insurance issuer** (or owned or controlled by an issuer or by a subsidiary or affiliate of an issuer).

In addition, the final rule requires AHPs to comply with certain consumer protections and anti-discrimination protections that apply to the large group market. For example, AHPs may not charge higher premiums or deny coverage to people because of pre-existing conditions, or cancel coverage because an employee becomes ill. Additionally, AHPs under this rule will not be able to charge employers different rates based on the health status of their employees.

The final rule does not affect existing AHPs, which are allowed under the DOL's current guidance. These plans can continue to operate as before or may elect to follow the new requirements if they want to expand within a geographic area, regardless of industry, or to cover the self-employed.

Applicability Date

The final rule includes a phased applicability date. The final rule allows fully insured plans to begin operating under the new rule on **Sept. 1, 2018**. Existing self-insured AHPs can begin operating under the new rule on **Jan. 1, 2019**, and new self-insured AHPs can begin on **April 1, 2019**.

According to the DOL, this phased approach will provide prompt relief to individuals seeking affordable health coverage through AHPs while allotting some additional time for the DOL and state authorities to address concerns about self-insured AHPs' vulnerability to financial mismanagement and abuse.