

**Summary of Guidance Issued by State Insurance Regulators In Response to Final U.S. Department of Labor Regulation:
Definition of “Employer” under Section 3(5) of ERISA – Association Health Plans” 29 CFR Part 2510 RIN 1210-AB85**

Updated as of: November 6, 2018

Prepared by:

Alden J. Bianchi, Member, Chair, Employee
Benefits & Executive Compensation Practice
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111

Christopher E. Condeluci, Principal
CC Law & Policy PLLC
1001, 4th Street, S.E.
Washington, DC 20003

Overview

On October 12, 2017, President Trump issued Executive Order 13813. Entitled, “Promoting Healthcare Choice and Competition Across the United States,” Executive Order 13813 directed the Secretary of Labor to consider issuing regulations or revising guidance, consistent with the law that would expand access to more affordable health coverage by permitting more employers to form association health plans (“AHPs”). On June 21, 2018, in furtherance of Executive Order 13813, the Department of Labor published a final regulation entitled “Definition of Employer Under Section 3(5) of ERISA-Association Health Plans” (the “final regulation”). The final regulation allows for the expansion of AHPs by altering the prior law commonality of interest test and for the first time permitting AHPs to include working owners as employer members.

The final regulation principally affects fully-insured AHPs. While states have near plenary powers to regulate self-funded AHPs, their power over fully-insured AHPs is constrained. The final regulation’s expansion of access to fully-insured AHPs threatens to disrupt state small and individual group insurance markets, which some states have taken steps to protect in response. At issue in the final regulation is

a simple question: When can an AHP put several unrelated small groups together to make a large group for underwriting and other purposes? Where this cannot be done, then underwriting and other regulation takes place at the member-employer level based on the size of each member/employer. This is referred to as the “look-through” rule, since one looks through the AHP to the individual member to determine group size. Prior to the final regulation (specifically, according to a 2011 CMS memorandum), the look through rule applied to AHPs except in the case of a bona fide association.

The table below tracks and summarizes state guidance relating to the final AHP regulation with emphasis on the application of the look-through rule. Unless otherwise indicated, references to AHPs below mean and include only fully-insured AHPs.

	<i>State</i>	<i>Guidance/ Authority</i>	<i>Comment</i>
(1)	California	<i>Guidance:</i> N/a <i>Authority:</i> SB 1375	SB 1375 prohibits employer group health benefit plans from being issued, marketed, or sold to a sole proprietorship or partnership without employees. The bill requires individual health benefit plans to be sold to any entity without employees. As a result, AHPs will be unable to cover working owners as defined and described in the final regulation.
(2)	Connecticut	<i>Guidance:</i> State of Connecticut Insurance Department, Bulletin HC-123, August 27, 2018 <i>Authority:</i> C.G.S. § 38a-564 through C.G.S. § 38a-567	Connecticut adopts a strict reading of the look-through rule, which does not recognize the any exceptions for bona fide associations. Small employers insured under a fully insured AHP will still be rated as small employers. Additionally, sole proprietors will not be considered members of an AHP group, so they must continue to purchase plans in the individual market. Out-of-state fully insured AHPS can sell products in Connecticut to small employers or sole proprietors, but they first must seek prior approval from the Department and are required to follow the requirements of small group health insurance plans where appropriate.

(3)	Illinois	<i>Guidance:</i> Illinois Department of Insurance Company Bulletin 2018-07– Association Health Plans	Insurers are free to apply the current requirements of the Illinois Insurance Code to satisfy final AHP regulation. Illinois will, as a result, recognize fully-insured bona fide, large groups.
(40)	Indiana	<i>Guidance:</i> Indiana Department of Insurance, Bulletin 245, October 17, 2018 – Association Health Plans	While Bulletin 245 purports to “announce the Department's position regarding the regulation of AHPs,” the Department’s position vis-à-vis the look-through rule is less than clear.
(5)	Iowa	<i>Guidance:</i> Bulletin 2018-07 Iowa Insurance Division [191], Adopted and Filed <i>Authority:</i> Iowa Code section 505.8 and 507A.4; 2018 Iowa Acts, sections 5, 6 and 7.	Newly adopted emergency regulations impose notice requirements on, and prescribe a comprehensive, discretionary certification process for, fully-insured AHPs. Among other things, AHPs must be tax-exempt entities; members must be in the same trade or business; and the sponsoring entity must have been in existence for at least five years. (In essence, the AHP is treated and regulated as though it was itself a carrier.)
(6)	Louisiana	<i>Guidance:</i> Louisiana Department of Insurance Advisory Letter 2018-03 <i>Authority:</i> La. R.S. 22:451, et seq.	Advisory Letter 2018-03 identifies 7 types of MEWAs based on their status as fully-insured of self-funded and whether formed under existing law or to be formed under the Department of Labor’s 2018 final AHP rule. In general, Louisianan follows the CMS approach to the application of the look-through rule by respecting the exception for bona fide associations.
(7)	Massachusetts	<i>Guidance:</i> Division of Insurance Bulletin No. 2018-03, July 27, 2018	The Massachusetts Division of insurance adopts the “look-through” rule without any reference to or acknowledgement of the bone fide plan

