

## Are Association Health Plans a Valentine for Small Employers?

By: Tawny Elgatian

Employers only have a few weeks left to submit comments on new association health plan rules aimed at making it easier for small employers to purchase health insurance across state lines.

The proposed rules, published Jan. 4, stem from a 2017 executive order directing the federal government to expand small businesses' access to AHPs.

However, critics point to previous problems with association health plans, including fraud and insolvency. In fact, past abuse led Congress to amend the Employee Retirement Income Security Act, stiffening AHP regulations.

Under those tighter rules, "it was very, very difficult to establish a bona fide association health plan," Ashley Gillihan, counsel in Alston & Bird LLP's Atlanta office, told Bloomberg Law. The proposed changes would loosen AHP restrictions, making it easier for small employers "to band together and take advantage of the large group market rules," he said.

### Definition of Employer Revised

While AHPs will continue to be treated as a type of multiple employer welfare arrangement, or MEWA, the proposed regulations expand who is able to start and participate in an AHP. The main way the rules would do this is by changing the current definition of "employer" under ERISA to allow more businesses to join AHPs.

Currently, ERISA defines employer as "any person acting directly as an employer, or any person acting indirectly in the interest of an employer in relation to an employee benefit plan." In addition, ERISA imposes commonality of interest requirements that must be met by an interest other than buying health insurance.

Under the proposed rules, the definition of employer under ERISA would change to:

- allow employers to relax the commonality of interest requirement to include industry or location (location not to exceed the size of a state or metropolitan area);
- permit AHPs to band together based on an employer-employee relationship (including dependents and beneficiaries); and
- let employers consider themselves employees in order to participate in AHPs.

"It will actually make it easier for small employers to establish fully-insured bona fide association health plans and be subject to only large group market requirements," Gillihan said.

*The Coalition Against Insurance Fraud warns that while AHPs are "well-intended efforts to help small business obtain affordable health coverage," the proposed rules will open up small businesses and their workers to fraud.*



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While it might be just as easy for self-funded bona fide AHPs to form and be subject to large group insurance market requirements, nothing in this rule makes it ultimately easier for self-funded AHPs to be established due to ERISA's lack of preemption of state insurance laws for such plans. It creates a much better landscape for insured plans as opposed to self-funded ones, he said.

If AHPs do take the form of group health plans, they will have to maintain compliance with requirements for nondiscrimination, benefits eligibility, and premiums. However, they wouldn't have to meet certain requirements under the Affordable Care Act, including rules for covering essential health benefits.

### Comment Letter Deadline Looming

While the bulk of comments are expected closer to the March 6 comment letter deadline, some associations have already submitted comment letters.

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