ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: Practical Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley Gillihan, Steven Mindy, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

AHP Opportunities for Small Employers and Business Owners

In October 2017, President Trump issued an Executive Order directing the Secretary of Labor to consider proposing regulations or revise its guidance to expand access to health coverage by allowing more employers to form association health plans (AHPs). AHPs offer an opportunity for otherwise unrelated small employers (i.e., employers that do not have common ownership) to group together to be considered a single large group health plan, and thus, depending on membership size, avoid the additional ACA rules otherwise applicable to small group plans.

There is no statutory definition of an AHP under ERISA, the PHSA, or the Code; however, all three laws recognize that an association may itself be treated as an employer, in which case the AHP is considered a single (e.g., possibly large) group health plan for federal law purposes. In January, the U.S. Department of Labor (DOL) gave us our first glimpse of its plan for AHPs by issuing proposed regulations.

Proposed Rule

Association can exist solely to provide benefits

Under the proposed regulation, an AHP may exist solely to provide health coverage to its employer members. The AHP can offer coverage only to the members' employees, former employees, and their family members. The AHP cannot be a health insurer.

The proposed rule also aims to prevent discrimination based on health conditions by preventing AHPs from discriminating among and between employers or employees with regard to health status for eligibility or rating (although bona fide business distinctions other than health risk are permitted).

In a departure from prior guidance, "working owners" such as sole proprietors and partners can participate if certain requirements are met. A working owner must work at least 30 hours per week in the business enterprise or have earned income from the trade or business in excess of the cost of coverage. The rules do not permit passive owners. Additionally, a working owner cannot have access to other employer subsidized group health plan coverage, such as coverage through a spouse's employer.

Relaxed Commonality of Interest Test

The proposed rule retains a modified version of the Commonality of Interest Test. Currently, the Commonality of Interest Test generally considers:

- How the association solicits members;
- Who is entitled to participate and who actually participates;
- The process by which the association was formed;
- The association's purposes;
- The relationship of its members outside the organization; and
- The powers, rights, and privileges that result from joining the organization.

Under case law, employers in the same line of business and same geographic location have been found to have requisite commonality of interest; however, employers that share only a common general interest, size, or geographic location have been held not to demonstrate sufficient commonality.[1] Thus, for example, the DOL found that a local chamber of commerce was not the "employer" as defined in section 3(5) of ERISA, where the primary economic nexus between the member employers was a commitment to private business development in a common geographic area.[2]

Under the proposed rule, the employers participating in the AHP will share commonality of interest if they are in the same trade, industry, line of business or profession. This provision should apply to franchisee arrangements, as well. As a result, an industry or franchisee related business could create a nationwide AHP.

Additionally, the employers will have a commonality of interest under the proposed rule if their principal place of business is in the same geographic region within a state or metropolitan area. Thus, all employers in North Dakota would share commonality of interest, as would employers in the metropolitan Washington, D.C. area regardless of whether they are in D.C., Maryland, or Virginia. Those employers would not be required to share any additional business connection other than their location.

As a result, a general business league could create or sponsor an AHP within certain boundaries. Although not specified in the regulations, it also appears that an AHP can provide coverage to an employer's other locations outside the AHP's geographic boundaries. This might be attractive to employers with a principal place of business in a lower cost geographic region that have operations in higher cost areas (e.g., San Francisco) who can lower their cost of coverage by joining the AHP and avoiding state small group community rating requirements that would otherwise apply.

Control Test might still be a challenge

The proposed rule retains the current Control Test. Specifically:

> "The functions and activities of the group or association, including the establishment and maintenance of the group health plan, are controlled by its employer members, either directly or indirectly through the regular nomination and election of directors, officers, or other similar representatives that control the group or association and establishment and maintenance of the plan."[3]

Moreover, the AHP must have "a formal organizational structure with a governing body and [have] by-laws or other similar indications of formality."[4]

Historically, the DOL has not found that the participating employers exercise control unless the participating employers have the authority to direct, replace, and supervise the plan's insurer/administrator, and have the ability to amend the plan.[5]

Further, the DOL has typically required that each participating employer must be involved in designing and administering the plan offered to their employees.[6] Typically, it has been difficult to determine if the participating employers satisfy the Control Test. Even the courts have had difficulty making this determination.[7]

With regard to the control test, the proposed rule does not seem to provide a significant relaxation of the current rule standards. The rule requires regular nomination and election of directors, officers, or representatives that control the AHP, as well as by-laws or similar formalities. AHPs might have difficulty obtaining or demonstrating employer participation.

For example, will the AHP require that employers meet regularly and vote on issues involving the AHP? Alternatively, will the participating employers regularly nominate and elect directors, officers, or other similar representatives? In either case, the AHP will need to ensure the active involvement of participating employers.

