Association Health Plans: Where are We Now?

By Stephen J. Evans & Serena F. Yee

For decades, small- and medium-sized businesses have struggled to find affordable medical coverage options to offer to their employees. As health care costs have continued to grow exponentially, this issue has also increasingly become the focus of policymakers. The Patient Protection and Affordable Care Act of 2010 (the "ACA") created the Small Business Health Options Program (a.k.a., "SHOP Exchanges") offering small businesses (i.e., less than 50 employees) access to group health insurance from state-based insurance marketplaces and a new tax credit.[1] Most recently, President Trump's Administration has sought to increase accessibility to health care coverage for small and medium sized businesses by reimagining an old, but previously limited, concept – association health plans under a new regulation intended to expand their availability to these businesses. However, just days before the regulation was to fully take effect, a federal district court judge, who in his opinion described the Department of Labor ("DOL") rule as "absurd", found key parts of the new regulation to be unlawful and vacated most of the regulation.[2] The DOL has filed an appeal of the judge's decision and a decision in the appeal is expected around the time of publication of this article. This article provides an overview of association health plans, their history, the Trump Administration's new regulations and the implications of the current litigation, and the current status of association health plans.

I. What is an Association Health Plan?

Association health plans are not new; but rather, have been operated with varying degrees of success since the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"). At its core, an association health plan is a plan sponsored by a group or association of employers for the purpose of providing health benefits to the employees of each participating employer. This is in contrast to a traditional employer group health plan, which is typically sponsored or maintained by a single company for the benefit of only its employees.

In a basic, typical arrangement a group or association of employers forms an association health plan by first establishing an independent trust to receive premium payments from the participating employers. The employers who are eligible to and desire to participate in the association health plan will enter into participation agreements that detail the terms of their participation. The trust will be governed by a board of trustees who are typically selected by the participating employers from among the owners or managers of the participating employers. The trust then purchases a group insurance policy from an insurance carrier, the insurance carrier issues a policy to the trust, and each participating employer receives a certificate of coverage for the benefits provided to its employees under the policy.[3]

II. Regulatory Background

Like traditional single company group health plans, association health plans are subject to the provisions of ERISA[4] as "employee welfare benefit plans," which are defined under Section 3(1) of ERISA to include any:

> plan, fund, or program . . . established or maintained by an employer or by an employee organization, or both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment . . . ."[5]

It is the term "employer" within this definition that is the key for association health plans. Section 3(5) of ERISA defines an "employer" as "any persons acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee welfare benefit plan; *and including a group or association of employers acting for an employer in such capacity."*[6] It is the last part of

1. 42 U.S.C. § 13031(b)(1)(B).
2. *See State of New York, v. United States Dep't of Labor,* No. 18-01747, slip op. at 35 (D.D.C. March 28, 2019).
3. This example assumes the association health plan will be designed to be "fully insured." Although permitted under ERISA, self-insured association health plans are less common than fully insured arrangements because of the expansive applicability of state laws to self-insured association health plans.
4. *See* ERISA § 4, 29 U.S.C. § 1003.
5. ERISA § 3(1), 29 U.S.C. § 1002(1).
6. ERISA § 3(5), 29 U.S.C. § 1002(5).

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this definition that permits a group of employers to be treated as a single employer for purposes of ERISA and is the subject of years of DOL guidance and the Final Rule.

An association health plan also constitutes a "multiple employer welfare arrangement" (commonly known as a "MEWA") under Section 3(40) of ERISA because it "is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals) or to their beneficiaries . . . ."[7]

Early association health plans frequently relied on ERISA's preemption provisions to avoid state laws designed to ensure adequate financial reserves and to combat fraud.[8] This lack of regulatory oversight lead to insolvent plans, unscrupulous promoters operating health insurance scams and scores of unsuspecting consumers with millions in unpaid medical bills.[9] Congress amended ERISA in 1983 to afford states with some degree of regulatory authority over MEWAs.[10] MEWAs were required to file a Form M-1 annual report with the DOL beginning in 2003, and significant changes were made to Form M-1 in 2013 to require more custodial and financial information and additional disclosures regarding assets and fiduciaries.[11] A MEWA also must register prior to commencement of operations in a state and is subject to criminal penalties for fraud.[12]

III. Benefits of Qualifying as an Association Health Plan

The benefits available to an association health plan sponsored by a "group or association of employers" that qualifies as an "employer" within the meaning of Section 3(5) of ERISA often outweigh the regulatory burdens associated with its MEWA status.[13] Properly structured, an association health plan is treated as a single "employee welfare benefit plan" under ERISA, which permits the association to file a single Form 5500 annual report with the DOL for the association health plan, rather than each participating employer having to prepare and submit its own separate Form 5500 filing.

