

DOL Proposes to Rescind Association Health Plan Regulations

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NPRM: Definition of “Employer”—Association Health Plans, 29 CFR Part 2510, 88 Fed. Reg. 87968 (Dec. 20, 2023)

Available at <https://www.govinfo.gov/content/pkg/FR-2023-12-20/pdf/2023-27510.pdf>

The DOL has announced a proposal to rescind regulations issued in 2018 that were designed to expand the availability of association health plans (AHPs). As background, before these regulations were introduced, a multiple employer welfare arrangement (MEWA) was generally treated as a single ERISA plan only if it was established by a “bona fide” association of employers with a genuine organizational relationship and an ability to control the association. (A MEWA treated as a single plan may avoid some Affordable Care Act (ACA) reforms applicable to the individual and small group insurance markets.) Among other things, the regulations created a more flexible “commonality of interest” test than applied under the bona fide association guidance and permitted working owners without common-law employees to participate in an AHP. However, in 2019, a court vacated key portions of the regulations, including the broader commonality of interest test and the provisions relating to working owners. While the DOL issued additional AHP guidance with a limited nonenforcement policy in light of the court’s ruling, the future of AHPs as contemplated under the regulations has remained somewhat unclear.

The DOL now proposes to rescind the AHP regulations in full to “resolve and mitigate any uncertainty” regarding their status and ensure that guidance provided on this issue aligns with ERISA’s “text, purposes, and policies.” A related [news release](#) expresses the DOL’s view that the regulations were “not consistent with the best reading of the statutory requirements governing group health plans.”

EBIA Comment: The DOL’s post-ruling guidance prohibited AHPs formed under the regulations from marketing to and signing up new members, so there likely are few, if any, AHPs that would be affected by this action. Nevertheless, rescinding the expanded rules would resolve any lingering uncertainty. Public comments may be submitted by February 18, 2024. In any event, the bona fide association guidance that predated the regulations remains applicable. For more information, see EBIA’s ERISA Compliance manual at Section XIX.D (“Is There an ERISA Plan at the MEWA Level or at the Participating Employer Level?”). See also EBIA’s Health Care Reform manual at Section XIV.A (“Introduction and Understanding Small and Large Group Markets”), EBIA’s HIPAA Portability, Privacy & Security manual at Section XVIII (“Guaranteed-Availability and Guaranteed-Renewability Rules for Large Group, Small Group, and Bona Fide Association Plans”), EBIA’s Self-Insured Health Plans manual at Section III.D (“Who Can Sponsor a Self-Insured Health Plan?”), and EBIA’s COBRA manual at Section V.M.1 (“When Does ERISA Apply at the MEWA Level?”).

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