Federal Expansion of Association Health Plans:

The Time is NOW?

Written By Ryan Work

Soon after the New Year, the U.S. Department of Labor (DOL) issued a regulatory proposal to increase the accessibility of association health plans (AHPs) for small business and self-employed business owners. This proposal, or Notice of Proposed Rule-Making, was a follow-up to the President's Executive Order, issued in October of last year, directing federal agencies to develop guidance that would expand the formation of both fully-insured and self-insured AHPs. In this article, we will examine the past and potential future of AHPs, as well as its impact on self-insurance.

Past Treatment of AHPs

Despite some congressional activity on the issue as recently as 2017, very little policy movement has been made on expanding the use of AHPs since changes were first proposed back in the late 1990s. Particularly, no past reform effort has successfully included AHP changes that provide the ability to self-insure.

In the wake of Affordable Care Act (ACA) implementation, the Obama Administration issued guidance in 2011 that essentially prohibited small employers from forming a fully-insured 'large group' health plan. This meant that the ACA's 'small group' market reforms applied to fully-insured AHP employer members with 50 or less employees. The one exception to this guidance was if the AHP formed a fully-insured "bona fide group or association of employers" as defined under ERISA, not applying to the ACA's "small group" market reforms. This guidance did not apply to self-insured AHPs, instead applying State "multiple employer welfare arrangement" (MEWA) laws to self-insured plans.

Current AHP Proposal

Fast forward to 2018. The DOL *Notice of Proposed Rule Making (NPRM) on Association Health Plans,* issued in the beginning of January, is the first step in the implementation of potential regulatory guidance to expand AHPs. The overall goal of this initial rulemaking is to expand affordable health coverage among small employer groups and self-employed individuals by removing restrictions under current ERISA law. This is essentially accomplished by treating the association itself as the employer sponsor of a single plan.

Because this action is being taken under regulatory authority and not a change of law by Congress, the agency may only maneuver within the confines of current ERISA law and past guidance. This limitation of action within the current law very much restricts what the DOL may do, particularly with issues arising from federal pre-emption and issues across multiple states absent a common metropolitan geographic area.

Related and Unrelated Employers

The proposed guidance really comes down to how it treats various types of employers, and how those employers may band together to form AHPs within a specific or broad geographic area.

To that point, the proposal allows two scenarios for which employers may form AHPs. In the first scenario, related employers from the same industry or profession may form a plan, regardless of geographic location. In this scenario, an association of widget makers from 3 different states could form an AHP to provide health insurance to their members and member dependents. In addition, franchisee employers tied to the same parent company could also set up an AHP and offer health coverage to the franchisees' employees regardless, regardless of where the employer is located.

In the second scenario, a group of unrelated employers may form a plan, but only within the same State or geographically

similar metropolitan area. In this case, a local Chamber of Commerce, representing different industries and professions, may form a self-insured AHP in the New York tri-state market, but not across multiple states like Colorado and Idaho. This means that a bakery and a dry-cleaner located in the same city, county, or State could, for example, join their local Chamber's AHP.

The AHP proposal also has several other important factors.

Working Owners: Self-Employed Individuals

First, and divergent from past regulatory treatment, self-employed individuals with no employees, otherwise known as 'working owners,' may participate in an AHP. For the first time, self-employed individuals with no employees (referred to as "working owners") could participate in an AHP.

In this case, according to the proposed changes, working owners in the same industry/profession and located in different geographic locations could participate in an AHP established by other "related" employer members. Working owners in the same industry/profession could also establish an AHP solely for "related" working owner members. For example, Uber drivers, considered working owners in this scenario, could establish an AHP in which Uber drivers all across the country could receive health coverage.

Health Coverage as Sole Purpose

In the past, AHP formations could only be done by an association that was already established for a specific purpose other than health care. For instance, the Widget Manufacturing Association could be organized for the purpose of growing and supporting the widget industry. This prevented associations from forming for the single purpose of offering health benefits and little else. This long-standing rule would be drastically changed by the proposed rule, which would allow an organization to establish an AHP to do just that - for the sole purpose of offering health coverage.

