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Association Health Plans – What You Need to Know

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Agenda

- BACKGROUND ON ASSOCIATION PLANS
- ASSOCIATION PLANS UNDER ERISA
- FINAL RULE ON ASSOCIATION PLANS

Association Health Plans

Association Health Plans

- **Association and “Bona Fide” Associations**
- Under Public Health Service Act (PHSA) rules for insurance providers, an association is any entity through which health insurance is offered to a collection of employers or individuals (or both employers and individuals), including trusts, MEWAs, purchasing alliances, and purchasing cooperatives
  - For example, professional or trade association offering health insurance as an incidental benefit of membership
  - Chamber of Commerce plan
- These rules are relevant to determining whether coverage is individual, small group, or large group

Association Health Plans

- **Under the PHSA, a bone fide association is an association that–**
  - Has been actively in existence for at least five years
  - Has been formed and maintained in good faith for purposes other than obtaining insurance
  - Does not condition membership in the association on any health status-related factor relating to any individual
  - Makes health insurance coverage offered through the association available to all members, regardless of any health status-related factor relating to the members
  - Does not make health insurance offered through the association available other than in connection with a member of the association
  - Meets any additional requirements that may be imposed under state law
- "Bona fide" distinction under PHSA generally relevant only to guaranteed issue and renewability rules
- *The DOL has its own definition of "bone fide" when it comes to employer groups*

Association Health Plans

- **Individual vs. Group Market**
- If coverage is offered in connection with a group health plan, it is group health coverage for purposes of the PHSA
- If coverage is offered other than in connection with a group health plan, it is generally considered to be individual coverage
  - It doesn't matter whether the coverage was purchased through an association
  - Classification as small or large group under state law is also irrelevant
    - States may classify association coverage as group insurance, but if it covers the individuals (non-employees) it's individual market coverage for PHSA purposes
    - States cannot simply define association coverage as group and thus avoid subjecting it to the single risk pool and other requirements of the individual and small group market

Association Health Plans

- **Small Group vs. Large Group Market**
- Under *most* employment-based coverage, the group health plan exists at the participating employer level, not at the association level
- In these situations, the determination of whether the association coverage is small group coverage or large group coverage is made on an employer-by-employer basis and depends on the size of each employer participating in the association plan
- “Mixed” associations may be comprised of individual, small and large groups; however, members cannot be treated as if all of them belonged to same market

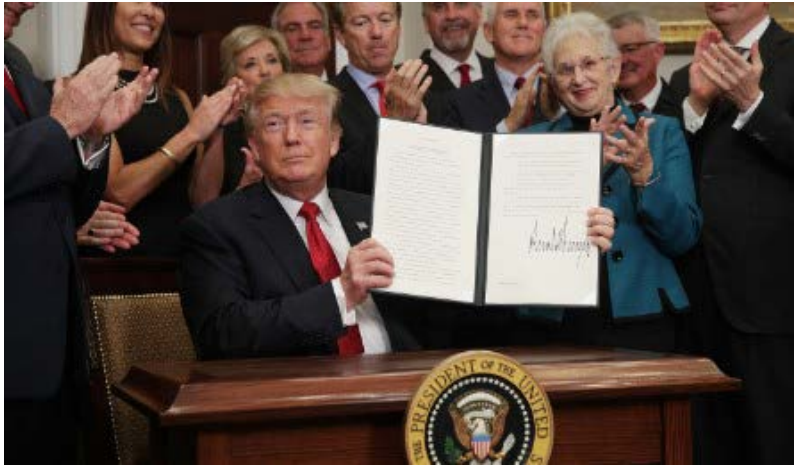
Association Health Plans

- **Small Group vs. Large Group Market**
- In *rare* instances, the association of employers is, in fact, sponsoring the group health plan and the association itself is deemed the “employer”
- In these situations, the association coverage is considered a single group health plan
  - The number of employees employed by all of the employers participating in the association determines whether the coverage is subject to the small group market or the large market rules

Promoting Healthcare Choice and Competition Across the U.S.

