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, 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.

DC COURT SENDS AHP RULE BACK TO DOL

In June of 2018, the DOL issued its Final Rule on association health plans (AHPs) which expanded the types of employer groups that might be considered to be a bona fide association. In March, a DC district court overturned the final AHP rule, and sent it back to DOL for it to determine which parts may be severable. During the pendency of this case, the status of AHPs established under the Final Rule ("New Rule AHPs) is in question. AHPs established under the old (sub-regulatory) AHP guidance ("Pre Rule AHPs") should not be adversely affected.

BACKGROUND

AHPs have been in existence for many years. If the association is "bona fide" under the applicable rules, the association is considered the "employer" under ERISA, with the result that the AHP can sponsor a single health plan on behalf of its members. If applicable rules are not satisfied, then each participating employer is treated as the sponsor of a separate group health plan. Fully-insured small employer group health plans are subject to additional ACA requirements that do not apply to large group or self-funded plans, such as the ACA requirement to offer essential health benefits (EHBs) and modified community rating. Through an AHP, a small employer may be able to avoid these additional requirements by banding together with other employers, potentially resulting in lower cost coverage.

Before the Final Rule, guidance as to when an association was considered "bona fide" under ERISA was contained in DOL "sub-regulatory" guidance, such as opinion letters and bulletins, as well as case law. This Pre-Rule Guidance generally sets forth two tests that must be satisfied for an association to be considered the "employer" for health plan purposes. First, the employer members of the association must have sufficient "commonality of interest". Second, the employers must exercise "control" over the association and AHP plan. Establishing a bona fide association under Pre-Rule guidance is challenging. The Final Rule relaxed some of these requirements, particularly the "commonality of interest" rule, making it easier to form AHPs.

KEY PROVISIONS UNDER THE DOL FINAL RULE

The DOL Final AHP Rule relaxed the requirements to establish a bona fide association in several regards:

Relaxed commonality of interest test allows for geographically based AHPs. The Final Rule retains a modified version of the pre-rule AHP commonality of interest test. Under the Pre-Rule guidance, 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. Thus, for example, pre-rule, the DOL found that a local chamber of commerce was not the "employer" (and therefore was not the proper sponsor of an AHP), where the primary economic nexus between the member employers was a commitment to private business development in a common geographic area. Under the Final Rule, the employers participating in an AHP will have commonality of interest if they are in the same trade, industry, line of business or profession. Additionally, the employers will have a commonality of interest under the Final Rule if their "principal place of business" is in the same geographic region within a single state or metropolitan area. Those employers would not be required to share any additional business connection other than their location.

The primary purpose of the association may be to offer health coverage, but the association must also have at least one substantial business purpose unrelated to providing benefits. Whereas the Pre-Rule guidance required that the association NOT be primarily established to provide insurance, the Final Rule found that the primary purpose could be the provision of benefits as long as the association has at least one other substantial business purpose. The Final Rule does not define the term "substantial business purpose," but does provide a safe harbor under which a substantial business purpose is considered to exist if the association would be a viable entity even in the absence of sponsoring an employee benefit plan. Examples of what may be considered a business purpose include providing conferences or other educational services to association members, acting as a standard setting organization to establish business standards or best practices, engaging in public relations activities on issues of interest to members unrelated to health benefits, and advancing the well-being of the industry in which association members operate through substantial activity in addition to providing health coverage. If an organization has operated with an active membership before offering benefits, the DOL considers that compelling evidence of a substantial business purpose.

"Working owners" such as sole proprietors and partners can participate if certain requirements are met (even if the business has no employees other than the owner and spouse). Under the Pre-Rule guidance, business owners could not participate unless they also had common law employees covered by the AHP. Under the Final Rule a working owner could participate if they work on average at least 20 hours per week or 80 hours per month in the business enterprise or have income from the trade or business at least equal to the cost of coverage under the AHP.