In addition, the ACA definition of "employer" incorporates the definition under Section 3(5) of ERISA, which means that for purposes of applying the ACA's individual, small, and large group market reforms, a group or association that qualifies as an ERISA "employer" will also be treated as a single employer rather than a group of individual employers.[14] Banding together to form a single ERISA "employer," therefore, permits a group or association of small employers that separately would be subject to individual market and small group market reforms under the ACA, to take advantage of the less onerous large group market rules.[15] In such case, the association health plan would not have to provide coverage for essential health benefits and could vary rates based on health status.

The group or association also may also use its collective size to benefit from economies of scale unavailable to a single small employer in order to reduce costs when hiring service providers to operate and administer the association health plans.

Despite these potential cost and administrative benefits, association health plans previously have been limited to a niche market due largely to the DOL's relatively narrow application of the circumstances under which a "group or association of employers" constitutes what it refers to as a *"bona fide* group or association of employers" for purposes of Section 3(5) of ERISA and sponsoring a plan.

IV. New Pathways for Association Health Plans

In October 2017, President Trump issued an executive order directing the DOL to issue regulations or guidance to make association health plans accessible to an even greater number of small businesses.[16] Following a rulemaking process, the DOL issued a final rule (the "Final Rule")[17] on June 21, 2018 creating a new regulatory pathway to forming an association health plan. Prior to the Final Rule, the only way to form an association health plan was to comply with the DOL's interpretation of what constituted a "group or association of employers" that was contained in sub-regulatory guidance. The DOL now refers to the historical sub-regulatory guidance as "Pathway 1" and the Final Rule as "Pathway 2."

Proponents of the new pathway assert that expansion of the associated health plans will result in lower premiums for employers due to their increased bargaining power and fewer regulatory requirements while opponents see it a means to undermine

7. ERISA § 3(40), 29 U.S.C. §1002(40). Certain plans and arrangements are excluded for coverage under ERISA's definition of a "multiple employer welfare arrangement," such as those "established or maintained" under one or more collective bargaining agreements, by a rural electric cooperative, or by a rural telephone cooperative association.

8. ERISA § 514(a), 29 U.S.C. §1144(a). ERISA preempts any and all state laws which "relate to" any employee benefit plan subject to Title I of ERISA

9. *See* Preamble to Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans, 83 Fed. Reg. 28,912 (June 21, 2018) (comments on the proposed rule). The regulation is referred to herein as the "Final Rule."

10. ERISA § 514(b), 29 U.S.C. §1144(b).

11. Filings Required of Multiple Employer Welfare Arrangements and Certain Other Related Entities, 78 Fed. Reg. 13781 (March 1, 2013), codified at 29 C.F.R. pt. 2520).

12. *See id*.

13. *See* ERISA § 514(a), 29 U.S.C. § 1144(a). Qualifying as a single "employer" under ERISA also permits an association health plan to rely on ERISA's general preemption of state laws that "relate to" employee benefit plans. The extent of which will depend on whether the association health plan is fully-insured (in which case regulation is limited) or self-insured.

14. Insurance Standards Bulletin Series –INFORMATION, Centers for Medicare & Medicaid Services (September 1, 2011), *available at* <https://www.cms.gov/CCIIO/Resources/Files/Downloads/ association_coverage_9_1_2011.pdf>.

15. Preamble to the Final Rule, 83 Fed. Reg. 28912, 28917 (June 21, 2018).

16. Presidential Executive Order Promoting Healthcare Choice and Competition Across the United States, Exec. Order No. 13813, 82 Fed. Reg. 48,385 (Oct. 12, 2017).

17. 83 Fed. Reg. 28912 (June 21, 2018).

the stability of the ACA marketplace and erode the consumer protections afforded under the ACA.