Other Compliance Concerns

Guaranteed Renewability Requirements under Public Health Service Act ("PHSA")

Under the PHSA, coverage provided to an employer through a bona fide association must be renewed unless the employer's membership in the association terminates. The PHSA's definition of "bona fide association" is narrower than the definition of association under the proposed rule. Thus, even if an AHP is considered a single large group health plan under DOL guidance, the exception to the guaranteed renewal requirement might only be available to insurers if the association meets the PHSA's definition of bona fide association. That definition requires, among other things, that the association have been in active existence for at least five (5) years and was formed and maintained in good faith for purposes other than obtaining insurance.[8]

AHPs are still MEWAs, which means state laws and ACA taxes might apply

AHPs are multiple employer welfare arrangements (MEWAs) under both current law and the proposed rule. Under the proposed rule, as under current law, the AHP will be a MEWA even if it is considered a single plan at the association level rather than separate plans sponsored by each participating employer. Thus, MEWA status should be considered when planning an AHP. Most MEWAs must file an initial and annual Form M-1 with the DOL. A MEWA might also be required to file a Form M-1 due to certain changes or before providing coverage in a new state.

Additionally, ERISA has specific preemption provisions that allow states to regulate MEWAs:

- For fully insured plans, states may impose and enforce requirements relating to reserves and contributions.

- States have even more control over self-funded MEWAs. State laws relating to self-funded MEWAs are preempted *only to the extent* that the state law is inconsistent with ERISA. In that respect, state laws that provide more participant protections generally are not inconsistent with ERISA. Some state laws prohibit self-funded MEWAs entirely or require significant registration and reserve requirements.

ERISA provides the DOL with the statutory authority to issue regulations exempting self-funded MEWAs from state laws. However, the DOL has never issued any exemptions. It is possible that the DOL will issue exemptions in the AHP final rule, but the DOL statutory authority to issue exemptions does *not* extend to state laws relating to reserve and contribution requirements. Depending on the DOL's actions, new issues might arise as to which provisions are preempted by federal law.

In addition to state regulation, MEWAs are subject to the ACA insurance sector fee tax – regardless of whether they are self-funded or fully insured.

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Many state laws will need to be changed for AHPs

Current state insurance laws might also present challenges to the formation of AHPs. For example:

- Most states require that the association have been organized for purposes other than providing insurance and in existence for a certain number of years (typically five (5) years).[9]

- Some states have minimum participation requirements. For example, North Carolina requires an association to have a minimum of 500 persons.[10]

- Some states might limit the types of entities that can form AHPs. For example, Texas insurance law states that the types of entities that can obtain an association policy include "a labor union or an organization of labor unions, a membership corporation organized or holding a certificate of authority under the Texas Non-Profit Corporation Act…and a cooperative or corporation subject to the supervision and control of the Farm Credit Administration[.]"[11]

Thus, those considering forming AHPs will need to consider state law carefully. Although state legislatures might change their laws to match federal requirements, they likely will occur slowly.

Conclusion

AHPs have a lot to offer. However, potential sponsors of AHPs will need to consider many issues, both at the state and federal level. Perhaps most significantly, it might take time for some states to update their insurance laws to accommodate the federal changes that permit AHPs. ■

References

1 See, e.g., Gruber v. Hubbard Bert Karle Webbers, Inc., 159 F.3d 780 (3d Cir. 1998); DOL ERISA Opinion Letters 2005-24A; 2005-25A; DOL ERISA Advisory Opinion 2003-17A.

2 See, e.g., DOL ERISA Opinion Letter 2008-07A and cases cited therein.

3 Prop. DOL Reg. § 2510.3-5(b)(4).

4 Prop. DOL Reg. § 2510.3-5(b)(3).

5 See, e.g., DOL ERISA Opinion Letter 96-25A.

6 See, e.g., DOL ERISA Opinion Letters 2005-24A, 2005-25A, 2003-17A, 90-11A, 90-07A, 89-21A, 89-13A, 88-07A, 87-92A, 86-26A and 86-08A.

7 See, e.g., *Assoc. Inds. Mgmt. Serv. V. Moda Health Plan, Inc.*, 2015 WL 4426241 (D. Or. 2015) (court could not make determination because it did not have information on how often the association meets or for what purpose, or the powers, rights and privileges of participating employers).

8 42 U.S.C. § 300gg–91(d)(3).

9 See, e.g., South Carolina Code 38-71-670(4) (association in existence for five years), but see Mo. Rev. Stat. 376.421(5) (requiring association to be actively in existence for at least two years)

10 N.C. G.S 58-51-80.

11 Tex. Ins. Code 1251.052.