HEALTH CARE REFORM NEWS

...From the Employer Perspective

Wednesday, January 25, 2018

DOL Proposes Rule to Expand Association Health Plans

Earlier this month, the U.S. Department of Labor (DOL) issued a proposed rule to expand the opportunity of unrelated employers of all sizes (but particularly small employers) to offer health insurance through Association Health Plans (AHPs) and gain some of the advantages of large employers. This rulemaking follows President Trump's October 12, 2017 Executive Order 13813, "Promoting Healthcare Choice and Competition Across the United States," which stated the Administration's intention to prioritize the expansion of access to AHPs.

Background

AHPs are, by their nature, multi-employer welfare arrangements (MEWAs), which are group health plans that cover employees of two or more unrelated employers. Due to some history of insolvency and fraud that left participants with unpaid benefits, a 1983 amendment to ERISA gave states authority to comprehensively regulate both self-funded and insured MEWAs, with the exception of insured MEWAs that qualify as a single ERISA-covered plan ("ERISA plan"). However, very few insured AHPs have qualified as a single ERISA plan under current regulations.

Insured AHPs can be treated as a single ERISA plan only if (a) the employer members have a "commonality of economic or representational interest" and join together for a purpose other than simply providing health coverage, (b) the association is controlled by its members, and (c) the employer members each have at least one employee who is not an owner (or related to an owner). However, the DOL has consistently interpreted "commonality of economic or representational interest" rather narrowly, making it difficult for most insured AHPs to qualify.

Thus, while still classified as MEWAs, most insured AHPs are not treated as single large group risk pools – each member employer is considered independently in determining whether the coverage it purchases through the AHP is subject to state and federal small group rules or large group rules. As a result, even when purchased through a large AHP, plans purchased by small employer members are still subject to requirements that do not apply to large group plans. For example, individual and small group plans are required to cover all ten categories of essential health benefits (EHBs) specified by the Affordable Care Act (ACA), whereas, with the exception of required preventive care, large group plans are only subject to restrictions on out-of-pocket costs and benefit dollar limits for any EHBs they voluntarily choose to cover.

Small group market is defined as employers with up to 100 employees in CA, CO, CT, MD, NY and VT and up to 50 employees in all other states.

Additionally, under ACA, premiums for employers in the small group market cannot take into account the health risk status of the group or any individual – they are based on the overall health risk of an insurer's entire small group risk pool. Limited adjustments are permitted only for age, geography, and tobacco use. Therefore, an AHP with better than average health risk on a collective basis does not benefit from it as would a large group plan.

With regard to self-funded AHPs, although ERISA generally exempts self-funded health plans from state regulation, the ERISA amendment noted above allows states to apply to self-funded MEWAs any state insurance laws that apply to insured plans in the state, including state-mandated benefit coverage. Many states regulate self-funded MEWAs as commercial insurance companies and others prohibit them altogether.

In addition to state insurance-related regulations, each state has its own regulations specific to the operation of MEWAs, including solvency, licensing, and administrative requirements, which apply to both self-funded and insured AHPs. A state's ability to directly regulate insured MEWAs that are single ERISA plans is limited to establishing reserve and contribution levels to ensure the solvency of the MEWA, but states are free to regulate the underlying insurance contacts or policies, which are subject to state insurance laws. Therefore, AHPs that operate in multiple states are subject to insurance and MEWA laws for each state in which they operate.

Proposed Rule

The DOL's proposal would make it easier for insured AHPs to be treated as one plan eligible for large group market standards and would expand the types of employers that can participate in an AHP. Under the proposed rule:

- An insured AHP would be regarded as a single ERISA plan, even if providing health benefits is the association's only purpose. Additionally, the commonality of interest standard could be satisfied simply by the employer members (a) being in the same trade, industry, line of business, or profession, or (b) having their principal place of business in the same state or the same metropolitan area (even if the metropolitan area includes more than one state).
- Employers eligible to join an AHP would include sole proprietors or other working owners of trades or businesses with no employees if they work at least 30 hours a week, 120 hours a month, or work enough to earn enough money to equal the cost of coverage in the AHP. Self-employed individuals must dedicate a certain amount of time to the business or earn a certain amount of income from the business, and must not be eligible for a group health plan sponsored by another employer.

Qualification as a single ERISA plan also requires that the group or association meet the following requirements:

- The group or association has a formal organizational structure with a governing body and by-laws or other appropriate formalities;
- Each employer member acts directly as an employer of at least one employee who is a participant under the plan;

- Member employers control the association's functions and activities, including the establishment and maintenance of the group health plan, either directly or through the regular election of directors, officers, or other similar representatives; and
- The group or association does not offer the AHP to anyone other than employees and former employees of employer members and family members, or other beneficiaries of those employees and former employees.