A. Pathway 1 Association Health Plan

For a group or association of employers to qualify as a "group or association" under Section 3(5) of ERISA, it must be "bona fide."[18] In the DOL's view, this requires a genuine organizational relationship among the employers that is more than a group of unrelated employers who are only related through their execution of identical trust agreements or participation agreements.[19] To satisfy the requirement to be a "bona fide" group or association of employers, the employers must:

1. Have a commonality of interest unrelated to the provision of benefits;
2. Exercise control over the employee welfare benefit plan, in both form and in substance; and
3. Consist of employers with at least one common law employee.[20]

Often, a group or association that seeks "bona fide" status will be a trade association or similar organization, but a sub-group of employers within such a group may also qualify as a "bona fide" group or association.[21]

The DOL's determination of whether a group or association meets the above requirements is based on all relevant facts and circumstances.[22] Specific factors the DOL will consider include:

- the methods for soliciting members;
- who is entitled participate and who actually participates in the group or association;
- the process by which the group or association was formed;
- the purposes for which the group or association was formed (other than providing benefits to employees of participating employers) and what, if any, were the preexisting relationships of the members;
- the powers, rights, and privileges of employer members that exist by reason of their status as employers; and
- who actually controls and directs the activities and operations of the benefit program.[23]

Given the fact intensive nature of this determination, practitioners with clients who are considering establishing an association health plan under Pathway 1 should review the DOL's historical Advisory Opinions to determine their eligibility to qualify as a "bona fide" group or association of employers. Importantly, the Pathway 1 guidance continues to remain in effect despite the issuance of the Final Rule and may be relied upon in forming a new association health plan.[24] Once eligibility is established, another important consideration is whether to apply to the DOL for a favorable Advisory Opinion as to the status of the group or association.

18. DOL Advisory Opinion 2005-25A.
19. DOL Advisory Opinion 2005-25A.
20. The DOL's position under the Pathway 1 sub-regulatory guidance is that, generally, groups or associations are not eligible for treatment as a "bona fide" group or association if they did not restrict membership to employers with at least one common law employee and permitted such employers to vote or otherwise participate in controlling the group or association. DOL Advisory Opinion 2005-12A.
21. DOL Advisory Opinion 2005-25A.
22. *See, e.g.*, DOL Advisory Opinion 2019-01A; DOL Advisory Opinion 2017-02AC; DOL Advisory Opinion 2005-02A.
23. DOL Advisory Opinion 2019-01A.
24. Preamble to the Final Rule, 83 Fed. Reg. 28912, 28916.
25. *Id.* § 2510.3-5(b)(3).
26. *Id.* § 2510.3-5(b)(4).
27. *Id.*
28. *Id.* § 2510.3-5(b)(5).
29. 29 C.F.R. § 2510.3-5(b)(1).
30. *Id.*
31. *Id.* § 2510.3-3(b)(5), (c)(1).

B. Pathway 2 Association Health Plan

The Final Rule is based on the historical Pathway 1 guidance but expands eligibility to form a Section 3(5) of ERISA "group or association of employers" in key ways. The Final Rule maintains the following requirements that are present in the Pathway 1 guidance:

1. The group or association must have a formal organizational structure, evidenced by a governing body and by-laws or other similar indications of formality.[25]
2. The group or association's functions and activities must be controlled by its employer members, and the members who participate in the association health plan must control it.[26] As under Pathway 1, control must be present in both form and substance.[27]
3. The participating employer members of the group or association must have a commonality of interest.[28]

The Final Rule, however, expands the types of groups of employers that will satisfy these requirements and qualify as a "group or association" under Section 3(5) of ERISA by:

1. Permitting the group or association's primary purpose to be the provision of health care to its members, *provided* the group or association also has at least one other "substantial business purpose" (which is not required to be for-profit purpose) unrelated to the provision of health care.[29] A "substantial business purpose" is present if the group or association would be a "viable entity" in absence of providing health care (the Final Rule gives examples of promoting common business or economic interest).[30]
2. Permitting commonality of interest among employers based solely on either (a) their being in the same trade, industry, line of business, or profession or (b) their having a principal place of business located in the same state or a metropolitan area that includes more than one state (e.g., the St. Louis metropolitan area, which covers areas of both the States of Missouri and Illinois).[31]
3. Permitting "working owners" of

a trade or business without common law employees to be counted as both the "employer" and "employee." Such "working owners" include individuals who:

