

# PUBLICATION

---

## DOL's Final Rule on Association Health Plans Aims to Help Small Businesses and Self-Employed

Authors: Elizabeth Ann Liner

September 06, 2018

**The U.S. Department of Labor (DOL) has published a Final Rule that aims to remove restrictions on the establishment of Association Health Plans (AHPs) in order to make affordable health care coverage more accessible to small businesses and self-employed individuals. Issued in June of 2018, the DOL's Final Rule establishes new guidelines regarding the definition of "employer" under Employee Retirement Income Security Act (ERISA). It also provides additional, alternative criteria for evaluating when multiple employers may join together in a group or association to sponsor a single group health plan under ERISA.**

Before the Final Rule, multiple employers could develop an AHP as a single ERISA plan only when the group or association demonstrated that it was a "bona fide association" of employers, which required that the employers all engage in the same industry *and* are within the same geographic region. An ERISA plan is subject to differing rules and regulations regarding coverage based on whether it is an individual, small group or large group. Large group plans are not required to provide coverage for certain essential health benefit categories, whereas small group plans must provide for all ten essential health benefits.

Generally, AHPs that do not constitute a single ERISA plan are subject to the "look through" doctrine, meaning that the association is disregarded and each member is evaluated to determine whether coverage is being obtained by an individual, small group or large group. Thus, the appeal of expanding AHPs that are considered single ERISA plans is the opportunity for small businesses and individuals to join together to benefit from the application of large group rules of coverage. The Final Rule changes criteria such that AHPs can provide what constitutes a single plan under ERISA when the members are either engaged in the same industry *or* within the same geographic region.

DOL issued this proposed rule in January 2018 seeking to broaden the criteria for satisfying the "bona fide association" standard. Commenters to the rule expressed concern that the movement of some small businesses and individuals into the AHPs and selection of less costly and less comprehensive coverage will cause an increase in the cost of the comprehensive policies to those small businesses that prefer them and potentially erode access to needed health care services. There is a possibility that employees may have a negative reaction to the less comprehensive coverage available through large group options. Accordingly, there may be some small businesses that choose to continue with more comprehensive policies in order to avoid employee turnover. But it is not yet apparent whether those that stick to the broader coverage will suffer increased expenses as a result of other small businesses effectively moving out of the marketplace.

Other commenters expressed serious concern regarding operational risks, such as fraud and abuse or insolvency of poorly managed AHPs. In response to these comments, the DOL determined that under the Final Rule, an AHP must have at least one "substantial business purpose" unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees. This does not mean that providing health coverage cannot be the primary purpose, but it cannot be the *only* purpose. The Final Rule further requires that the AHP have a formal organizational structure and obligates the member employers to "control" the AHP to ensure that the association is acting in the interest of the participating employers.

Moreover, AHPs remain subject to all applicable state regulation, which may affect whether entities find AHPs under the new rule attractive or affordable.

The concept that a group of small businesses can band together to create an AHP and effectively spread the risk among far more employees certainly sounds appealing to those employers that incur greater costs and higher premiums for health care coverage simply as a result of being smaller and not having access to large group coverage options. The hospitality industry is certainly an area where this particular Final Rule could have great relevance because the change to the geographic restriction could allow for numerous franchisees to band together as an AHP and provide the same coverage options to all of their employees.

Some commenters expressed concerns that the geographic region-based AHPs could determine the region in a manner that achieves favorable risk pools or caters to higher income areas, effectively excluding people with poorer health. The DOL noted in response that the Final Rule prohibits such discrimination and provides that "if a group or association organizes or offers health coverage to a segment of an industry or geography as a subterfuge for discriminating against an individual based on a health factor, the association will not meet the commonality of interest requirement." Final Rule, p. 52.

The DOL suggests that the Final Rule could result in coverage for approximately 400,000 individuals who do not currently have coverage. However, some have expressed concern that it could also result in other individuals who are currently covered, receiving reduced services, leaving current jobs due to inadequate benefits, or having increased premiums on current coverage. As the implementation of the Final Rule progresses, we will see what impact it has on employee health care coverage. Some states may respond by implementing new regulations of AHPs and similar multiple employer welfare organizations. We will keep you advised.

For assistance with your questions on AHPs, please contact the author, Beth Liner, or any member of Baker Donelson's [Labor & Employment Group](#).