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Green Light for AHPs

The Department of Labor has issued a final rule that adopts a new regulation at 29 CFR 2510.3-5 that will allow an expansion of Association Health Plans (AHPs) by revising the definition of who can qualify as an "employer" under ERISA and loosening the criteria for what constitutes a bona fide group or association of employers that can establish an employee welfare benefit plan. This new rule will allow unrelated small employers and the self-employed to band together for the purpose of purchasing health coverage that is exempt from many of the requirements imposed by the Affordable Care Act (ACA) in the individual and small group market as well as from the ACA rules that apply through the employer mandate to large employer plans.

The final rule is similar to the rule that was proposed a few months ago and adopts the "commonality of interest" test for determining who can qualify as an employer under ERISA. The final rule does require that a group or association of employers have at least one substantial purpose other than the provision of health benefits to its members. This is defined quite broadly, and could include simply offering conferences, classes or educational material on business issues to members or conducting public relations activities such as advertising and education on business issues. The primary purpose of the group can be the provision of health insurance.

As under the proposed rule, the group or association must have an organizational structure and the participating employers must control the AHP (such as by nominating and electing the governing body, having the authority to remove the persons in the governing body, and having the ability to approve or veto material amendments to the plan). Health insurance issuers cannot sponsor or control an AHP, but they can serve as a third party administrator for a self-funded AHP. The final rule also adopts the nondiscrimination rule in the proposed rule but clarifies that premiums among employer members can be varied based on non-health factors, such as size, occupation, industry and participation in wellness programs. For purposes of determining whether MHPAEA applies, it is the size of the AHP as a whole, not the size of each member employer that is determinative. We expect the same rule will apply for COBRA, but it is the Treasury and IRS, not the DOL, that can provide that guidance.

Some view the expansion of the definition of employer for AHPs mainly as helpful to small employers and self-employed individuals because they can band together to purchase health coverage that will not be required to cover essential health benefits or provide minimum value. Others are concerned about the longer term impact this will have on the insurance market and the Marketplace that likely will lose healthier people to the "skinnier" plans many AHPs are expected to offer. The future of AHPs now depends on how each state chooses to regulate these plans which are also MEWAs under ERISA. Adding to the uncertainty is the fact that the attorney generals in New York and Massachusetts have indicated

their intent to challenge the final rule on the grounds that it allows certain plans to avoid compliance with the ACA group health plan protections that apply in the individual and small group markets.