- have any ownership right in a trade or business;
- earn wages or self-employment income from the trade or business for providing personal services to the trade or business; and
- either work an average of at least 20 hours per week or 80 hours per month providing personal services to the trade or business or have wages or self-employment income from the trade or business that at least equal the individual's cost of coverage for participation in the plan (including the cost for any beneficiaries).[32]

The Final Rule does, however, include a new requirement that may serve to restrict the operation of an association health plan formed under the new, more permissive requirements. Under the Final Rule, the coverage offered by the group or association must comply with nondiscrimination rules in the Final Rule that prohibit:

- the association health plan from conditioning employer membership on certain health factors of the employees of participating employers,
- discrimination in premiums or eligibility based on certain health factors, and
- the association health plan from treating the employees of different participating employers as distinct groups of similarly-situated individuals based on a health factor of one or more individuals.[33]

This aspect of Pathway 2 is more restrictive than the Pathway 1, which permit an association health plan to vary premiums for each participating employer based on prior or expected claims experience (i.e., "experience-rating").[34]

V. States' Reactions and Legal Challenge to the Final Rule

Association health plans, as "multiple employer welfare arrangements" under ERISA, are subject to state insurance regulation under special provisions of Section 514 of ERISA.[35] The DOL confirmed that nothing in the Final Rule was intended to restrict the States' authority to regulate association health plans as multiple employer welfare arrangements under ERISA.[36] As one might expect, the states have reacted to the Final Rule by using their regulatory authority in one of two ways: either by actively expanding or marketing the availability of association health plans or by taking action to restrict the availability of association health plans.[37] Missouri's Department of Insurance, for example, issued Insurance Bulletin 18-04, which confirms the long-standing availability of association health plans in the state and provides information on applicable state statutes and differences with the Final Rule.[38] North Carolina went even further, passing legislation specifically permitting association health plans that are established under the Final Rule.[39] At the other end of the spectrum, California enacted Senate Bill No. 1375 to prohibit sole proprietors and partners from participating as employees in an association health plans.[40] Importantly, many states already had laws on the books that apply to association health plans, including the states which have taken action in response to the Final Rule.It is important, therefore, that in addition to a review of the federal rules that apply to an association health plan, an association looking to establish an association health plan also reviews the laws of the states in which it will operate for application to the association health plan.

In addition to the regulatory changes implemented or under consideration in the states, the Attorneys General of 11 states and the District of Columbia filed suit in the U.S. District Court for the District of Columbia arguing that the Final Rule is not a permissible interpretation of the definition of "employer" in Section 3(5) of ERISA and that the rule frustrates the congressional intent behind the ACA.[41] On March 28, 2019, the District Court for the District of Columbia issued a memorandum opinion vacating substantially all of the Final Rule with immediate effect, including the Final Rule's commonality of interest and working owner provisions.[42] The court found that the DOL's interpretation and expansion of the definition of "employer" under Section 3(5) of ERISA was not reasonable because it does not include a meaningful limit on the types of groups or associations which qualify as "bona fide" for purposes of ERISA, does not include meaningful limits on associations because common geographic location is not a legitimate "commonality of in-

32. *Id.* § 2510.3-5(e)(2). The AHP is required to determine "working owner" status at the time the individual first becomes eligible and is required to periodically confirm continued qualification for such status.

33. *Id.* § 2510.3-3(b)(7).

34. Preamble to the Final Rule, 83 Fed. Reg. 28912, 28927.

35. Section 514(b)(6)(A) of ERISA, 29 U.S.C. § 1144. The extent to which a state may regulate an association health plan, however, depends on whether or not the association health plan is "fully insured" within the meaning of ERISA's preemption provision. Although a full examination of ERISA's preemption provision as applied to associated health plans is outside the scope of this article, it should be noted that an associate health plan which is not "fully insured" will generally be subject to a state's insurance laws without limitation.