		<i>Authority:</i> M.G.L Ch. 176J, § 1	exception. The Division relies on M.G.L Ch. 176J, which provides constituent employers that from a multiple employer welfare arrangement are rated based on the size of the individual member/employer and not on the size of the aggregate MEWA membership. This is a change from prior practice, wherein the Division did not apply M.G.L Ch. 176J when presented with a determination by the Department of Labor of a group’s status as a bona fide association. The impact of existing large group AHPs is unclear.
(8)	Michigan	<i>Guidance:</i> State of Michigan Department of Insurance and Financial Services, Bulletin 2018-21-INS, September 24, 2018 <i>Authority:</i> MCL 500.607	Fully-insured AHP coverage is a “type of group coverage.” Insurers offering fully-insured AHP coverage must hold a Life and Health Certificate of Authority issued by DIFS. The bulletin also imposes filing requirements, but there is not indication that AHPs that qualify cannot operate as a single large group.
(9)	Nebraska	<i>Guidance:</i> Nebraska Farm Bureau announcement <i>Authority:</i> Not specified	See Notice issued by the Nebraska Farm Bureau dated September 9, 2018, wherein the bureau encourages the formation of large-group AHPs.
(10)	Nevada	<i>Guidance:</i> Not specified <i>Authority:</i> Not specified	Nevada’s insurance commissioner showed its support by approving the Las Vegas Chamber of Commerce’s association health plan, among others. So far the LV Chamber’s plan already has 650 small businesses in the process of signing up.
(9)	New Hampshire	<i>Guidance:</i> BULLETIN; Docket No.: INS NO. 18-045-AB, August 31, 2018	New Hampshire law is currently inconsistent with the final regulation. Insurance coverage issued to small employer association members cannot be

		<i>Authority:</i> RSA 420-G:2, XVI(a); RSA 415-E	<p>treated as large employer coverage. Regardless of the new flexibility offered by the DOL, fully insured AHP coverage under NH law must be rated in accordance with small group rating rules if issued to a small employer. The New Hampshire Insurance Department is in the process of convening a working group to draft legislation for 2019 to address coverage options with the intent to avail small employers of the flexibility of the final regulation.</p>
(11)	New York	<p><i>Guidance:</i> Insurance Circular Letter No. 10 (2018) July 27, 2018</p> <p><i>Authority:</i> N.Y. Insurance Law §§ 1101, 1102, 2110, 2117, 2122, 2127, 2403, 2406, 3201, 3231, 4317 and 4235</p>	<p>New York has reiterated its enforcement of its own state laws by providing that the AHP rules does not preempt New York laws or the Department of Financial Services’ (“DFS”) regulation of health insurance. DFS will “continue to enforce state requirements vigorously and to the fullest extent of State law” the guidance states. New York’s enforcement approach thus remains unchanged.</p> <p>An association formed to obtain health insurance coverage is not a recognized group in New York and therefore is not permitted to purchase health insurance coverage in the state. Accordingly, issuers may not deliver or issue for delivery health insurance policies or contracts in New York to an association that does not satisfy the New York Insurance Law requirements, nor may brokers or agents solicit or procure such a policy in New York State.</p>
(12)	Pennsylvania	<i>Guidance:</i> Pennsylvania Insurance Department, Association Health Plans, August 2, 2018	Pennsylvania opposes the final regulations, reiterating that an AHP may only provide health

		<i>Authority:</i> 40 P.S. § 756.2; <i>see</i> 40 P.S. § 46; 40 P.S. § 3801.301	coverage in the state if it is in proper compliance with all Pennsylvania legal requirements including licensure, solvency, form rating and standards, examination provisions and enforcement. A sole proprietor must still have an individual policy, an employer group of 2-50 employee must have a small group policy, and employer groups with 50+ employees will have a large group policy.
(13)	Oregon	<i>Guidance:</i> Oregon Division of Financial Regulation, Regulation of Association Health Plans in Oregon, September 10, 2018 <i>Authority:</i> ORS 743B.005; ORS 750.307	Oregon will continue to enforce its current laws as they applied to AHPs rule without modification by the final AHP rule. Thus, it will respect bona fide associations that qualify as such under prior law. ORS 743.524 establishes the eligibility requirements for an association to be a group health policy holder in Oregon, and requires, among other things, that the group be organized in good faith and for purposes other than obtaining insurance.
(14)	Vermont	<i>Guidance:</i> Vermont Department of Financial Regulation, Emergency Rule I-2018-01-E, “Fully-Insured Multiple Employer Welfare Arrangements and Association Health Plans” <i>Authority:</i> 8 V.S.A. § 4079a	This emergency rule imposes, among other things, an AHP licensing regiment, “No association or MEWA may offer a fully-insured health benefit plan in this State unless duly licensed with the Department. An association or MEWA seeking to offer a fully-insured health benefit plan shall make application for a license to the Department and shall not offer such plans in this State until it is licensed. . . .” The existing rating rules continue to apply, which means that the look-through will not apply.
(15)	Washington, D.C	<i>Guidance:</i> N/a	The Council of the District of Columbia has introduced legislation that would adopt a strict

		<i>Authority:</i> B22-1022 - Health Insurance Marketplace Improvement Amendment Act of 2018	look-through rule with no exception for bona fide groups. The legislation is B22-1022 - Health Insurance Marketplace Improvement Amendment Act of 2018, available here , the relevant portions of which are set out in this summary . If this legislation passes, fully-insured large group AHPs will not be permitted in the District.
(16)	Washington State	<i>Guidance:</i> State of Washington, Office of the Insurance Commissioner, August 29, 2018 memorandum. <i>Authority:</i> N/a	The August 29 memorandum reminds readers that self-funded AHP are not permitted in the State. Regards fully insured AHPs the memorandum advises that the Commission is reviewing and endeavoring to understand the new rule. There is no indication that the Commission will object to the final regulation.
(17)	Wisconsin	<i>Guidance:</i> Not specified <i>Authority:</i> Not specified	Wisconsin approved a state bankers association that will soon start offering health coverage to its 235 bank members through its association health plan.