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Court Ruling Chills Association Health Plans

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On March 28, 2019, in *State of New York v. United States Department of Labor*, a federal district court in the District of Columbia set aside key portions of the Department of Labor's final rule (the "Final Rule") which paves the way for the expansion of association health plans (AHPs). This is a significant set-back for AHPs.

Released last summer, the Final Rule loosens the criteria that must be met for an association of employers to establish an employee welfare benefit plan which is regulated under ERISA and the Affordable Care Act as a single employer plan. Under the Final Rule, small employers and self-employed individuals with no employees who work in the same trade, industry or geographic area are able to band together for the purpose of purchasing health plan coverage as a large employer. In doing so, they are able to avoid the requirements imposed by the Affordable Care Act on small employer and individual insured health plans, including restrictions on underwriting and certain group health plan mandates, like the requirement to offer essential health benefits.

Shortly after the Final Rule was issued, eleven states and the District of Columbia (the "States") filed a lawsuit alleging that the DOL's interpretation of the definition of "employer" in ERISA to include association health plans which meet the requirements of the Final Rule is not reasonable. At issue is language in the definition of "employer" which defines the term to include any group or association of employers acting indirectly in the interest of an employer with respect to an employee benefit plan. In last week's order, the court agreed with the States.

The court set aside the provisions in the Final Rule establishing the criteria for qualifying bona fide associations and allowing working owners to participate in an AHP because the DOL failed to establish a meaningful limit on the types of associations that can qualify to sponsor an association health plan under the Final Rule. The court found that the Final Rule is an "end-run" around the protections that the ACA intended to provide in the small group and individual markets. Looking at the requirement that the association have at least one substantial business purpose other than the provision of health care, the court found that there is nothing that requires that the association's activities align with or further the interests of its members. The court also took issue with the portion of the Final Rule that allows a group of employers to demonstrate a commonality of interest based solely on being in the same geographic area because there is nothing that ensures that the members will, in fact, share a commonality of interest. The court also found that allowing self-employed individuals to participate in an association health plan extended ERISA's coverage to plans outside of any employment relationship which in the court's view clearly was not the intent of Congress.

In a two page set of Questions and Answers issued this week in response to the ruling, the DOL indicates that it is still considering all of its options, including the possibility of appealing the court's order and requesting that the court stay its decision while the appeal is pending.

Until additional guidance is provided, any new AHPs formed pursuant to the Final Rule will not be permitted. (AHPs formed pursuant to pre-Final Rule guidance are not affected by the court's ruling.) Under the Final Rule, self-insured AHPs were not allowed until April 1 but insured AHPs were allowed beginning January 1, 2019. For insured AHPs that are already operating in reliance on the Final Rule, it is unclear how the states will react. Most states likely will allow the AHP to continue for the year for existing participants (but not allow marketing to new participants), but it is possible that a state could require corrective action mid-year. In addition, for those states that are currently considering legislation which would allow AHPs consistent with the Final Rule, the court's ruling could have a chilling effect on the advancement of that legislation.