Executive Order signed 1/20/17

- *Encourages federal agencies to begin dismantling ACA to the extent allowable by law*
- *Instructs agencies to do what they can to "ease the burdens" on individuals, states and the health care industry*



Executive Order signed 10/12/17

- *Instructs DOL, HHS and IRS to consider expanding association health plans (AHPs), short-term limited duration insurance (STLDI) and health reimbursement arrangements (HRAs)*

Association Health Plans

- **Directions from the October 12, 2017 Order**
  - DOL should expand the “commonality of interest” requirement for purposes of determining whether an association is an “employer” under ERISA
  - DOL should also consider ways to promote AHP formation on the basis of common geography or industry
- Order did not address that AHPs are Multiple Employer Welfare Arrangements (MEWAs)
  - A MEWA is a single plan that covers the employees of two or more unrelated employers

Multiple Employer Welfare Arrangements (MEWAs)

- **MEWAs are regulated at State and Federal level**
  - Historically, MEWAs were promoted as a way to escape state insurance regulation and were subject only to federal oversight
  - Congress amended ERISA in 1983 to give states the authority to regulate MEWAs – states may regulate MEWAs whether or not they're subject to ERISA
  - Under ACA, the DOL may issue cease and desist orders and seize temporary control of a MEWA if it believes the MEWA has engaged in fraudulent activity

ERISA Preemption of State Insurance Law

- **ERISA is a federal law that regulates both fully insured and self-insured employer-sponsored health and welfare plans**
- ERISA preempts state laws “relating to” employee benefit plans
- ERISA does not preempt state insurance laws; However, ERISA’s “deemer” clause prevents a state from deeming a self-insured plan to be insurance subject to state regulation
  - This is why self-insured ERISA plans are exempt from state insurance laws
- “Deemer” clause **does not** apply when the plan is MEWA
  - States may regulate self-insured MEWAs as commercial insurers
  - States may regulate fully insured MEWAs in terms of setting solvency and reserve requirements, and may also regulate the policies sold to the MEWA

Is the MEWA Itself Subject to ERISA? (Pre-Rule)

- **Does ERISA apply at the MEWA or participating employer level?**
- This is important for several reasons, including:
  - The degree to which the MEWA is regulated by the state
  - Whether it's small group or large group
  - How the MEWA complies with Form 5500 and participant disclosure requirements
  - Whether the aca's rate review rules apply
- For ERISA to apply at the MEWA level, both the DOL's "commonality of interest" and "control" tests must be satisfied
  - If it meets these standards, it will be a bona fide association under DOL rules

Is the MEWA Itself Subject to ERISA? (Pre-Rule)

- **“Commonality of Interest” Standard**
- A facts and circumstances determination that considers—
  - How the association solicits members
  - Who is entitled to participate and who actually participates in the association
  - The process by which the association was formed
  - The association’s purpose
  - The relationship of its members outside the organization
  - The powers, rights, and privileges that a members enjoys as a result of joining the association

Is the MEWA Itself Subject to ERISA? (Pre-Rule)

- **Employer “Control” Requirement**
- The employer members of the association must control and direct the plan’s activities and operations, in both form and substance
- As with the PHSA definition of bona fide association, the “control” test is designed to exclude arrangements that exist only for the entrepreneurial purpose of selling health coverage to employers
- Employers must actually be involved in designing and administering the plan of benefits made available to their employees

Is the MEWA Itself Subject to ERISA? (Pre-Rule)

- **To be bona fide, the association must be formed for purposes other than obtaining health insurance coverage**
- To avoid the commonality or interest and control standards from being broadly construed, the DOL requires a genuine organizational relationship among the members other than a mere association for the purpose of qualifying for benefits
- Unrelated employers who merely execute identically worded trust agreements as a means to provide benefits are not a bona fide association under ERISA unless there is a genuine organizational relationship between the employers

Today’s Webinar

During the webinar, feel free to email or text Richard if you have additional questions that you would like to have addressed.

Text: 443-250-8606

Email: richard@silbs.com

Final Regulations on Association Health Plans

Final Regulations on AHPs

- **DOL's New Definition of Employer**
- *Historically*: Association had to be formed for something other than obtaining health insurance coverage—**no longer a requirement**
- Under final "Commonality of Interest" rules, AHP may be formed
  - Along same Geographic Area (In-State or In-Metropolitan Area)
  - Along same Trade, Industry, Line of Business, or Profession
- Must be formally established and run by employers
- Effective dates:
  - 9/1/18 – All associations may establish a fully insured AHP
  - 1/1/19 – Existing associations that sponsor an AHP may self-insure
  - 4/1/19 – All other associations (new or existing) may self-insure an AHP
- MBWL can help with incorporating documents & related documents