Insured AHPs treated as a single ERISA plan would be prohibited from restricting membership based on any health factor (defined as health status, medical condition, claims experience, receipt of health care, medically history, genetic information, evidence of insurability, or disability) of an employee or dependent and from setting different rates for different employer members based on health factors. However, premiums could vary based on a broader spectrum of non-health factors than allowed under ACA small group rules, such as industry, occupation, business size, or gender.

> Currently, within an insurer's large group risk pool, group-specific underwriting is permitted employer-by-employer based on an individual employer's own claims experience, but individuals within the group cannot be charged different rates based on health status. Similarly, under the proposed rule, in the case of an AHP treated as a single ERISA plan, underwriting based on the experience of all AHP members combined would be permitted, but different employer members of the AHP could not be charged different rates based on the health status of their employees.

The DOL has asked for comments on whether this structure could create involuntary cross-subsidization across employers that would discourage formation of AHPs.

Discussion

If adopted, the proposed rule could create more opportunity for unrelated employers of all sizes; however, it is primarily geared to enable small employers to join an AHP and enjoy some of the advantages of larger employers. In its News Release, the DOL claims the proposed rule "may reduce [employers'] administrative costs through economies of scale, strengthen their bargaining position to obtain more favorable deals, enhance their ability to self-insure, and offer a wider array of insurance options."

Certainly, there would be opportunity for some savings related to administrative efficiency and negotiating leverage associated with a large group, but those savings may be offset to some degree by costs associated with forming, operating and marketing an association and AHP. The DOL acknowledges this might be the case for new associations, but believes associations that already exist have more potential to realize these savings.

The greatest source of opportunity for employer savings would be the "wider array of insurance options" noted in the DOL's comments, which, in other words, are plans that are subject to fewer state and federal requirements than small group market plans.

- On the federal level, small employer members of qualifying insured AHPs would no longer be required under the ACA to purchase plans that provide coverage for all ten categories of EHBs. The proposal would not, however, relieve insured AHPs of meeting Mental Health Parity requirements for any covered mental health services or ACA rules regarding coverage for preventive care and regarding out-of-pocket costs and benefit dollar limits for any EHBs that are covered by the plan.
- On a state level, qualifying insured AHPs would still be subject to state benefit mandates applicable to large group plans, but, if operating in multiple states, they would only be subject to the insurance requirements of the state in which the AHP is established. This would enable qualifying insured AHPs to be established in a state with fewer coverage requirements and less restrictive rating rules and those rules would apply to the AHP in all states.

Opponents of the proposal worry it may lead to a proliferation of AHPs offering coverage with limited benefits that attract only employers with relatively healthy employees, which could drive up premiums in the individual and small group markets. Proponents of the proposal believe it would provide more flexibility and choice for employers and their employees and argue that AHP employer members would likely still want to offer comprehensive coverage for competitive reasons.

On a practical note regarding multi-state AHPs, operation across state lines could present some challenges. Health care costs vary widely by location -- setting a consistent price across all states would be unappealing to those located in less expensive areas, but setting prices based on local markets would limit negotiating power. The proposal also would not relieve insured AHPs of state-by-state MEWA requirements related to solvency, licensing, and disclosure.
If adopted, the proposed regulations will be welcomed by small employers and self-employed individuals but, given that this rule addresses only insured AHPs, ability to take advantage it may depend on whether the AHPs are attractive to insurers. In addition to considering operational challenges, insurers may also need to weigh the business opportunity of AHPs versus the degree to which it might undermine the stability of their existing individual and small group market business.

Even though ERISA gives the DOL the authority to also exempt self-funded MEWAs from most state regulation, thus far it has not done so and these newly-proposed regulations address only insured arrangements. The DOL did, however, indicate that future proposals could involve self-funded MEWAs and invited comments on how the rule might be applied to self-funded plans.

Next Steps

The DOL is soliciting comments on a number of aspects of the proposed rule, which are due no later than March 6, 2018. Revisions to the rule are likely, but the proposed rule does not include an effective date for a final rule and there is no deadline by which the DOL must issue final regulations. Since the rule is only in proposed form, employers should not currently take action in reliance on them and should await adoption of any final rule. Trion will continue to monitor this matter and update you as developments occur.

###

Your Trion Strategic Account Managers are here to answer any questions you might have as you prepare to comply with ACA requirements. If you are not currently a Trion client and would like assistance navigating the changes required by health care reform, please contact us today by emailing trionsales@trion-mma.com.

About Trion Group, a Marsh & McLennan Agency, LLC (Trion) *Health Care Reform News*

MARSH & McLENNAN AGENCY | trion™