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M E M O R A N D U M

TO: CIAB

FROM: Scott Sinder
Kate Jensen

RE: **Updated -** Final Rule on Association Health Plans

On June 19, the Department of Labor ("DOL") released its long-awaited final rule on association health plans ("AHPs"). The rule – meant to make it easier for small businesses and sole proprietors to band together to form large group health plans for purposes of Title I of ERISA – contains the following key features:

- Allows small businesses and sole proprietors that pool together to avoid more onerous small group rules under the Affordable Care Act ("ACA");
- Allows "working owners" without common law employees to participate in AHPs if certain conditions are satisfied;
- Permits formation of AHPs – with the primary, but not the sole, purpose of offering health coverage – based on common geography (city, county, state, or multi-state metropolitan area) or industry, if other bona fide association requirements are met;
- Leaves in place existing AHP rules and guidance (which current AHPs may opt to follow) and creates a parallel regime with the new rule;
- Does **not** alter the legal, regulatory, or preemption framework for Multi-Employer Welfare Arrangements ("MEWAs")—of which AHPs are one type;
- Contains anti-discrimination provisions that, among other things, prohibit AHPs from distinguishing between employees of different employer members based on health factor for purposes of premiums, benefits, terms of coverage, etc.; and
- Staggers applicability dates:

- September 1, 2018 – all associations (new or existing) may establish a fully-insured AHP under the new rule;
- January 1, 2019 – existing associations that sponsored an AHP on or before the publication date of the final rule in the Federal Register may establish a self-funded AHP under the new rule; and
- April 1, 2019 – all other associations (new or existing) may establish a self-funded AHP under the new rule.

The Administration has long touted AHPs as a solution for bringing small businesses' and sole proprietors' healthcare costs down and for opening up coverage options to those groups. CBO estimates that, as a result of the rule, four million Americans will be covered by AHPs by 2023, including approximately 400,000 who are currently uninsured. Moreover, according to the rule's preamble, estimated cost savings in annual premiums for small businesses range from $1,900 to $4,100, and from $8,700 to $10,800 for individuals (depending on the generosity of AHP coverage offered).

Without changes to state-law treatment of MEWAs (particularly self-insured MEWAs), however, operational and legal hurdles for interstate AHPs will persist. Thus, it appears that the new regime will be most useful/impactful in intra-state scenarios.

Discussion of the Final Rule

I. Commonality of Interest and Bona Fide Associations

Perhaps most significantly, the rule relaxes the "commonality of interest" requirement under existing DOL guidance to make it easier for more groups to sponsor single large-plan AHPs. On the other hand, the rule retains many other requirements for establishing a "bona fide association" capable of sponsoring an AHP.

A. Commonality of Interest

Under the new rule, sufficient commonality of interest exists if employers are:

- In the same trade, industry, line of business, or profession;[1] or
- Have a principal place of business within a region that does not exceed the boundaries of the same state (e.g., a city or county) or the same metropolitan area (even if the metropolitan area includes more than one state).

The DOL declined to define "trade, industry, line of business, or profession," but states that these terms will be construed broadly (indicating it will consider the use of "any generally-accepted

[1] If the association sponsoring the AHP is itself an employer member of the group, the group will be deemed for purposes of the commonality of interest requirement to be in the same trade, industry, line of business, or profession as the other employer members of the group.

classification system" for these terms). Ultimately, the determination will be based on all relevant facts and circumstances.

Similarly, the rule does not define "metropolitan area." The preamble states that DOL will consider any area that matches a Metropolitan Statistical Area or a Combined Statistical Area (as defined by OMB) to be a metropolitan area for purposes of the rule – but DOL does not intend for this to be the exclusive test for metropolitan areas. Rather, the DOL leaves open the possibility of other less formal constructs including, for example, "the area from which a city regularly draws its commuters."

B. Other Bona Fide Group/Association Requirements

To be a bona fide association capable of sponsoring an AHP, employers may band together *for the primary purpose of providing health coverage to employer members and their employees.* The final rule makes clear, however, that to be a bona fide association, the group must have at least one other "substantial business purpose" unrelated to the offering of health coverage (this differs from the proposed rule, which would have allowed AHPs to be formed *solely* for the purpose of offering health coverage). The rule would allow a group/association to create a wholly owned subsidiary with the sole purpose of administering an AHP, provided the group/association still satisfies the substantial business purpose requirement.

The rule does not define "substantial business purpose." It does, however, state that such a purpose exists "if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan." Examples provided in the text of the rule include promoting the common business interests of the association's members or promoting the common economic interests of a trade or employer community. The preamble to the rule also mentions as examples: convening conferences or offering educational classes or materials; acting as a standard-setting organization; and engaging in public relations activities. It further states that if a group operates with an active membership before sponsoring an AHP, that is "compelling evidence" that the substantial business purpose requirement is met.

