

FEDERAL AGENCIES ISSUE COMPLIANCE GUIDANCE REGARDING ASSOCIATION HEALTH PLANS

Hodgson Russ Employee Benefits Newsletter
September 28, 2018

Practices & Industries

Employee Benefits

In June, the U.S. Department of Labor issued final regulations expanding opportunities for small employers and working owners to band together to form association health plans (“AHPs”). See our June, 2018 newsletter article. The DOL and IRS have separately issued guidance addressing key legal compliance topics for sponsors of AHPs.

The IRS updated its Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act to clarify that an employer that is not an applicable large employer (has fewer than 50 full time employees) does not become an ALE subject to the employer mandate solely because the employer participates in an AHP. Multiple employers are not aggregated to determine ALE status, unless the entities are in a controlled group or under common control.

The DOL issued a Compliance Assistance Publication describing various compliance rules that apply to AHPs as group health plans, including multiple legal requirements under ERISA, federal consumer health protection statutes, and concurrent regulation by states of multiple employer welfare arrangements. Key features of the guidance include:

- Disclosure Rules – The DOL highlights the three most important disclosures required to be provided to participants automatically and upon request: the summary plan description; the summary of material modification, and the summary of benefits and coverage.
- Reporting Rules – The DOL guidance describes the Form 5500 annual reporting requirement, and the requirement to file Form M-1 to register the AHP as a multiple employer welfare arrangement.
- Claims Administration – The DOL reminds the AHPs are subject to the detailed claims procedure rules under ERISA, which establish minimum timing and content standards for claims adjudications, notifications, and appeals.
- COBRA Continuation Coverage – Continuation of group health plan coverage under AHPs will be available to covered employees, spouses and dependents when coverage is lost due to the occurrence of a qualifying event. AHP coverage on a self-pay basis will be available for 18-36 months under ERISA, and may continue

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longer under state mini-COBRA laws. The DOL anticipates issuing future guidance about how it intends to enforce the COBRA rules respecting member employers with fewer than 20 employees, the applicable number to trigger federal COBRA obligations.

- Consumer Health Protections – Group health plans must comply with numerous consumer protection provisions, including the Health Insurance Portability and Accountability Act, the Affordable Care Act, the Mental Health Parity and Addiction Equity Act, the Newborns’ and Mothers’ Health Protection Act, the Women’s Health and Cancer Rights Act, and the Genetic Information Nondiscrimination Act.
- Fiduciary Rules – ERISA establishes standards governing the conduct of AHP fiduciaries, individuals controlling and administering the AHP. AHP member employers have a fiduciary obligation to monitor AHP fiduciaries by obtaining periodic reports on the AHP fiduciary’s management and administration of the AHP.
- Prohibited Transactions and Applicable Exemptions – ERISA prohibits parties involved in administering AHPs from engaging in certain conduct that amounts to self-dealing or misconduct. Exemptions from the prohibited transaction rules permit AHPs to engage in transactions necessary for administering the AHP, such as paying AHP service providers reasonable and necessary fees.
- Availability of Voluntary Correction Programs – The DOL explains the availability of its Voluntary Fiduciary Correction Program, and the Delinquent Filer Voluntary Correction Program to correct legal compliance errors by AHPs.
- Concurrent State Enforcement of MEWAs – The DOL describes the joint enforcement authority of the DOL and state insurance regulators over AHPs in their capacity as Multiple Employer Welfare Arrangements.

Regarding concurrent state regulation, the New York State Department of Financial Services recently issued guidance indicating its position that the DOL’s rules regarding the liberalization of the requirements for AHPs do not preempt contrary New York law requiring associations to be formed for a “principal” purpose other than the provision of benefits, and allowing the state to continue to rate policies issued to AHPs based on member employer size and not the size of the association as a whole. It is unclear whether this apparent conflict may result in partial preemption of these contrary New York standards, or contrary standards of other states.

Despite the uncertain application of state law to AHPs, the IRS and DOL guidance is welcome compliance assistance for employers navigating the patchwork of federal laws governing AHPs.

The guidance can be found at DOL Compliance Assistance Publication for Association Health Plans, August 20, 2018: <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/compliance-assistance-publication-ahp.pdf>; the IRS guidance is located at Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act, Q/A No. 18: <https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act>; and the New York State Department of Financial Services, Insurance Circular Letter No. 10, dated July 27, 2018 can be found at https://www.dfs.ny.gov/insurance/circular/2018/cl2018_10.pdf