Behind the buzz:
Association health plans stir interest, but will insurers – and the states – play along?

The US Department of Labor (DOL) released on June 19 much-anticipated final regulations for association-based health plans (AHPs). These regulations give associations and other groups of employers expanded opportunities to come together for health insurance coverage. Federal authorities expect about 4 million sole proprietors and employees of mostly small businesses to obtain less expensive health insurance over the next five years, as a result of the new rules.

The final regulations vary slightly, but significantly, from the rules proposed in January (see our Alert). While not a panacea for all that ails the health insurance markets, the rules might help certain associations and other employer groups – specifically, those with employer members boasting attractive risk profiles and willing to commit to AHP participation – provide more affordable health insurance to the members’ employees.

Small-employer members have the most to gain. The new rules allow an AHP to escape the community-rating rules that may otherwise apply to a group of small employers banding together to purchase insurance. Importantly, the new rules do not supersede state laws that prohibit or restrict association plans from self-funding.

Lockton comment: While AHPs have gained considerable attention since the new rules were proposed in January, the new rules don’t substantially change the game for existing associations that could have maintained AHPs all along, under current, long-standing AHP-related guidance. As further explained below, under existing guidance the prerequisites for an effective AHP are fewer but more limiting. The new rules soften these limits but impose additional requirements in exchange.

The final rules leave two important, practical considerations to be answered: First, will insurance carriers step up to underwrite association-based health plans (that is, will insurers see the risk as worth taking on)? Second, will politically progressive states – states that are very much opposed to the new rules for the threat they pose to the states’ individual and small-group markets – take steps to prevent insurers from underwriting association-based health plans in those states?

Lockton comment: We hope you can join us on Friday the 13th (of July) for a complimentary webcast on the final AHP regulations. You may register here.
What’s all the buzz about?

Association health plans have the potential to supply more cost-effective health insurance coverage to their employer members, particularly small employers, than those members could obtain on their own.

*Lockton comment:* There are several complex and related reasons for this, many attributable to Affordable Care Act-imposed requirements on the nation’s small-group health insurance markets.

But for an association-based health plan to achieve this happy result, federal authorities have long required the association to be bona fide, that is, a legitimate group of employers coming together for legitimate reasons other than merely health insurance.

Over the years, the DOL and federal courts fashioned a series of requirements the association must satisfy: requirements that a typical industry or professional association (a manufacturing association or a dental association, for example) could satisfy rather easily, but other multitrade associations (like a chamber of commerce) or groups of employers coming together primarily for health insurance purposes could not.

The newly final AHP regulations are designed to kick the AHP door open to more associations and other groups of employers, including sole proprietors and employers that come together primarily for health insurance purposes, but the new rules extract an additional price: several new requirements, including a nondiscrimination requirement.

**Two paths to association health plans**

Significantly, the new rules don’t replace existing rules for AHPs and the associations or groups that sponsor them. Rather, they offer an entirely *alternative* path that an association or other group of employers can meet to offer cost-effective AHPs.

Let’s consider the two sets of rules. Traditional industry- or trade-specific associations will likely find the existing AHP rules more to their liking, while the new rules will be attractive to chamber of commerce-like groups and other groups of employers looking to band together primarily for health insurance purposes.

