

Department of Labor Releases AHP Final Rule; NAPEO Issues Initial Analysis

On June 19, the Department of Labor (“DOL”) issued a final regulation (the “Final Rule”) to increase access of small businesses and certain self-employed individuals to “association health plan,” or “AHP,” coverage. The Final Rule modifies the DOL’s proposed rule regarding AHP coverage, which was released in January, and reflects thousands of comments that were received by DOL in reaction to that proposed rule. NAPEO will host a webinar next week, June 27 at 1pm ET, about the rule and its impact on PEOs. You may register for the webinar at <http://napeo.org/events/events-calendar/webinars>.

The Final Rule significantly expands the ability of employer groups or associations to offer AHP coverage to their employer members and their employees (as well as certain self-employed individuals). Most importantly, qualifying AHPs generally will be able to make large group coverage available to their employer members, including those employers which would not generally be eligible for large group coverage standing alone.

Per the terms of the Final Rule, an association will be able to establish a fully-insured AHP under these new rules on or after September 1, 2018, and if it sponsors a self-insured plan currently, it will be able to operate a compliant self-insured AHP on or after January 1, 2019. New self-insured AHPs will be able to operate on or after April 1, 2019.

The Final Rule does not directly address or reference PEO-sponsored coverage, but it could have substantial implications for PEOs, as it will likely impact the health insurance market for small businesses and may change the ways health insurers do business with both small employers and PEOs. Moreover, as noted below, the Final Rule includes certain provisions regarding the ability of AHPs to vary pricing for AHP coverage at the participating employer level (versus plan level) in accordance with the nondiscrimination requirements of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). The preamble to the Final Rule includes some important guidance regarding how the HIPAA nondiscrimination rules apply in both the AHP and non-AHP context, and how in some cases they allow the pricing of coverage at the participating employer level.

The Final Rule is controversial, as many advocacy groups and stakeholders believe it will undermine the Affordable Care Act by detrimentally impacting the individual and small group markets (under the theory that “healthy risk” will migrate from those risk pools to more affordable AHP coverage). There has been credible speculation that opponents will challenge the Administration’s authority to promulgate the Final Rule, based on the argument that the Final Rule redefines “employer” to encompass associations and working owners in a way that is inconsistent with a federal statute (the Employee Retirement Income Security Act, or “ERISA”). While litigation over the Final Rule is likely, for now most observers are assuming it will go into effect on the dates set forth above, unless a federal court enjoins its enforceability in the interim. It is worth noting, however, that the Final Rule contains a “severability” provision which provides that if any of its provisions are found to be invalid or stayed pending further agency action, the remaining portions of the Final Rule would remain operative and available for qualifying employer groups or associations. DOL may have included this language in anticipation that one or more challenges in federal court would be forthcoming.

Some of the more significant issues addressed by the Final Rule are the following:

- The definition of “bona fide group or association of employers” under DOL rules is expanded to make it easier for associations to sponsor AHPs, but there are still certain organizational and control requirements that apply. However, the Final Rule also clarifies that existing AHPs that relied on prior guidance regarding what constitutes a “bona fide group or association of employers” may continue to do so.

- Under the Final Rule, employer members of an association sponsoring an AHP must have a “commonality of interest.” Commonality is generally established by either: (a) being in the same trade, industry, line of business or profession; or (b) operating a principal place of business within the same state or metropolitan area.
- The Final Rule confirms that AHPs (like other group health plans) are subject to the HIPAA nondiscrimination rules. They therefore generally cannot discriminate in eligibility, benefits, or premiums against an individual within a group of similarly situated individuals based on a health factor. The Final Rule has detailed rules regarding how AHPs can price coverage for different employer members in accordance with these rules.
- The Final Rule explains how “working owners” (i.e. certain self-employed individuals) can qualify for AHP coverage, provided that the working owner meets certain minimum hours worked and income requirements. The Final Rule eliminated a requirement in the proposed rule that would have made an individual ineligible to be a working owner if he or she was eligible to participate in other subsidized employer-sponsored group health coverage.
- The Final Rule confirms that states will maintain the authority to regulate AHPs that operate within their borders; state laws will not be preempted by the new federal rule. Thus, it should be expected that certain states may seek to restrict the nature and/or extent of AHP coverage made available to employers operating in, and residents of, their state.