36. Preamble to the Final Rule, 83 Fed. Reg. 28912, 28954.

37. The Kansas Legislative Research Department prepared a comprehensive survey of state responses to the Final Rule. The memorandum, titled "Stated Actions Following Issuance of Final Rule, Definition of "Employer" under Section 3(5) of ERISA – Association Health Plans," is available at: <http://www.kslegislature.org/li/b2019_20/committees/ctte_h_ins_1/documents/testimony/20190206_01.pdf>.

38. *See* Department of Insurance, Financial Institutions and Professional Registration, Insurance Bulletin 18-04 (Nov. 21, 2018).

39. *See* Small Business Healthcare Act, 2019 N.C. Sess. Laws 2019-202.

40. 2018 Cal. Stats. Ch. 700.

41. Pls.' Compl., ECF No. 1, Case No. 18-cv-01747, available at: <https://ag.ny.gov/sites/default/files/complaint_asfiled.pdf>.

42. *See State of New York, et al. v. United States Dep't of Labor*, No. 18-01747 (D.D.C. March 28, 2019).

terest" among members, and the dual treatment of "working owners" as both employers and employees is inconsistent with the intent of ERISA. [43]

VI. The U.S. Department of Labor Response to the Challenge to the Final Rule

The DOL responded to the decision of the District Court for the District of Columbia by filing an appeal with the Federal Court of Appeals for the District of Columbia Circuit.[44] Oral arguments were heard by a three-judge panel on November 14, 2019.[45]

The DOL also issued interim guidance for association health plans that formed and commenced operations under the provisions in the Final Rule prior to the district court's decision vacating substantial portions of the Final Rule.[46] Under this interim guidance, the DOL stated its disagreement with the district court's decision and stated its commitment to taking appropriate actions within the DOL's authority to minimize the consequences to employers, employees, and their families resulting from the district court's decision.[47]

In addition, the DOL stated that employers participating in fully insured association health plans on the date of the district court's ruling were permitted to maintain their coverage through the later of the end of the applicable plan year or contract year.[48] Upon expiration of this transitional period, the coverage is available only for renewal if it meets the applicable requirements for a policy issued in the small or large group market of the applicable state depending on the size of the individual participating employer.[49] Further, the DOL committed to working with other agencies and the states to minimize disruptions due to the uncertain status of the Final Rule and not to take enforcement action against parties for any actions taken in good faith reliance on the Final Rule prior to the district court's decision.[50] It is not clear from the interim guidance whether association health plans formed in reliance on the Final Rule may continue operating beyond the expiration of the interim guidance period. These association health plans should, therefore, carefully review their options with legal counsel (including whether the group or association may qualify under the Pathway 1 guidance) while awaiting the results the of the district court's decision.

VII. Due to the Uncertainty of the Final Rule's Status, What Options are Available to Association Health Plans?

As is often the case in the law, the answer depends on the particular group or association of employers sponsoring the association health plan. A group or association of employers that formed an association health plan under the Final Rule will need to consider its eligibility for the DOL's transition relief described above. These groups or associations of employers will also want to consider whether operating under the Pathway 1 guidance is a possibility for them and what, if any, changes to their organizational structures and membership terms would be required to comply with the Pathway 1 guidance. Association health plans formed and operating under the Pathway 1 guidance are in a better position and will be able to continue operating without interruption because the Pathway 1 guidance is unaffected by the status of the Final Rule.

VIII. Conclusion

Association health plans have for years served as an avenue for small- and medium-sized employers to provide quality, affordable health benefits to their employees and have the potential to provide access to such benefits to even more employers. Groups of employers interested in forming an association health plan should carefully review their eligibility to do so under the Pathway 1 or Pathway 2 guidance (the latter of which is subject to continuing litigation), and existing association health plans should conduct an ongoing review of changes in federal and state law to ensure continued compliance.

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43. *See id.*

44. *State of New York et al. v. United States Dep't of Labor,* Dock No. 19-05125 (D.C. Cir. April 30, 2019) (Notice of Appeal).

45. *Id.* (Courtroom Minutes of Oral Argument filed Nov. 14, 2019).

46. Department of Labor Statement Relating to the U.S. District Court Ruling in *State of New York v. United States Department of Labor* (April 29, 2019), *available at* <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB85/ahp-statement-court-ruling>.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*