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DC DISTRICT COURT WEIGHS IN

Eleven states and the District of Columbia filed suit against the DOL alleging that the final AHP Rules are unlawful under the Administrative Procedures Act ("APA"). The APA regulates the process by which the agencies, including the DOL, make rules. In this particular case, the plaintiffs argued that the DOL's definition of "employer" in the AHP rules extended beyond the authority granted to it by Congress in ERISA, which violates the APA. The Court agreed—noting that the AHP rules, which broadened the definition of "bona fide association" and also allowed working owners without employees to participate in plans maintained by the expanded bona fide associations-- scrapped ERISA's careful statutory scheme that focuses on employee benefit plans and the inherent employment relationship at the core of such plans. It further noted that the AHP Rules were an "end-run around the ACA". The Court vacated the Final Rule bona fide association definition and the working owner provision rules and then sent the rule back to the DOL to assess what parts of the final rule are severable.

The DOL, of course, has a right to appeal. In this regard, the DOL issued a set of FAQs addressing the ruling, including its potential impact on currently covered individuals. With regard to an appeal, the DOL noted as follows:

> **Will the Department appeal the decision?**
> We disagree with the District Court's ruling and are considering all available options in consultation with the Department of Justice. The Administration will continue to fight for sole proprietors and small businesses so that they can have the freedom to band together to obtain more affordable, quality healthcare coverage.

If an appeal is filed, there will likely be a stay of the holding pending the appeal and there may not be final resolution for some time.

Regardless of whether the DOL appeals or not, the future of AHPs founded and maintained based solely on the new rules is uncertain at best. Those who were considering establishing a new association based solely on the new rules (a New Rule AHP) will likely rethink moving forward until there is final resolution. Those that have already established a New Rule AHP are in a much more precarious position. States have significant flexibility to regulate the insurance market in their state and some may still afford the New Rule AHPs established in or covering individuals in their state large group market treatment despite the court's holding; however, such treatment may not be too beneficial if federal law remains consistent with the court decision.

Also, the court ruling reinforces the status of Pre-Rule AHPs established under the bona fide association rules in effect prior to the New Rule. This path is limited because the association will not be bona fide under the prior rules unless there is a common employment or industry connection among the members and the primary purpose of the association is other than to provide health coverage to its members. Also, working owners would not be permitted to participate in a bona fide association health plan.

THE COURT'S REASONING

At the core of the DC court's holding was ERISA's statutory definition of employer, which it defines as an employer or a group or association of employers that "act in the interests of an employer.

The court noted that because ERISA plans arise from a special relationship between employers and employees, "a plan is not an ERISA plan unless the entity providing benefits and the individuals receiving the benefits demonstrate the 'economic or representational' ties or protective 'nexus' that characterizes an employment relationship."

Ultimately, the court essentially held that the Final Rule AHP definition failed to identify an organization that characterizes an employment relationship.

In making its decision, the court analyzed each of the 3 prongs of the Pre-Rule AHP bona fide association definition: purpose, commonality of interest and control.

First, the court held that the primary purpose of the association under the Final Rule could be to provide benefits to its members and that merely forming to provide benefits was not enough to act in the interest of employers.

The court noted that the Final Rule required that there be one substantial business purpose other than the provision of benefits; however, the court further noted that this did not set any meaningful limits on the character and activities of an association.

Even the Final Rule safe harbor describing "substantial purpose", which indicated that the other purpose is substantial if the association would be viable in the absence of the health plan, is just that- a safe harbor, suggesting that some associations would still meet the purpose test if they didn't meet the safe harbor.

Second, the court rejected the notion that an association of employers connected solely by geography would be acting in the common "interests" of employers, noting that that there was nothing "intrinsic in common geography that would generate the types of economic or reputational ties that courts have deemed essential for a plan to be covered by ERISA."

Finally, the court noted that the control requirement did reflect an employment connect but that the "control test alone, however, does not mean that the employer members are united in interest."

Given the above analysis, it is not surprising—in light of the court's focus on employment connection-- that the court also rejected the Final AHP Rule's working owner provision, noting that Congress did not intend for working owners without employees to be included within ERISA.

CONCLUSION

At this point, every AHP should examine its status under the Pre-Rule AHP analysis. New Rule AHPs will need to carefully watch how this case progresses and, absent an appeal and reversal, likely restructure their operations. Even Pre-Rule AHPs can expect additional scrutiny by many state authorities seeking to evaluate their status under the old bona fide association test (e.g., control requirement).■