Fact Sheet

U.S. Department of Labor
Employee Benefits Security Administration
April 29, 2024

Department of Labor Rescinds Invalidated Rule on Association Health Plans

On April 29, 2024, the U.S. Department of Labor announced a final rule to rescind 2018 rule titled "Definition of Employer Under Section 3(5) of ERISA – Association Health Plans," also known as the 2018 AHP Rule. This action marks a return to the Department's pre-rule guidance on association health plans, reflecting the Administration's goal to help more Americans have access to quality health coverage.

The Department determined that the core provisions of the 2018 AHP Rule were, at a minimum, not consistent with the best reading of ERISA's statutory requirements governing the definition of "employer" for purposes of establishing group health plans. The final rule removes section 2510.3-5 from Chapter 29 of the Code of Federal Regulations and makes conforming amendments to section 2510.3-3.

Background

The Employee Retirement Income Security Act (ERISA) regulates employee benefit plans, including private-sector job-based retirement plans, health plans, and other welfare benefit plans. To be an employee benefit plan under ERISA, a plan must be established by:

- an employer,
- an employee organization (a union, for example), or
- both (such as a multiemployer plan).

Section 3(5) of ERISA defines the term "employer" to include "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."

Since at least 1979, the Department's pre-rule interpretive guidance has stated that ERISA's definitional provisions recognize that a single employee welfare benefit plan may be established or maintained by a bona fide group or association of employers acting in the interests of its employer members to provide benefits to their employees.

However, this pre-rule guidance is clear that no bona fide group or association of employers can exist for purposes of ERISA section 3(5) if several unrelated employers without any genuine organizational relationship merely execute participation agreements or similar documents as a way to fund ERISA-covered benefits.

The 2018 AHP Rule

On June 21, 2018, the Department adopted the 2018 AHP Rule, which established alternative criteria under ERISA section 3(5) for determining when employers may join together in a group that could be treated as the "employer" sponsor of a single multiple employer group health plan.

Many of the 2018 AHP Rule's criteria were significantly weaker than the pre-rule guidance criteria in order to spur the formation of association health plans.

- The 2018 AHP Rule allowed the group or association acting as an employer to have the provision of health coverage as its primary purpose. The pre-rule guidance requires that the group or association exist for purposes other than providing health benefits.

- The 2018 AHP Rule deemed groups or associations of disparate businesses in the same state or metropolitan area to have a sufficient common interest. The pre-rule guidance requires that employers must share a common purpose and have a genuine organizational relationship apart from offering benefits, as geography alone is not sufficient to establish commonality.

- The 2018 AHP Rule specifically allowed working owners without any common-law employees to participate in AHPs as both "employers" and "employees." The pre-rule guidance generally does not recognize these owners as either employers (for the purpose of participating in a bona fide employer group or association) or as employees who could participate in an ERISA-covered employee benefit plan.

Litigation Surrounding the 2018 AHP Rule

The 2018 AHP Rule was challenged by 11 States and the District of Columbia as contrary to law, in excess of statutory authority, and as an arbitrary and capricious rule under the Administrative Procedure Act.

The U.S. District Court for the District of Columbia largely invalidated the AHP Rule in a 2019 decision in *New York v. United States Department of Labor.*[1] The district court invalidated the 2018 AHP Rule's definition of bona fide group or association of employers and the language allowing working owners without common-law employees to be treated as employers and employees when participating in an AHP. The court concluded that:

- The "substantial business purpose" and "geographic commonality" requirements were not drawn narrowly enough to limit groups or associations to those that act in the interest of participating employers, as required by ERISA.

[1] *See New York v. U.S. Department of Labor*, 363 F. Supp. 3d 109 (D.D.C. 2019).

- The expansion of the term "employer" to include working owners without common-law employees was unreasonable because it was contrary to ERISA's text and central purpose of regulating employment-based relationships.

The Department appealed the ruling and announced a temporary safe harbor from enforcement in April 2019. This allowed AHPs that were established in good faith reliance on the 2018 AHP Rule to continue operations necessary to wind down the AHP by the end of the applicable plan year or contract term. That enforcement policy has long since expired.

In January 2021, the D.C. Circuit Court of Appeals granted the Department's request to pause the appeal. That pause is still in effect.

2023 Notice of Proposed Rulemaking

On December 20, 2023, the Department published a notice of proposed rulemaking to rescind the 2018 AHP Rule in its entirety. The Department received 58 comment letters in response to the proposal, which are available on EBSA's website.

Decision to Rescind the 2018 AHP Rule

The 2018 AHP Rule reflected a substantial departure from the Department's longstanding pre-rule guidance on ERISA's definition of "employer." The rule struck the wrong balance between ensuring a sufficient employment connection and enabling the creation of AHPs. The employment relationship is at the heart of what makes an entity a bona fide group or association of employers capable of sponsoring an AHP. It's also at the heart of what separates bona fide employer associations from commercial ventures that sell insurance to unrelated individuals and employers.

