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M E M O R A N D U M

TO: CIAB

FROM: Scott Sinder
Kate Jensen
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RE: DOL Proposed Rule on Association Health Plans

On January 4, 2018, the Department of Labor ("DOL") released its proposed rule to revise existing guidance to make it easier to form association health plans ("AHPs") that qualify as large group plans.[1] Specifically, the proposed rule would:

- Modify the definition of "employer" under DOL's ERISA-related guidance by creating a more flexible "commonality of interest" test for the employer members (i.e., finding such commonality when employers are engaged in the same trade or industry, or when they have a principal place of business within a certain region);
- Allow sole proprietors/"working owners" of an incorporated or unincorporated trade or business to elect to act as employers/employees and participate in AHPs; and

[1] Proposed Rule, *Definition of Employer under Section 3(5) of ERISA—Association Health Plans*, No. 2017-28103, at 5 (Jan. 4, 2018) (scheduled to be published in the Federal Register on Jan. 5, 2018) [hereinafter Proposed Rule].

- Establish nondiscrimination requirements to mitigate adverse selection concerns and misuse of the AHP structure.

Notably, the proposed rule would not preempt any current state regulations or requirements governing multiple employer welfare arrangements ("MEWAs") (which encompass AHPs—as noted in the proposed rule, "AHPs described in this proposal are one type of MEWA").[2] So, while the proposal aims to make AHP formation easier from a federal-law perspective, it does not purport to address any challenges or barriers at the state level. Thus, the proposal's ultimate usefulness in terms of promoting and facilitating the formation of AHPs as single large employer plans—with related regulatory benefits—is unclear.

Comments on the proposed rule are due by March 6, 2018. We anticipate discussing the proposed rule at The Council's legislative conference in early February. We would appreciate hearing from Council members with thoughts on the proposal and/or about your general experiences with AHPs (and any related regulatory/legal challenges associated therewith) by **Monday, January 22.**

DOL welcomes comments on all aspects of the proposed rule but has requested comments on the following specific issues, among others:

- Whether the final rule should recognize other bases for finding a commonality of interest;
- Whether to include the requirement that a "working owner" must not be eligible for other subsidized group health plan coverage under another employer or a spouse's employer;
- Whether the proposed standard for a "working owner" to qualify as an employer/employee (i.e., the earned income and hours worked requirements) is workable;
- Generally, whether different criteria would be more appropriate to ensure that "working owners" who join an AHP are genuinely engaged in a trade or business

[2] *Id.* at 12-13, n.4, 70, 72, 76; 29 U.S.C. § 1002(40) (defining a MEWA as "employee welfare benefit plan[s], or any other arrangement[s] (other than an employee welfare benefit plan), which [are] established or maintained for the purpose of offering or providing [benefits such as health care] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries . . . ."). As explained in the proposed rule, under DOL's current regulatory framework, the degree of state regulation of AHPs/MEWAs will depend on whether they are self-insured or fully-insured. If self-insured, for example, then they will be subject state insurance laws and regulations to the extent that they do not run afoul of ERISA. 29 U.S.C. § 1144(b)(6)(A)(ii); Proposed Rule, *supra* note 1, at 76. If fully-insured, on the other hand, they are only subject to state insurance laws and regulations that govern the maintenance of specified contribution and reserve levels. 29 U.S.C. § 1144(b)(6)(A)(i); Proposed Rule, *supra* note 1, at 76.

and are performing services for the trade or business in a manner that is in the nature of an employment relationship;

- How the nondiscrimination requirements balance risk selection issues with the stability of the AHP market and the ability of employers to innovate and enter voluntary coverage arrangements; and
- The relative merits of possible exemption approaches under current law related to self-insured MEWAs.

Additionally, we would appreciate your input on the following broader, market-based questions:

- What benefits may be derived from the proposal in terms of easing regulatory hurdles/burdens;
- Whether there are data, studies, or other information that would help estimate the benefits and costs of the rule, if finalized; and
- What potential concerns and market/consumer consequences are associated with a more pro-AHP regime (e.g., could it impact the generosity or quality of coverage for employees?).

A compilation of DOL's requests is included in the attached Appendix.

<u>Overview – Current Law on AHPs</u>

Under ERISA, an AHP (i.e., an "employee welfare benefit plan" that is often considered a MEWA) must be offered by "employers" or "employee organizations."[3] To date, DOL has narrowly interpreted who qualifies as an "employer" for the purposes of establishing an AHP.

To qualify, DOL requires there be a cognizable, "bona fide" group of employers bound together by a "commonality of interest" (i.e., a sufficiently close economic or representational nexus to the employers and employees that participate in the AHP)

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[3] 29 U.S.C. § 1002(1) (defining an "employee welfare benefit plan" as "any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits . . . ."); 29 CFR § 2510.3-1 (clarifying the definition of employee welfare benefit plan). Notably, the Affordable Care Act defines "group health plan" by reference to the definition of the term in the Public Health Services Act (PHSA); and the PHSA defines it by reference to ERISA's definition of "employee welfare benefit plans." *See* 42 U.S.C. § 300gg-91(a)(1); *see also* 29 U.S.C. § 1002(5) (defining "employer" to mean "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.").

with vested control of the association.[4] Generally, DOL applies a facts-and-circumstances test to determine whether a commonality of interest exists for there to be a bona fide employer group, reviewing three main factors, including whether the group or association has a business purpose unrelated to the provision of benefits.[5]

This interpretation has resulted, operationally, in few of these associations being classified as employers; instead, the associations' arrangements for health coverage are generally treated as a collection of plans, separately sponsored by each of the individual employers.[6]

There also are added complexities associated with state regulation in this area. Namely, the laws on this subject vary from state to state, and may result in additional costs for those trying to create or participate in an AHP.

