

# DOL ISSUES FINAL REGULATIONS EXPANDING ACCESS TO ASSOCIATION HEALTH PLANS

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**Practices & Industries**

Employee Benefits

The U.S. Department of Labor has issued final regulations expanding opportunities for small employers and working owners to band together to form association health plans (“AHPs”). The final regulations are generally consistent with the proposed regulations, which were summarized in our [February, 2018 newsletter article](#).

The final regulations allow an association of employers in the same industry or geographic area to join together for the primary purpose of sponsoring a group health plan. The new rule broadens the formerly restrictive “commonality of interest” standard used to determine when a group of employers may sponsor a single ERISA group health plan. While an association may be formed for the primary purpose of providing group health benefits to its members, the final regulations require that the association must have at least one “substantial business purpose” unrelated to the provision of employee benefits. The business purpose must be substantial enough such that the association would be a viable entity in the absence of its sponsorship of the AHP. Substantial activities of an association might include: convening conferences, offering classes, establishing standards for the industry, or engaging in public relations activities.

Some commenters challenged the loosening of the commonality standard as inconsistent with ERISA, previous DOL advisory opinions, and established case authority. Other commenters challenged the new rule on the basis that loosening the AHP standards allows small employers and individuals to avoid the ACA’s essential health benefits requirements, and undermines the ACA’s consumer health protections.

Other AHP requirements include:

- The association must have formal organizational structure, governing body, and bylaws or other indicia of formality;
- The employer members of the association must control both the association and the AHP, but need not manage the day-to-day affairs of the association or AHP;
- The association may not restrict membership in the AHP on the basis of any health factor (health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability or disability), but may make distinctions based on other factors such as industry,

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- occupation, geography or adherence to a wellness program; and
- The association must not be a health insurance issuer, or owned or controlled by a health insurance issuer.

AHPs have expanded to include working owners without common law employees. Participation by owner employers is limited to those working at least 20 hours per week, a lower threshold than under the proposed regulations. The final regulations also removed the requirement that working owners must not have access to any other subsidized group health coverage, for example, through a plan sponsored by a spouse's employer.

AHPs formed under the previous legal standard are grandfathered, and AHPs may be sponsored by an association that complies with either the new rule, or pre-rule guidance.

The regulations become effective for fully insured AHPs as of September 1, 2018, for existing self-insured AHPs under pre-rule guidance as of January 1, 2019, and for new self-insured AHPs formed under the new rule as of April 1, 2019. The new rules can be found at Federal Register, Vol. 83, No. 120, Thursday, June 21, 2018, 29 CFR Part 2510, "Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans".