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Definition of "Employer"—Association Health Plans Proposed Rule Summary

On December 20, 2023, the Employee Benefits Security Administration (EBSA) of the Department of Labor (Department) published in the Federal Register (88 FR 87968) a proposed rule entitled "Definition of 'Employer'—Association Health Plans" (AHPs). This proposed rule would rescind the similarly titled rule finalized in 2018 (83 FR 28912).

The 2018 AHP Rule expanded the regulatory definition of "employer" under the Employee Retirement Income Security Act of 1974 (ERISA) to include associations (1) formed by employers with substantially loosened links to each other (based on the revised definition of bona fide group or association of employers), and (2) comprised of working owners with no employees. The potential effects of the 2018 AHP Rule include, for example, that a working owner with no employees could join an association that is deemed the "employer" for purposes of an AHP and thus subject to health plan requirements for large employers, rather than the more comprehensive requirements for individual coverage. In 2019, the U.S. District Court for the District of Columbia set aside the 2018 AHP Rule's definition of bona fide group or association of employers as well as the language permitting working owners without employees to be treated as employees for AHP purposes. The court remanded the rule back to the Department to consider the viability of the remaining provisions. Without the core provisions of the 2018 AHP Rule, the Department has decided the 2018 AHP Rule would have no operationalizable substance, providing no meaningful guidance, and proposes to rescind the 2018 AHP Rule in its entirety.

Comments are due by February 20, 2024. The Department seeks comment not only on whether to rescind the 2018 AHP Rule, but also on whether it should propose a rule that:

- Codifies pre-rule guidance for group health plans (that is, the subregulatory guidance in place prior to the 2018 AHP Rule),
- Clarifies the application of the pre-rule guidance to group health plans (for example, the application to AHPs of nondiscrimination policies in Health Insurance Portability and Accountability Act of 1996 (HIPAA)), and
- Offers revised alternative criteria for multiple employer association-based group health plans.

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I. Background

A. Definition of Employer Under Section 3(5) of ERISA

The 2018 AHP Rule overrode prior, longstanding guidance for determining when an association or group of employers can be treated as a single "employer" under section 3(5) of ERISA for purposes of an AHP. ERISA regulates employee benefit plans which, by definition, must be established by an employer and/or an employee organization. Section 3(5) of ERISA defines the term employer as

> *any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.*

Thus, ERISA's definition of "employer" can include not only an employer in the usual sense of the word (common-law employer), but also "a group or association of employers." The 2018 AHP Rule sought to define when a group/association of employers constitutes an "employer" for purposes of an AHP—specifically, for a group health plan and the provision of health benefits.

B. Historical Guidance Prior to the 2018 AHP Rule—"Bona Fide" Group or Association

The Department's pre-rule guidance was mostly in the form of advisory opinions issued over more than three decades addressing specific arrangements. It was applied across various federal courts without any apparent definitional issues. The pre-rule guidance permitted a group/association of employers to sponsor a single "multiple employer" plan if certain circumstances were satisfied—that is, if it was a "bona fide" employer group/association meeting the following three standards (among others):

- Business Purpose. The group/association has business or organizational purposes and functions unrelated to the provision of benefits.
- Commonality. The employers share some commonality of interest and genuine organizational relationship unrelated to the provision of benefits.
- Control. The employers that participate in a benefit program, either directly or indirectly, exercise control over the program, both in form and substance.

In applying these criteria, the Department's pre-rule guidance assessed a number of factors, such as how members are solicited, who is entitled to participate and who actually participates in the group/association, the process by which the group/association was formed, and the purposes for which it was formed.

C. Association Coverage under the Public Health Service Act

Title XXVII of the Public Health Service Act (PHSA) contains numerous health insurance and coverage protections created in the Affordable Care Act (ACA). For purposes of many definitions regarding group/employer coverage, title XXVII of the PHSA relies on definitions in ERISA. For example, ERISA definitions are used to determine whether health insurance coverage sold to or through associations is individual or group coverage under title XXVII of the PHSA—and if it is group coverage, whether the sponsor of the group coverage is the association

or whether each employer-member of the association is considered to sponsor its own group coverage.

CMS guidance from 2011 said that coverage that is provided to associations but *not* related to employment is not considered group coverage for purposes of the PHSA and thus is considered coverage in the individual market (and is subject to that market's rules). However, if it is considered group health insurance coverage, then it must be determined whether it is in the small group market or the large group market (and which market's rules apply accordingly). Generally, this was determined based on the size of the individual employer. However, if the group/association sponsored the plan and the association was deemed the "employer" under the ERISA definition, then whether the coverage was subject to the small or large group market rules was based on the number of employees employed by all the employers in the association.

