Scott A. Sinder
202 429 6289
ssinder@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

Steptoe
STEPTOE & JOHNSON LLP

June 19, 2018

M E M O R A N D U M

TO: CIAB

FROM: Scott Sinder
Kate Jensen

RE: Final Rule on Association Health Plans

Today, the White House and the Department of Labor ("DOL") rolled out the Administration's long-awaited final rule on association health plans ("AHPs"). The rule – meant to make it easier for small businesses and sole proprietors to band together to form large group health plans – contains the following key features:

- Allows small businesses that pool together to be underwritten at the large group level and avoid small group rules under the Affordable Care Act ("ACA");
- Allows "working owners" without common law employees to participate in AHPs if certain conditions are satisfied;
- Permits formation of AHPs – with the primary, but not the sole, purpose of offering health coverage – based on common geography (city, county, state, or multi-state metropolitan area) or industry, if other bona fide association requirements are met;
- Leaves in place existing AHP rules and guidance (which current AHPs may opt to follow) and creates a parallel regime with the new rule;
- Does **not** alter the legal, regulatory, or preemption framework for Multi-Employer Welfare Arrangements ("MEWAs")—of which AHPs are one type;
- Contains anti-discrimination provisions that, among other things, prohibit AHPs from distinguishing between employees of different employer members based on health factor for purposes of premiums, benefits, terms of coverage, etc.; and
- Staggers applicability dates:

- September 1, 2018 – all associations (new or existing) may establish a fully-insured AHP under the new rule;
- January 1, 2019 – existing associations that sponsored an AHP on or before the publication date of the final rule in the Federal Register may establish a self-funded AHP under the new rule; and
- April 1, 2019 – all other associations (new or existing) may establish a self-funded AHP under the new rule.

The Administration has long touted AHPs as a solution for bringing small businesses' and sole proprietors' healthcare costs down and for opening up coverage options to those groups. CBO estimates that, as a result of the rule, four million Americans will be covered by AHPs by 2023, including approximately 400,000 who are currently uninsured. Moreover, according to today's release, estimated cost savings in annual premiums for small businesses range from $1,900 to $4,100, and from $8,700 to $10,800 for individuals (depending on the generosity of AHP coverage offered).

Without changes to state-law treatment of MEWAs (particularly self-insured MEWAs), however, operational and legal hurdles for interstate AHPs will persist. Thus, it appears that the new regime will be most useful/impactful in intra-state scenarios.

Discussion of the Final Rule

I. Commonality of Interest and Bona Fide Associations

Most significantly, the rule relaxes the "commonality of interest" requirement under existing DOL guidance to make it easier for more groups to sponsor single large-plan AHPs. On the other hand, the rule retains many other requirements for establishing a "bona fide association" capable of sponsoring an AHP.

Under the new rule, sufficient commonality of interest exists if employers are:

- In the same trade, industry, line of business, or profession;[1] or
- Have a principal place of business within a region that does not exceed the boundaries of the same state (e.g., a city or county) or the same metropolitan area (even if the metropolitan area includes more than one state).

To be a bona fide association capable of sponsoring an AHP, employers may band together *for the primary purpose of providing health coverage to employer members and their employees.* The final rule makes clear, however, that to be a bona fide association, the group must have at least one substantial business purpose unrelated to the offering of health coverage (this differs from the proposed rule, which would have allowed AHPs to be formed *solely* for the purpose of

[1] If the association sponsoring the AHP is itself an employer member of the group, the group will be deemed for purposes of the commonality of interest requirement to be in the same trade, industry, line of business, or profession as the other employer members of the group.

offering health coverage). A "substantial business purpose" exists "if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan." Examples provided in the rule include promoting the common business interests of the association's members or promoting the common economic interests of a trade or employer community.

Consistent with long-standing DOL guidance on AHPs, the rule includes several structural/organization requirements for bona fide associations beyond the commonality of interest determination. In addition to satisfying the nondiscrimination rules described below, these requirements for associations include:

- A formal organization structure with a governing body and by-laws or other similar indications of formality;
- A commonality of interest (as described above);
- Its functions and activities controlled by its member employers and the group health plan controlled by employer members participating in the plan;
- Its health coverage limited to employees and former employees (who became eligible when they were employees) of current employer members (and family/beneficiaries thereof); and
- A requirement that each employer member participating in the plan is acting directly as an employer of at least one employee (which may include a working owner, as discussed below) who is a participant covered under the plan.

II. Working Owners Eligible to Participate in AHPs

The rule broadens eligibility for participation in AHPs to include "working owners" (e.g., sole proprietors and other self-employed individuals) *without common law employees*, provided certain requirements are met and the individual is not eligible for other subsidized group health plan coverage.

A "working owner" eligible to participate in an AHP is defined under the rule as:

> any person who a responsible plan fiduciary reasonably determines is an individual:
>
> (i) Who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner and other self-employed individual;
> (ii) Who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and
> (iii) Who either:
> (A) Works on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner's trade or business, or
> (B) Has wages or self-employment income from such trade or business that at least equals the working owner's cost of coverage for participation by the

> working owner and any covered beneficiaries in the group health plan sponsored by the group or association in which the individual is participating.

The rule requires that the "working owner" definition be satisfied when the individual first becomes eligible for coverage under the plan, and eligibility must be periodically confirmed "pursuant to reasonable monitoring procedures."

III. Nondiscrimination Protections

In response to concerns that AHPs could lead to adverse selection or function as commercial enterprises (i.e., like traditional insurers selling insurance), the proposed rule includes nondiscrimination protections. These provisions build on existing health nondiscrimination provisions under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") (as amended by the Affordable Care Act ("ACA")). Specifically, the rule:

- Prohibits AHPs from restricting employer membership based on any individual's health factor (e.g., health status, medical condition, claims experience, medical history, disability, etc.);
- Requires AHPs to comply with HIPAA nondiscrimination rules with respect to eligibility for benefits, premiums, required contributions, and participant/beneficiary coverage; and
- Prohibits AHPs from treating the employees of different employer members as distinct groups of similarly-situated individuals based on a health factor of one or more individuals (for purposes of premiums, benefits, terms of coverage, etc.).

The rule contains a series of examples illustrating how these nondiscrimination rules will be applied. One example provides, for instance, that an agriculture industry association would be permitted to charge employers different premiums based on their primary subsector (e.g., crop farming, livestock, forestry, etc.) because the distinction is not directed at individual participants or beneficiaries based on health factor.

IV. No Changes to MEWA Rules

In its proposed rule, DOL solicited public input on whether it should use its existing authority to exempt self-insured MEWAs from certain state regulations. Ultimately, however, DOL determined that such action is outside of the scope of this rulemaking and is not taking any steps at this time to address preemption or any state law issues associated with MEWAs.