Overview of the Proposed Rule

I. *Revised Definition of "Employer"*

Most significantly, the proposed rule would revamp the "commonality of interest" requirement under current DOL guidance that stipulates an employer group or association must have a purpose other than offering health coverage to qualify as an "employer" under ERISA.[7] Instead, it would find a significant "commonality of interest" and allow employers to "band together" for the express purpose of offering health coverage if they are either:

- In the same trade, industry, line of business, or profession; or
- Have a principal place of business within a region that does not exceed the boundaries of the same state (e.g., a city or county) or the same metropolitan

[4] Advisory Opinion 12-03A, 2012 WL 2167551, at *3 (May 25, 2012).

[5] DOL would also review (1) whether the employers share some commonality and genuine organizational relationship unrelated to the provision of benefits; and (2) whether the employers that participate in the benefit program exercise control over the program, both in form and substance. Proposed Rule, *supra* note 1, at 11. Advisory Opinion 85-27A, 1985 WL 32818, at *2 (July 15, 1985); Advisory Opinion 94-07A, 1994 WL 84835, at *4 (Mar. 14, 1994) (noting that an employee benefit plan is grounded on the premise "that the entity that maintains the plan and the individuals that benefit from the plan are tied by a common economic or representation interest, unrelated to the provision of benefits").

[6] Proposed Rule, *supra* note 1, at 5.

[7] *Id.* at 21-24.

area (even if the metropolitan area includes more than one state (e.g., the Tri-State Region, the Washington Metropolitan Area, etc.)).[8]

The proposal would also allow associations to rely on other characteristics upon which they previously relied to satisfy the "commonality of interest" provision (i.e., those that would have qualified because they had some "identifiable and definable relationship to one another").[9]

Beyond the "commonality of interest" provisions, the proposal would codify the requirements that an AHP must meet in order to qualify as a bona fide group or association of employers capable of establishing an AHP.[10] Many of these requirements echo conditions in DOL's existing guidance, including requiring the group or association to have:

- A formal organization structure with a governing body;
- A commonality of interest (as described above);
- Bylaws or other similar indications of formality appropriate for the legal form in which the group or association operates;
- Its functions and activities controlled by its member employers; and
- Its membership/coverage limited to employees and former employees of employer members (and family/beneficiaries thereof).[11]

Notably, the proposed rule would broaden participant eligibility to go beyond the conventional employer-employee relationship to include "working owners" (e.g., sole proprietors and other self-employed individuals who act as employers, provided certain requirements are met and the individual is not eligible for other subsidized group health plan coverage).[12] This would provide self-employed individuals with the opportunity to elect to act as employers for the purposes of participating in an employer group or association and also be treated as employees for the purposes of being covered by the

[8] *Id.* at 21, 77 (to be codified at 29 C.F.R. 2510.3-5(c)).

[9] *Id.* at 22, 32-33.

[10] *Id.* at 24-25.

[11] *Id.* at 24-25, 78-79 (to be codified at 29 C.F.R. 2510.3-5(b)).

[12] *Id.* at 25-33. Specifically, to qualify as an employee for the purposes of being covered by an employer's AHP, a sole proprietor or working owner must earn income from the business for providing personal services to the business and either (1) provide, on average, at least 30 hours of personal services to the business per week or 120 hours of such services per month; or (2) earn income derived from such business that is at least the cost of coverage under the AHP. *Id.* at 30, 82-83 (to be codified at 29 C.F.R. 2510.3-5(e)).

AHP.[13] By permitting their participation, under the proposed rule, AHPs could be comprised of participants who are common law employees, common law employees and working owners, or solely working owners.[14]

II. *Health Nondiscrimination Protections*

In response to concerns that AHPs could lead to adverse selection or function as commercial enterprises (i.e., like traditional insurers selling insurance in the employer marketplace), the proposed rule also includes nondiscrimination provisions.[15] These provisions build on existing health nondiscrimination provisions under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") (as amended by the Affordable Care Act ("ACA")).[16] Specifically, the provisions would:

- Ensure the AHP does not restrict membership based on any health factor (i.e., health status, medical condition, claims experience, medical history, disability, etc.); and
- Require the AHP to comply with HIPAA's health nondiscrimination rules governing eligibility for benefits and premiums for coverage (i.e., the AHP may not treat different employer members as distinct groups of similarly-situated individuals).[17]

The proposed rule provides a series of examples illustrating how these nondiscrimination rules could be applied.[18]

III. *Request for Information on Self-Insured MEWAs*

Outside of the scope of the proposed rule, DOL also IS interested in the relative merits of using its existing authority to exempt self-insured MEWAs from certain state regulations.[19] Specifically, DOL is interested in both the potential for such exemptions to

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[13] *Id.* at 27.