The approach taken in the 2018 AHP Rule does not agree with the better reading of the statute. It goes too far in disregarding ERISA's focus on employment-based relationships. The pre-rule guidance rightly insists on those relationships. By departing from these standards in the 2018 AHP Rule, the Department undermined ERISA's employment-based focus and wrongly treated entities whose primary purpose was to market health benefits to unrelated employers and individuals as "employers."

The Department is no longer of the view that the business purpose standard, geography-based commonality standard, and working owner provision in the 2018 AHP Rule, even as bolstered by that rule's nondiscrimination standards, are sufficient to distinguish between meaningful employment-based relationships and commercial insurance-type arrangements.

While the 2018 AHP Rule was finalized, it was never fully implemented. The Department is not aware of any parties currently relying on the 2018 AHP Rule, given the district court's decision and the Department's expired enforcement policy. As a result, the Department does not believe that rescinding the 2018 AHP Rule will result in any regulatory costs or burdens.

The rescission will:

(1) resolve and mitigate any uncertainty regarding the status of the criteria that were set under the 2018 AHP Rule;
(2) allow for a reexamination of the criteria for a group or association of employers to be able to sponsor an AHP; and
(3) ensure that guidance being provided to the regulated community is in alignment with ERISA's text, purposes, and policies.

Access to Affordable, Quality Health Coverage

This final rule reflects the Administration's goal to expand the availability of affordable health coverage, improve coverage quality, strengthen benefits, and help more Americans enroll in quality health coverage.

AHPs formed under the 2018 AHP Rule might have reduced access to quality coverage, for example, by not covering essential health benefits that are required in the individual and small group markets. AHPs offering less comprehensive coverage can be cheaper to purchase, but individuals who join these AHPs may become underinsured if the AHP does not cover benefits that are expected or necessary, such as emergency services, prescription drug benefits, or even inpatient hospital coverage.

AHPs under the 2018 AHP Rule might also have disrupted the stability of the individual and small group markets. Under the relaxed standards of that rule, there was a risk that AHPs would have attracted healthier, younger people to AHPs with lower premiums, thus increasing premiums for those remaining in the individual and small group markets.

AHPs are generally classified as multiple employer welfare arrangements (MEWAs), which have historically been subject to financial mismanagement or abuse. Because the 2018 AHP Rule increases the possibility that individuals who join AHPs will be subject to mismanaged plans, it could interfere with the goal of increasing affordable, quality coverage.

Return to Pre-Rule Guidance

The rescission of the 2018 AHP Rule leaves in place the longstanding pre-rule guidance that has been consistently supported and relied upon in numerous judicial decisions. This guidance fosters a sufficient employer-employee nexus and proper oversight of AHPs, while remaining consistent with ERISA's text and purpose.

The pre-rule guidance applies a facts-and-circumstances approach to determine whether a group or association of employers is a bona fide employer group or association capable of sponsoring an ERISA plan on behalf of its employer members. Under this approach, there are three general criteria:

(1) whether the entity has business or organizational purposes and functions unrelated to the provision of benefits;
(2) whether the employers share a commonality and genuine organizational relationship unrelated to the provision of benefits; and
(3) whether the employers that participate in a benefit program, either directly or indirectly, exercise control over the program, both in form and substance.

The Department's pre-rule guidance sets forth a variety of factors that are relevant when applying these three general criteria to a particular group or association. These factors include:

- how members are solicited;
- who is entitled to participate and who actually participates in the group or association;
- the process by which the group or association was formed;
- the purposes for which it was formed;
- what, if any, were the preexisting relationships of its members;
- the powers, rights, and privileges of employer members that exist by reason of their status as employers;
- who actually controls and directs the activities and operations of the benefit program; and
- the extent of any employment-based commonality or other genuine organizational relationship unrelated to the provision of benefits.

Federal and State Regulation of MEWAs

An AHP offered by a bona fide group or association of employers under the pre-rule guidance is subject to all of the ERISA provisions applicable to group health plans, including the fiduciary responsibility and prohibited transaction provisions in Title I of ERISA.

In addition, such AHPs are MEWAs. States may apply and enforce their State insurance laws with respect to AHPs.[2] In general, ERISA allows for the application and enforcement of State insurance laws with respect to any MEWA.[3]

The extent to which State insurance laws may be applied to a MEWA that is an ERISA-covered plan is dependent on whether or not the plan is fully insured. For more guidance on this topic, see the Department of Labor publication, "Multiple Employer Welfare Arrangements Under ERISA, A Guide to Federal and State Regulation."

[2] To the extent provided by ERISA section 514(b)(6)(A).
[3] Within the meaning of ERISA section 3(40).