D. 2018 AHP Rule

To expand access to AHPs, the 2018 AHP Rule created 29 CFR §2510.3-5 to allow small employers and working owners to band together to purchase coverage in the large group market, thereby avoiding the application of certain legal provisions governing individual and small group markets, such as Essential Health Benefit (EHB) requirements. It did so by (1) substantially loosening the requirements for groups/associations to be considered a bona fide group/association and (2) permitting working owners with no employees to be included in such a group/association.

The 2018 AHP rule set forth eight criteria that a group/association must meet to be a bona fide group/association eligible to establish an ERISA plan. As previously mentioned, the following criteria were expanded substantially from pre-rule guidance:[1]

- Purpose. Under the pre-rule guidance, the group/association acting as an "employer" must exist for purposes *other than* providing health benefits. However, the 2018 AHP Rule allowed such a group/association to exist for the primary purpose of providing health benefits, as long as it would still be a "viable" entity if it did not offer the benefits, thus weakening the purpose standard (29 CFR §2510.3-5(b)(1)).
- Commonality. Under the pre-rule guidance, geography alone is not sufficient to establish commonality between otherwise disparate businesses. However, the 2018 AHP Rule allowed the commonality standard to be met if their only "common interest" was having principal places of business located within a region that did not exceed the boundaries of the same state or metropolitan area (such as the Washington Metropolitan Area of the District of Columbia, which also includes portions of Maryland and Virginia) (29 CFR §2510.3-5(b)(5) and (c)).

The 2018 AHP Rule also allowed working owners without any common-law employees to participate in AHPs, stating that a working owner would be treated both as an "employer" and "employee" for purposes of participating in and being covered by an AHP (29 CFR §2510.3-5(e)), notwithstanding the absence of any employment relationship with common-law employees. Under the pre-rule guidance, working owners without common-law employees are not permitted to be treated as employers for the purpose of participating in a bona fide employer

[1] The 2018 AHP rule's other criteria and provisions, such as non-discrimination, are not described in this summary.

group/association and generally are not treated as employees able to be participants in an ERISA-covered employee welfare benefit plan.

E. Court Decision Setting Aside Core Provisions of the 2018 AHP Rule

In July 2018, 11 states and the District of Columbia sued the Department, arguing that the 2018 AHP Rule violated the Administrative Procedure Act (APA) by exceeding the Department's statutory authority and being arbitrary and capricious in its expansion of the definition of "employer." Calling the 2018 AHP rule "clearly an end-run around the ACA," the U.S. District Court for the District of Columbia set aside the following provisions of the 2018 AHP Rule on March 28, 2019:[2]

- Regarding the definition of a bona fide group/association of employers—
  - The expansion of the purpose standard to permit associations for the primary purpose of obtaining health benefits, as long as some other "viable" purpose existed (referred to as the viability safe harbor).[3]
  - The expansion of the commonality standard to permit associations based solely on geography.[4]
- Counting sole proprietors (working owners) without any employees as both "employers" and "employees."[5]

The court remanded the rule back to the Department to consider the viability of the remaining provisions. The Department is not aware of any AHPs that currently exist in reliance on the 2018 AHP Rule.

II. Proposal to Rescind

The Department proposes to remove 29 CFR §2510.3-5 as established by the 2018 AHP Rule and to make a related technical amendment to the definition of "employees" at 29 CFR §2510.3-3(c). If finalized, this proposed rule would rescind the 2018 AHP Rule in its entirety.[6]

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[2] *New York v. United States Department of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019).

[3] In its opinion, the court said the 2018 AHP Rule made the purpose test "flimsy … Sponsoring an AHP, then, may serve not only as the 'primary purpose' of an association under the first part of the purpose test—sponsoring an AHP may serve as its only real purpose. The 'substantial business purpose' test, then, is only an ex post facto, perfunctory requirement—merely a box to check—that virtually any association may fulfill on the side and thereby qualify to sponsor an AHP under the Final Rule. … It sets such a low bar that virtually no association could fail to meet it" (*New York*, 363 F. Supp. 3d at 132).

[4] In its opinion, the court said, "Because the geography test does not, in fact, ensure that associations qualifying to sponsor AHPs under the Final Rule share a 'commonality of interest,' it creates no meaningful limit on these associations" (*New York*, 363 F. Supp. 3d at 134).