[14] *Id.* at 32.

[15] *Id.* at 34-36.

[16] *Id.* at 36.

[17] *Id.* at 36-39, 79-82 (to be codified at 29 C.F.R. 2510.3-5(d)).

[18] *Id.* at 80-82 (to be codified at 29 C.F.R. 2510.3-5(d)(5)).

[19] *Id.* at 40-43. ERISA confers powers on DOL to shield self-insured MEWAs from state law to some degree. Specifically, it permits DOL to prescribe regulations under which self-insured MEWAs that are employee benefit plans may be granted exemptions, individually or class by class. Such exemptions are not unlimited; rather DOL is only allowed to exempt a self-insured MEWA from state insurance laws

promote healthcare consumer choice and competition, as well as in the risk such exemptions might present to appropriate regulation and oversight of AHPs.[20]

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that can apply to a fully-insured MEWA plan (i.e., state insurance laws that establish reserves and contribution requirements and provisions to enforce such standards). 29 U.S.C. § 1144(b)(6)(B).

[20] Proposed Rule, *supra* note 1, at 42.

APPENDIX

DOL requested comments on a series of issues related to the proposed rule. In particular, DOL requested comments on the following:

Commonality of Interest

- Whether the final rule should recognize other bases for finding a commonality of interest;
- Whether more clarification would be helpful regarding the definition of a "metropolitan area" in the commonality of interest determination (i.e., whether a federal designation by the U.S. Census or the Office of Management and Budget (or other definition) should be used and, if so, how, for purposes of establishing eligibility for continued or new employer membership);
- Whether there is any reason for concern that associations could manipulate geographic classifications to avoid offering coverage to employers expected to incur more costly health claims;
- Whether there are other examples that would help clarify the commonality of interest provision; and
- Whether there should be a special process established to obtain a determination from DOL that all an association's members have a principal place of business in a metropolitan area.

Coverage of "Working Owners"

- Whether to include the requirement that a "working owner" must not be eligible for other subsidized group health plan coverage under another employer or a spouse's employer;
- Whether the proposed standard for a "working owner" to qualify as an employer/employee (i.e., the earned income and hours worked requirements) is workable;
- Whether any additional clarifications would be helpful to address issues relating to how working owners could reasonably predict whether they will meet the earned income and hours worked requirements;
- Whether AHPs should be required to obtain any evidence in support of such a prediction beyond a representation from the working owner; and
- Generally, whether different criteria would be more appropriate to ensure that "working owners" who join an AHP are genuinely engaged in a trade or business and are performing services for the trade or business in a manner that is in the nature of an employment relationship.

Health Nondiscrimination Protections

- Whether the proposal's provision prohibiting the group or association from treating member employers as "distinct groups of similarly situated individuals" would create involuntary cross-subsidization across firms that would discourage formation and use of AHPs;
- Whether the aforementioned provision is an appropriate or sufficient response to the need to distinguish AHPs from commercial insurance (and on any alternative provisions that might achieve the same goal);
- Whether the aforementioned provision could destabilize the AHP market or hamper employers' ability to create flexible and affordable coverage options for their employees;
- How the nondiscrimination requirements balance risk selection issues with the stability of the AHP market and the ability of employers to innovate and enter voluntary coverage arrangements; and
- The effect of additional or different nondiscrimination protections (e.g., further limitations on price flexibility).

Request for Information – Self-Insured MEWAs

- The relative merits of possible exemption approaches under current law related to self-insured MEWAs;
- The potential for such exemptions to promote health care consumer choice and competition across the United States, as well as in the risk such exemptions might present to appropriate regulation and oversight of AHPs, including state insurance regulation oversight functions;
- How best to ensure compliance with the ERISA and ACA standards that would governs AHPs (and any need for additional guidance on the application of these standards or other needed consumer protections);
- How DOL can best use the provisions of ERISA Title I to require and promote actuarial soundness, proper maintenance of reserves, adequate underwriting, and other standards relating to AHP solvency;
- Whether additional provisions should be added to the final rule to assist existing employer associations (including MEWAs that do not now constitute AHPs) in making adjustments to their business structures, governing documents, or group health coverage to become AHPs under the final rule; and
- Rules and obligations that would benefit from additional guidance as applied to AHPs, as well as any perceived deficiencies in existing guidance or regulatory safeguards.

Miscellaneous

- The interaction with and consequences under other state and federal laws, including the interaction with provisions for voluntary employees' beneficiary associations ("VEBAs"), should an AHP want to use a VEBA;
- Whether any notice requirements are needed to ensure that employer members of associations, and participants and beneficiaries of group health plans, are adequate informed of their rights or responsibilities with respect to AHP coverage;
- The impact of the proposed rule on the risk pools of the individual and small group health insurance markets; and
- Data, studies, or other information that would help estimate the benefits, costs, and transfers of the rule.