<table>
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<tr>
<th>Requirement</th>
<th>Existing AHP guidance</th>
<th>Newly final AHP rules</th>
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<tr>
<td>Association or group sponsoring the AHP can exist primarily for providing health insurance to its members.</td>
<td>Generally, no; the association or group must exist for purposes other than providing health benefits.</td>
<td>Yes, but the association or group must have at least one other substantial business purpose (i.e., the association or group could stand on its own if it were not providing benefits).</td>
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<td>The association or group must be industry-specific.</td>
<td>Effectively, yes. The association or group maintaining the AHP, and the individuals benefiting from it, must be tied by a “common economic or representational interest.”</td>
<td>No, but if employer members of the association or group are in different industries, trades or professions, there are geographic limits to the AHP’s reach (e.g., the state, or multistate metropolitan area).</td>
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<td>AHP participation is limited by geography.</td>
<td>Generally, no; the AHP may include employer members from coast to coast (but the employer members are effectively in the same industry, trade or profession).</td>
<td>No, for industry-specific associations or groups. Yes, for associations or groups that include employers from diverse industries, trades or professions; in that case AHP participation is limited to employer members in the same state or multistate metro area.</td>
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| Members of the association or group must control the AHP. | Yes, employer members of the association or group must control and direct the activities and operations of the AHP; employer members must be involved in designing and administering the AHP, although control may be exercised through a subgroup (e.g., a committee). | Yes. The DOL will look for:  
- Whether employer members regularly nominate and elect people who constitute the governing body of the group or association and the AHP.  
- Whether employer members have authority to remove any such person with or without cause.  
- Whether employer members that participate in the plan have the authority and opportunity to approve or veto decisions relating to the formation, design, amendment, and termination of the plan, including changes in coverage, benefits and premiums. |
| Sole proprietors or working owners can participate in the AHP. | Yes, but an AHP covering only sole proprietors or working owners is problematic. | Yes, even if the AHP covers only sole proprietors or working owners. But sole proprietors or working owners may not participate for plan years after they cease to be sole proprietors or working owners, except as required by COBRA. |
| The association or group can risk rate individual employer members of the AHP. | Generally, yes, subject to state-based restrictions. | No, the AHP must not discriminate against an eligible employer in premiums or eligibility based on health risk of the employer’s employees. |
| The association or group must reflect formal organizational structure. | Effectively, yes. | Yes. |

**What about self-insured AHPs?**

All AHPs are multiple-employer welfare arrangements, or MEWAs, and as such are most typically fully insured because most states prohibit self-insured MEWAs or impose substantial restrictions on their operation.

The newly final regulations don’t make it easier or more difficult for an association to sponsor a self-insured AHP. That is, the regulations don’t affect the current self-insured MEWA status quo. States continue to have the right to regulate, including the right to outright prohibit, self-insured AHPs.
What is next?

That’s the potentially multimillion-dollar question. While the new AHP regulations have garnered significant interest, will they live up to the hype? Probably not, although they could certainly be game changers for some associations and other employer groups, particularly associations and groups that can’t satisfy existing AHP-related guidance and whose employer members boast decent risk profiles.

There are several reasons why the new rules likely won’t trigger a stampede toward AHPs.

First, the new rules have little significance for the clear majority of existing associations, at least the industry-specific associations. Most of these groups don’t offer AHPs today, even though they could do so under current AHP guidance. The primary obstacle for AHPs in the past has been more practical and administrative than the regulatory landscape. The main challenges have been avoiding adverse selection (i.e., holding onto employers with good risks and avoiding too many employers with bad risks) and efficiently administering members enrolling and withdrawing, as well as timely premium payments, etc. Adverse selection will continue to be the primary challenge.

*Lockton comment:* However, it’s also true that cost pressures in the small-group health insurance markets will continue to cause associations to consider an AHP for their employer members. And technology has made administration of AHPs easier than in the past.

Second, an AHP makes little sense unless the risk profile of the employers in an association is, in the aggregate, better than the aggregate risk profile of the community-rated, small-group health insurance market in which those employers would otherwise be buying health insurance. If the association’s risk profile is worse than the community-rated market, there’s less to gain by consolidating that poorer-than-average risk in a single AHP, and it will be difficult to find an insurer willing to underwrite the risk.

Third, except where an association is inclined and permitted to self-insure its AHP, the association will need an insurer willing to underwrite the AHP. If the best candidate for an insurer is the predominant insurer in the small-group market or markets where the association’s employer members would otherwise be shopping for insurance, why would the insurer be interested in facilitating the withdrawal from that market some of the insurer’s better risks?

Finally, more than a few states are concerned that because AHPs make the most sense where they can draw off better-than-average risk from the state’s community-rated, small-group market, AHPs will trigger a deterioration of that community-rated pool. Some of these states are almost sure to move quickly to limit the ability of insurers to underwrite AHPs.

Effective dates

The final regulations allow fully insured association-based plans to continue to operate under existing rules or under the new rules as early as Sept. 1, 2018.

Associations wishing to maintain self-insured AHPs in states where that’s allowed can apply the new rules beginning Jan. 1, 2019, if the association already offers an AHP, or April 1, 2019, if it does not.
Final thoughts

Associations and other employer groups to put an AHP in place in accordance with either existing AHP guidance or the newly final rules should remember that the AHPs are ERISA plans, subject to the panoply of requirements that apply to other ERISA welfare benefit plans, and subject to the federal Form M-1 filing.

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Compliance Services

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