

# REFORM UPDATE

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## FINAL RULES ON ASSOCIATION HEALTH PLANS

The Department of Labor (DOL) recently released the final rules for Association Health Plans (AHPs). These plans were part of President Trump's Executive Order last fall detailing steps to make health care more affordable. The rules make it easier to form associations and offer health plans through them. They also modify ERISA's definition of employer and allow AHPs to qualify as a single employer group health plan under ERISA and other legislation.

Small groups have always be able to obtain coverage through an association. Although associations were able to offer health plans in the past, individual businesses buying health coverage through an association plan were treated as separate employers. Their rates depended on their group size and their potential experience. They also needed to comply with any state or federal law that applied to a group of their size. For example, small employer groups (50 or fewer employees) had to cover Essential Health Benefits (EHBs). The benefits from using the traditional association health plan were ancillary to the actual plan. The association might have offered COBRA administration or ERISA plan documents to any employer seeking coverage through an association health plan. The new regulations did not revise these rules. Associations can still offer health plans under the old rules. However, these final rules expand opportunities for associations to sponsor Association Health Plans (AHPs). The new rules loosen the requirements of the old rules and also may offer benefits related to health plan coverage and rating.

The final rules essentially redefine "employer" under ERISA. They combine all employers that purchase health coverage under a new AHP and consider them to be a single entity. For example, assume an AHP has 10 employer member groups, each with 20 employees. The AHP would be treated as a single employer with 200 employees. This allows smaller employers to band together under an AHP to sidestep some of the restrictive rules that apply to small group health plans.

These new AHPs have to meet specific requirements. Although, in some cases the new rules are the same as the old ones, in other cases, the new rules are more flexible. The following are key aspects of the new rules (and how they differ from the old rules):

- **Requirements to Form an Association** – Member employers must:
  - Be in the same industry, trade, line of business or profession (without regard to geographic location) *or*

- Have their principal businesses located in the same state or metropolitan area (even if it crosses state lines)

Under the old rules, member employers had to meet both requirements.

- **Purpose of an Association** – The association can be created to offer health benefits to member employers. Its primary purpose can be to offer a health plan, but it must also have one other substantial business purpose:
  - The business purpose does not have to be a for profit activity
  - Valid business purposes could include marketing, sales support, member education, lobbying efforts and so on

Under the old rules, the association had to have a business purpose other than to provide an AHP to members.

- **Governance** – A formal governing body and bylaws must exist (ensures member employers have some control of the AHP). Member employers must be able to:
  - Elect or remove directors/officers/trustees who have authority over the AHP
  - Directly vote on actions to form, amend, or terminate the AHP

These requirements are the same under the old rules.

- **Eligible Participants** – The AHP can allow the following to be eligible for coverage:
  - Employees and former employees of current member employers
  - Beneficiaries of employees and former employees as defined by AHP (spouse, children, and so on)
  - Former employees are eligible only if they became eligible as an employee of the member employer. This limits former participants to COBRA participants and employees who qualify for retiree health care under AHP (if it is offered)
  - A **sole proprietor or other self-employed individual** operating a business with no common law employees **can qualify as a member employer. However, the individual must:**
    - Work at least 20 hours a week, 80 hours a month or
    - Have an earned income from the business at least equal to the cost of AHP coverage

The old rules did not allow sole proprietors or self-employed individuals to belong to an AHP.

- **Plan Design and Underwriting** – An AHP **may not** develop and charge different premiums to different member employer groups based on the member's actual health claims experience rating. In these instances, plans are treated as single employer health plans, so they will be rated based on the size of the combined entity.

The AHP premiums can vary based on actual employment classifications not related to health factors or claim experience including:

- Full- or part-time
- Different occupations (for example, corporate or retail)
- Date of hire
- Geographic location (urban or rural)

- Union or non-union
- Length of service
- Current or former employees

If the AHP is insured, it may need to meet state law. Under the old rules, AHP members were rated as individual employers based on their size and their own experience. Employer size and state or federal law determined coverage requirements.

AHPs are considered Multiple Employer Welfare Arrangements (MEWAs) under ERISA rules. They must, therefore, comply with state laws regarding MEWAs as well as a number of state and federal reporting requirements, such as filing Form M-1 with the Department of Labor. One of the benefits the Trump administration publicized is that these AHPs can be established across state lines. However, it appears that state MEWA requirements will still likely apply. If the AHP is fully insured, the insurance carrier will be responsible for ensuring the AHP complies with state laws.

States will have significant authority over these new AHPs. Under the final rules, if states over-reach that authority and interfere with organizations forming self-funded AHPs, the DOL may seek to limit the state's ability to regulate them.

AHPs will generally be required to report and disclose information underlying benefit plans, such as providing Summary Plan Descriptions (SPDs), Summaries of Benefits and Coverage (SBCs), and Form 5500 filings. HIPAA wellness rules also apply to AHPs that offer wellness incentives. The Mental Health Parity and Addiction Act's requirements will apply as well if the combined number of employees of all members exceeds 50. The DOL is still considering final rules on how COBRA will apply to AHPs.

The effective dates for these final rules and how they apply to AHPs depends on the situation as follows:

1. September 1, 2018 – New or existing associations may establish a fully-insured AHP under the new rules
2. January 1, 2019 – AHPs existing on or before June 18, 2018, may establish a self-funded AHP
3. April 1, 2019 – All other new or existing associations may establish a self-funded AHP

## WHAT DO THESE AHPs MEAN FOR EMPLOYERS?

It will be interesting to see. Certainly, small employers (employers with under 50 employees) and sole proprietors may obtain less expensive health insurance through these new AHPs, depending on how many of these plans are launched and whether they will be available for employers.

Large employers can participate in these plans. However, large employers currently do not need to cover Essential Health Benefits and are not subject to the rating rules that apply to small employers. Large employers, therefore, may not benefit from AHP coverage.

A number of states' attorneys general have already filed suit to block these rules. Depending how these lawsuits proceed might affect the future of these new AHPs. In the past, some association health plans have engaged in fraudulent behavior. There is some concern that these plans may be repeating history.

Certainly, some associations will be eager to launch AHPs under these new, more beneficial rules. They may provide invaluable rate relief to small businesses. However, as far as a long-term solution, a lot will depend on how well associations manage these plans and, of course, the experience of these pools.

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