



Finding Your Path Through AHP Confusion

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Finding Your Path Through AHP Confusion

Written by: Mark J. Lamberth and Julie Mitchell, The Capstone Group, Inc. – 7/24/19

A federal district court recently struck down the easier pathway employers could use to form association health plans (“AHPs”). This pathway was created by the Department of Labor (“DOL”)’s 2018 final rule, which allowed more employers to form AHPs than previous DOL sub-regulatory guidance. Although employers may no longer rely on forming an AHP under the easier pathway (at least for now), they can still form AHPs under long-standing DOL guidance unaffected by the district court’s ruling.

Background

On June 21, 2018, the DOL published a final rule on AHPs expanding the definition of how a “bona fide group or association of employers” under ERISA section 3(5) can be considered a single-employer ERISA plan.¹ Prior to the final rule, DOL’s sub-regulatory guidance categorized AHPs as either “bona fide”, which were considered a single-employer plan at the association level, or other AHPs, which were a collection of separate ERISA plans.²

Employers wanting to enjoy various ACA exemptions and ERISA benefits associated with sponsoring a bona fide AHP had to meet a variety of criteria: exercising control of the plan, having a common economic or representational interest, and exhibiting a genuine relationship between the employers, other than sharing a common goal to provide health benefits.³

¹ <https://www.federalregister.gov/documents/2018/06/21/2018-12992/definition-of-employer-under-section-35-of-erisa-association-health-plans>

² <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions>

³ <https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/guidance/advisory-opinions/2019-01a.pdf>

AHPs formed pursuant to DOL's pre-final rule guidance are referred to as "Pathway 1 AHPs".⁴

In addition to formation under the stricter Pathway 1 guidance, the final rule created an easier path for employers to create bona fide AHPs by allowing small businesses, including self-employed workers, to establish an AHP simply because they share the geographic location.⁵ In addition, the genuine relationship between the employers could now be satisfied by simply wanting to provide healthcare benefits – provided the association of employers have at least one substantial business purposes unrelated to offering such benefits.⁶ These AHPs are commonly referred to as "Pathway 2 AHPs".

Pathway 1 AHPs: Still Viable

The 2018 final rule creating Pathway 2 AHPs was recently struck down in *State of New York v. United States Department of Labor*. Subsequently the DOL, along with the Department of Justice ("DOJ"), filed a notice to appeal the district court's ruling.⁷

To help pave through the confusion of the ruling, the DOL released a policy statement regarding the status of AHPs formed in reliance prior to the district court's ruling.⁸ The statement explained that AHPs formed in good faith pursuant to the final rule (*prior* to the district court's ruling) will not be punished and may continue to provide benefits through the remainder of the plan year or contract term.⁹

⁴ *Id.*

⁵ <https://www.dol.gov/general/topic/association-health-plans#FAQs>

⁶ <https://www.federalregister.gov/documents/2018/06/21/2018-12992/definition-of-employer-under-section-35-of-erisa-association-health-plans>

⁷ <file:///C:/Users/jmitchell.CAPSTONE/Desktop/Blogs/Notice%20of%20Appeal.pdf>

⁸ <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB85/ahp-statement-court-ruling>

⁹ *Id.*

The DOL reiterated the contents of its policy statement in subsequent guidance and clarified that AHPs formed under the DOL's pre-rule sub-regulatory guidance are unaffected by the district court's decision.¹⁰ Therefore, employer groups and associations may still sponsor an ERISA-covered AHP by creating it consistent Pathway 1 pre-final rule guidance.¹¹

Takeaways

Although Pathway 2 AHPs are on hold as the final rule travels through the appeals process¹², employers are still able to rely on Pathway 1 guidance to form AHPs.¹³ More information on association health plans can be found at the DOL's website¹⁴ and in the forms of press releases, FAQs, and published advisory opinions.¹⁵ As always, employers should consult with an expert or legal counsel regarding AHP formation and the compliance obligations associated with ERISA, ACA, and other federal mandates.

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¹⁰ <https://complianceadministrators.com/wp/wp-content/uploads/2019/07/ahp-q-and-a-court-ruling-part-2.pdf>

¹¹ <https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/guidance/advisory-opinions/2019-01a.pdf>

¹² <https://www.courtlistener.com/docket/11888/state-of-new-york-v-dol/>

¹³ <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/compliance-assistance-publication-ahp.pdf>

¹⁴ <https://www.dol.gov/general/topic/association-health-plans>

¹⁵ <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions>

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