[5] In its opinion, the court said that under current law, "A working owner without employees is plainly beyond ERISA's scope when he establishes a benefit plan for himself. The Court concludes that a working owner's membership in an association does not bring him within ERISA. And the contention that two working owners without employees, neither of whom is within ERISA's scope alone, could associate with one another and thereby come within the statute's reach is absurd" (*New York*, 363 F. Supp. 3d at 137).

[6] In 2019, after the finalization of the 2018 AHP Rule and the district court's decision in New York v. U.S. Department of Labor, the Department finalized a rule on Association Retirement Plans (ARPs), which made changes similar to those in the 2018 AHP Rule, including commonality, purpose, and working owner provisions (84 FR 37508). The Department did not address the ARP rule in this proposed rule, citing specific retirement plan considerations beyond the scope of this AHP proposal (88 FR 87979).

A. Authority to Define "Employer" in ERISA Section 3(5)

The Department states that it is tasked by Congress to administer ERISA and that it has clear authority to interpret the term "employer," including defining when a "group or association of employers" may act "indirectly in the interest of an employer" in establishing an employee benefit plan; however, the 2018 AHP Rule extended that authority based on its revision to the definition of "employer" to commercial insurance-type arrangements that lack the requisite connection to employment.

The Department also says that its longstanding pre-rule guidance has also been informed by extensive experience with "unscrupulous promoters, marketers, and operators of multiple employer welfare arrangements (MEWAs)" (88 FR 87973). (AHPs are generally a type of MEWA.) Many of the Department's oft-cited examples are quite dated. However, it also provides more recent examples, stating that since 2018 it has taken civil and criminal enforcement action against 21 MEWAs to protect participants and beneficiaries from fraud or mismanagement of such arrangements. In the last five years, the Department has civilly recovered over $95 million from mismanaged or fraudulent MEWAs.

The Department says that because these entities often become insolvent, individuals and families bear the risk, with a devastating impact that can include being deprived of medical services if they cannot afford to pay out-of-pocket for medical claims not paid by the AHP. Even before such MEWAs become insolvent, enrollees may still become financially responsible for medical claims where the AHP failed to adequately disclose the limitations and exclusions under the plan. With limited oversight resources combined with the 2018 AHP Rule's weakened standards, oversight of MEWA, including AHPs, could be hindered.

The Department is no longer of the view that the business purpose standard, commonality standard, and working owner provision in the 2018 AHP Rule are sufficient to distinguish between meaningful employment-based relationships and commercial insurance-type arrangements. Given the related concerns, ERISA-covered AHPs need to be limited to true employee benefit plans that are the product of a genuine employment relationship, not artificial structures marketed as employee benefit plans. Hence, consistent with the sound administration of ERISA and the court's decision, the Department has concluded that it should rescind the 2018 AHP Rule from the Code of Federal Regulations (CFR).

B. Discussion of Decision to Propose to Rescind

The Department states that the intent of the 2018 AHP Rule was to expand access to affordable health coverage for employees of small employers and certain self-employed individuals by lessening restrictions on the formation of AHPs, thus allowing for the purchase of health insurance through the less regulated large group market. The Department is now of the view, however, that the business purpose standard, the viability safe harbor in the business purpose standard, the geography-based commonality standard, and the working owner provisions of the 2018 AHP Rule do not align with the best reading of ERISA's text and statutory purposes—all points made in the district court's decision. In this section, the Department details its revised

reasoning as to how those elements of the 2018 AHP Rule are inconsistent with ERISA, aligning with the district court opinion.

The Department also cites comments from 2018 that the AHP rule would:

- Draw healthier, younger people into AHPs, resulting in higher premiums for those remaining in the individual and small group markets (adverse selection).
- Permit AHPs to tailor plan benefits in a way that discourages enrollment by those anticipated to have higher health care costs, resulting in further risk segmentation and adverse selection.
- Provide “skinny” coverage, resulting in underinsurance for additional AHP enrollees, since requirements to offer EHB do not apply in large group markets.

The Department notes that the 2018 AHP Rule was a substantial change and significant departure from its pre-rule guidance and no longer represents its interpretation of when a group or association can constitute an “employer” for purposes of sponsoring a group health plan under ERISA. The proposed rescission leaves in places longstanding pre-rule guidance, while also facilitating a re-examination of AHP-related policies and standards, as follows.