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In fact, an AHP could be established by employer members and/or working owners even if there (1) is no pre-existing organization and (2) the AHP is established for the sole purpose of offering health coverage.

Nondiscrimination Rules

One important proposal to note is that AHP's *cannot* refuse coverage based on health factors, and may not use such health factors to vary premium. This was done to encourage not only strong plans, but to assuage critics who have been vocal in their opposition to so called "skinny plans." Under the proposed nondiscrimination protections, employers or working owners are prohibited from refusing AHP participation to an eligible employee based on any "health factor," which includes: health status, medical condition (including both physical and mental illness), claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability.

Similarly, the premiums for the "large group" AHP health coverage cannot be varied based on a particular participant's "health factor." The same proposed rule also includes benefits, which cannot be different based on these same factors. The only ability to differentiate AHP variables is due to bona fide employment-based classification like: full-time vs. part-time employees, union vs. non-union, employees located in different geographic locations, different occupations, date of hire, and length of service.

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For example, the National Widget Association offers AHP health coverage to its employer and working owner members. Widget-Maker A is located in Massachusetts, Widget-Maker B is located in Minnesota, and Widget-Maker C is located in Alabama. The premiums for the AHP coverage are higher for Widget-Maker A in Massachusetts than the premiums for Widget-Maker C in Alabama. So long as the price differential between Widget-Maker A and Widget-Maker C is reasonable, such premium differential does not violate the nondiscrimination rules (and is permissible) because the premiums vary due to different geographic locations.

Self-Insured AHPs & State Regulation

Considering the proposed rule must be applied under current strictures of law, it walks a fine line between respecting the insurance regulatory authority of states and the federal authority to expand AHPs.

Under the proposal, a self-insured AHP would be considered a self-insured multiple employer welfare arrangement (MEWA). ERISA explicitly gives States the authority to impose any State insurance law requirement on self-insured MEWAs. At this point, most if not all States have done this by enacting State MEWA laws, though some are more onerous than others. For example, some States have an outright prohibition on self-insured MEWAs. Other States require an eligible MEWA to receive a "certification" from the State Insurance Commissioner proving it has complied with various reserve requirements, and in some cases, benefit mandate and/or premium rating requirements.

In our current reading, the proposed AHP regulations in no way impact States' ability to regulate self-insured MEWAs through their own laws. As a result, all of the current State MEWA laws would continue to apply to self-insured AHPs. Importantly, States could augment laws in the future, should they want to place further requirements within their state.

At this point, it appears that a self-insured AHP must satisfy each State MEWA law in each of the States in which the AHP coverage is offered if offered to employees in multiple states. This fact may limit the extent to which self-insured AHPs are formed, despite the additional flexibility the DOL is providing to employers and working owners when it comes to AHP formation.

One important note is that, as part of the proposed regulations, the DOL did ask for comments, through a Request for Information or RFI, on whether the DOL should issue a "class exemption" that would preempt the non-solvency requirements of all State MEWA laws. The expansion of a "class exemption" would essentially allow self-insured AHPs to avoid State MEWA statutes, and instead, offer health coverage in multiple States in accordance with uniform rules and requirements set forth in the class exemption.

What Happens Next?

The DOL is now seeking comments by early-March on the overall proposed rule, which the agency will then review and consider further changes before rule finalization. In addition, the DOL is also seeking comments on the "class exemption" RFI on potential state pre-emption of State MEWA laws. This RFI is a pre-curser to a potential future rule-making process and will not be included in the final AHP regulations. Over the next several weeks, SIIA will be conducting committee meetings and outreach to gain feedback on implications, potential changes and overall recommendations to formulate comments and feedback to the DOL.

Please contact Ryan Work (rwork@siia.org) or Chris Condeluci (ccondeluci@siia.org) with any questions or comments. ■