Consistent with long-standing DOL guidance on AHPs, the rule also includes several structural/organization requirements for bona fide associations beyond the commonality of interest determination. In addition to satisfying the nondiscrimination rules described below, groups/associations must:

- Have a formal organization structure with a governing body and by-laws or other similar indications of formality;
- Have a commonality of interest (as described above) among employer members;
- Be controlled – in form and substance – by their member employers (in terms of the group's functions and activities) and the group health plan must be controlled by employer members participating in the plan;
- Limit health coverage to employees and former employees (who became eligible when they were employees) of current employer members (and the beneficiaries thereof);

- Require that each employer member participating in the plan is acting directly as an employer of at least one employee (which may include a working owner, as discussed below) who is a participant covered under the plan; and
- Not be a health insurance issuer or be owned/controlled by an issuer.

The DOL declined in the final rule, despite adverse selection concerns expressed by commenters, to impose any specific requirements with respect to AHP open enrollment periods.

II. Working Owners Eligible to Participate in AHPs

The rule broadens eligibility for participation in AHPs to include "working owners" (e.g., sole proprietors and other self-employed individuals) *without common law employees*, provided certain requirements are met. Specifically, a "working owner" eligible to participate in an AHP is defined under the rule as:

> any person who a responsible plan fiduciary reasonably determines is an individual:
>
> (i) Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner and other self-employed individual;
> (ii) Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and
> (iii) Who either:
> (A) Works on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner's trade or business, or
> (B) Has wages or self-employment income from such trade or business that at least equals the working owner's cost of coverage for participation by the working owner and any covered beneficiaries in the group health plan sponsored by the group or association in which the individual is participating.

The rule requires that the "working owner" definition be satisfied when the individual first becomes eligible for coverage under the plan, and eligibility must be periodically confirmed "pursuant to reasonable monitoring procedures."

III. Nondiscrimination Provisions

The final rule contains multiple nondiscrimination provisions, which build on existing health nondiscrimination provisions under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") (as amended by the Affordable Care Act ("ACA"))—laws and rules that apply to group health plans, including AHPs.

Generally, as the rule's preamble recognizes, HIPAA does not permit discrimination in eligibility for benefits or premiums within groups of similarly-situated individuals, but it does allow different treatment across such groups. Under existing law, groups of similarly-situated individuals must be defined based on bona fide employment-based classifications that are consistent with employers' usual business practices (e.g., full-time versus part-time status, geographic location, length of service, current versus former employees, different occupations, etc.). Groups may not be determined/classified based on any health factor.

Under this framework, according to the DOL, AHPs will be permitted to charge different premiums to different member employers "in much the same way that a single large employer could charge different premiums to different employees in different operating divisions, locations, or occupations within the company, but may not make distinctions in premiums that a single large employer could not make."

Although one section of the preamble – notably, not the portion discussing the final substance of the rule – suggests that AHPs may classify employees of subsets of employer members as distinct groups based on employees' ages or gender,[2] such a classification would seem impermissible under current HIPAA rules (described above), as well as Title VII of the Civil Rights Act (prohibiting discrimination in employment, including benefits, based on gender) and the Age Discrimination in Employment Act.

Ultimately, the final nondiscrimination rules:

- Prohibit AHPs from conditioning employer membership in the group on any individual's health factor (e.g., health status, medical condition, claims experience, medical history, disability, etc.);
- Require AHPs to comply with HIPAA nondiscrimination rules (29 CFR 2590.702(b)-(c)) with respect to eligibility and application for benefits, premiums, contributions, and participant/beneficiary coverage (see discussion above with respect to similarly-situated individuals); and
- In applying the HIPAA nondiscrimination rules, prohibit AHPs from treating the employees of different employer members as distinct groups of similarly-situated individuals based on a health factor of one or more individuals.

The rule contains a series of examples illustrating how these nondiscrimination rules will be applied. One example provides, for instance, that an agriculture industry association would be permitted to charge employers different premiums based on their primary subsector (e.g., crop

[2] Specifically, in describing the overall need for the regulation, the preamble states: "[A]n AHP providing health coverage under this final rule must not treat the employees of an employer member as a distinct group of similarly-situated individuals based on the employees' health factors. (Such an AHP may, however, treat employees of subsets of employer members as distinct groups of similarly situated individuals based on bona fide employment-based classification based on other, non-health factors, such as its industry or location, or its *employees' ages or genders*, or occupations)." (emphasis supplied).

farming, livestock, forestry, etc.) because the distinction is not directed at individual participants or beneficiaries based on health factor.

The DOL does not, despite several commenters' suggestions, apply Federal rating rules under the PHS Act (which do apply in the individual and small group markets) to self-insured or insured AHPs that cover more than 50 employees. As the preamble notes, however, states maintain "significant authority" to impose additional rating rules – along with benefit mandates, which the DOL also declined to impose – on both self-insured and insured AHPs.

IV. No Changes to MEWA Rules

In its proposed rule, the DOL solicited public input on whether it should use its existing authority to exempt self-insured MEWAs from certain state regulations. Ultimately, however, the DOL determined that such action is outside of the scope of this rulemaking and it is not taking any steps at this time to address preemption or any state law issues associated with MEWAs.