1. Business Purpose Standard

The Department cites numerous court opinions that to be an “employer” under ERISA, common interests besides the provision of benefits are required, consistent with pre-rule guidance. Although no generally applicable standard had been articulated prior to the 2018 AHP Rule, employer groups/associations that sponsored an ERISA plan tended to have well developed and shared business purposes unrelated to the provision of benefits.

The Department reviews the business purpose standard established in the 2018 AHP Rule, along with the viability safe harbor, which it now considers too loose to ensure the group/association is actually acting in the employers’ interest rather than as a commercial insurance venture.

2. Geographic Commonality

The Department reviews prior court decisions reaffirming that ERISA’s definition of employer requires common interests besides the provision of benefits. The 2018 AHP Rule required employers in the group/association be in the same industry or in the same geographic region. The latter was a departure from pre-rule guidance. While the 2018 AHP Rule accepted so-called geographic commonality, it rejected other suggestions for commonality based on shared ownership characteristics (e.g., women-owned), shared business models (e.g., nonprofit), shared religious/moral convictions, or shared business size, with a discussion the Department now considers “incomplete at best” (88 FR 87977).

3. Working Owners

In 29 CFR §2510.3-5(e), the 2018 AHP Rule defined a working owner without common-law employees, who would be treated as both an employer and an employee for AHP purposes.[7] The Department observes that ERISA applies when there is an employer-employee nexus, which is the heart of what makes an entity a bona fide group or association of employers capable of sponsoring an AHP. The Department is now of the view that removing the requirement for a genuine employer-employee nexus departs too far from ERISA's essential purpose and fails to take appropriate account of the basis for the bona fide group/association of employers standard. The Department says that treating people as "employers" when they have no employees risks converting ERISA from an employment-based statute, as intended by Congress, to one regulating the sale of insurance to individuals, without regard to an employment relationship. Consistent with its traditional interpretations and judicial decisions, the Department now states that a working owner may act as an employer for purposes of participating in a bona fide employer group/association if there are common-law employees of the working owner.

C. Alternatives to Complete Rescission of the 2018 AHP Rule

The Department considered several alternatives to a complete rescission of the 2018 AHP Rule, including rescinding only the portions set aside by the district court, which were the provisions representing the most dramatic departure from pre-rule guidance. However, the remaining provisions would not provide an adequate definition of "employer" and would be missing key elements for a comprehensive framework for a group/association to demonstrate it is acting "indirectly in the interest of an employer" (in accordance with section 3(5) of ERISA).

The Department also considered pairing a wholesale rescission with a codification of pre-rule guidance, which is largely in the form of advisory opinions that lack the strength of regulations. However, the Department concluded it would be better to seek comment on whether it should propose a rule either codifying the pre-rule guidance or creating alternative criteria and then consider that input as part of a comprehensive re-evaluation of the definition of "employer" in the AHP context.

III. Requests for Public Comments

The Department seeks comment on:

- This proposal to rescind the 2018 AHP Rule, and
- As a next step, whether it should:
  - Propose a rule for group health plans that codifies and replaces the pre-rule guidance,
  - Issue additional guidance clarifying the application of its pre-rule guidance to group health plans (for example, how the HIPAA nondiscrimination rule applies to AHPs),

[7] In its opinion, the court said, "This logic is clever but ultimately not persuasive. When one counts the employees employed by two self-employed persons without employees, the sum is zero. DOL's feat of prestidigitation transforms two individuals, neither of whom works for the other, into a total of three employers and two employees" (*New York*, 363 F. Supp. 3d at 140).

- Propose revised alternative criteria for multiple employer association-based group health plans, or
- Pursue some combination of those or other alternative steps.

IV. Regulatory Impact Analysis

The White House's Office of Management and Budget (OMB) has designated this proposed rule a "significant regulatory action" within the meaning of section 3(f)(1) of Executive Order 12866, as amended—particularly since it would rescind a rule that was considered significant.

The 2018 AHP Rule was never fully implemented, and no costs or benefits from that rule have been realized.[8] Rescinding the 2018 AHP Rule would simply maintain the status quo. Thus, the Department assumes the costs of this proposal to rescind the 2018 AHP Rule would effectively be zero.

[8] At that time of the 2018 AHP Rule, the Department hypothesized that plans serving small employers could have benefited from the ability to band together to offer less generous benefits, thus reducing their costs. As a result, other plans and participants were assumed to see higher costs due to adverse selection, with those remaining in the small-group and individual markets facing premium increases between 0.5 and 3.5 percent, along with an increase in the number of uninsured individuals.