Final Regulations on AHPs – Highlights of the Final Rule

- Existing bona fide associations may continue to rely on prior DOL guidance
  - Final rule provides an *additional* mechanism for an association to sponsor a single ERISA-covered group health plan
  - Important because many bona fide associations experience- rate on an employer-by-employer basis, which is prohibited under the new rules
    - Bona fide associations may continue to rate on an employer-by-employer basis
- AHPs may self-insure under the final rule; However, the DOL anticipates that many AHPs will be subject to state benefit mandates
  - States retain the authority to adopt minimum benefit standards, including standards similar to those applicable to individual and small group insurance policies under the ACA, for all AHPs

Final Regulations on AHPs – Highlights of the Final Rule

- AHPs must limit enrollment to current employees (and their beneficiaries, such as spouses and children), or former employees of a current employer member who became eligible for coverage when the former employee was an employee of the employer
- Working owners may participate but must work an average of 20 hours per week or 80 hours per month
  - Proposed rule: 30 hours per week or 120 hours per month
  - Proposed rule: Working owners would be excluded if they are eligible for other employer-subsidized coverage
    - Final regulations do not include this rule

Final Regulations on AHPs – Highlights of the Final Rule

- The primary purpose of the association may be to offer health coverage to its members; However, it also must have at least one substantial business purpose unrelated to providing health coverage or other employee benefits
  - A “substantial business purpose” is considered to exist if the group would be a viable entity in the absence of sponsoring an employee benefit plan
  - Preamble contains several examples:
    - Offering services to member employers, such as convening conferences or offering classes or educational materials on business issues of interest to the association members
    - Being a standard-setting organization that establishes business standards or practices
    - Public relations activities such as advertising, education, and publishing on business issues of interest to association members unrelated to sponsorship of an AHP
    - Advancing the well-being of the members’ industry through substantial activity

Final Regulations on AHPs – Highlights of the Final Rule

- Employer members of an association must control its functions and activities, and the employer members that participate in the group health plan must control the plan, both in form and in substance:
  - Do employer members regularly nominate and elect the governing body of the association and the plan?
  - Do employer members have authority to remove a member of the governing body with or without cause?
  - Can employer members approve or veto decisions relating to the plan?

Final Regulations on AHPs – Highlights of the Final Rule

- **AHP Nondiscrimination Requirements**
- AHP cannot condition employer membership on any health factor
  - Eligibility and premiums must comply with HIPAA/ACA nondiscrimination rules
  - AHP may not treat different employer members as distinct groups of similarly-situated individuals
    - Intent is to prohibit AHPs from “employer-by-employer risk-rating”
  - While AHPs cannot deny eligibility or charge higher premiums based on health factors, they can vary premiums based on other factors, such as gender, age, industry or occupation, or business size
  - Final rule adds examples to clarify that employees of participating employers may be charged different premiums based on their industry subsector or occupation (e.g., cashier, stockers, and sales associates) or full-time vs. part-time

Final Regulations on AHPs

- **Potential Limits Based on State Regulation**
- All AHPs are MEWA and will need to ensure compliance with existing federal regulatory standards governing MEWAs (such as M-1 filings)
  - DOL intends to re-examine existing reporting requirements for AHPs/MEWAs, including the Form M-1 and possibly the Form 5500
- Final rule does not preempt state insurance law, nor does it create an exemption from existing state regulation for self-insured MEWAs
  - Many states regulate self-insured MEWAs as commercial insurance companies and others prohibit them altogether
  - States regulation of fully insured MEWAs is limited to setting contribution and reserve levels, licensing, registration, and financial reporting to ensure solvency; however, states may regulate the underlying insurance contacts or policies

Final Regulations on AHPs

- **In the past, states have opposed AHPs due to consumer protection concerns**
- *Adverse selection*: AHPs will be subject to large group rating rules (no EHB requirement)—they could be marketed toward healthier/younger individuals, which could undermine the individual and small group marketplaces
- Other concerns relate to fraud protection from unscrupulous promoters
- States may impose standards to protect consumers and guard against adverse selection, which may cause AHPs to be less attractive to employers
- Some states already prohibit small group members of an association from being rated as large group

What's Next?

- The new regulations may not significantly increase the number of self-insured AHPs because of existing state MEWA rules
  - Future of AHPs is in the hands of the states
  - Massachusetts and New York AG's intend to file a lawsuit challenging the legality of the new regulations
    - 15 other state AGs had signed onto a comment letter opposing the rule; not clear at this time whether they'll join any lawsuit challenging the new AHP rules
  - New Jersey recently enacted an individual mandate (eff. 2019), which provides that coverage under an AHP will not qualify as minimum essential coverage for purposes of the law unless it complies with state standards

Questions?

Thank you!

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