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DEEP DIVE: ASSOCIATION HEALTH PLAN CONSIDERATIONS FOLLOWING THE COURT ORDER VACATING THE DOL'S FINAL RULE

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On March 28, 2019, the Federal District Court for the District of Columbia issued an opinion and order vacating key portions of the Department of Labor's regulation, published in June 2018, which had expanded the definition of "employer" under Section 3(5) of ERISA (the "AHP Rule"), thereby broadening the scope of association health plans ("AHPs"). According to the Court, it is unreasonable to interpret "employer" as including working owners and groups that do not have "a true commonality of interest" and doing so leads to "absurd results" and is an "end run" around the Affordable Care Act. The Court's opinion was issued with immediate effect and has cast doubt on the future use of AHPs, especially self-insured AHPs.

As background, the AHP rule was promulgated in response to President Trump's October 12, 2017, Executive Order, which directed the DOL to expand access to and allow more employers to form AHPs. Before the Executive Order, the DOL had been characterizing AHPs maintained by a "bona fide" group or association of employers as being sponsored by a single employer (with the AHP retaining its status as a MEWA under ERISA). The AHP Rule significantly expanded such application by permitting groups or associations, including groups consisting entirely of "working owners" (self-employed individuals without common law employees), to form a single employer AHP that could qualify as a "large group" plan that would be exempt from certain Affordable Care Act reforms, such as offering the full suite of "essential health benefits," that otherwise apply to individual and small group market plans.

A month after the AHP Rule was finalized, the Attorneys General in 11 states and the District of Columbia challenged it in court, arguing that the AHP Rule is not a permissible interpretation of ERISA's definition of "employer" and that the rule frustrates the congressional intent of the Affordable Care Act. On March 28, 2019, the Court agreed and remanded the case to the DOL for reconsideration of the AHP Rule in light of the Court's holdings.

To summarize its overall findings, the Court held that the AHP Rule is not a reasonable interpretation of ERISA because it:

(1) provides no meaningful limit on the groups or associations that qualify as "bona fide" ERISA employers because of its "flimsy" substantial purpose requirement;

(2) does not create meaningful limits on associations because permitting associations based on geography does not provide a legitimate "commonality of interest" among members and

(3) the dual treatment of "working owners" as both the employer and employee is inconsistent with the intent of regulating employer-employee relationships under ERISA and leads to unreasonable results under both ERISA and the Affordable Care Act.

The DOL responded to the Court's decision by publishing a Q&A, advising that the DOL disagrees with the decision and reviewing its options for responding to the Court's decision. Therein, the DOL advises that AHPs relying on the new rule must continue to provide coverage according to their terms for valid claims of participants, and that the DOL will be issuing further guidance for AHP sponsors. Some considerations and potential impacts of the Court's decision are as follows:

(1) The DOL has not yet provided direct guidance on how it will respond to the court's decision, stating only that it is considering "all available options" on how to proceed. These options would include seeking a stay of the Order or appealing the Court's decision. The DOL could also (on remand) review and revise the AHP Rule, withdraw the rule, or issue a new proposed rulemaking to address the Court's concerns. We believe the DOL will likely choose to appeal the Court's decision and request a stay of the Court's Order. [**UPDATE**: On the same day this post was published, the DOL filed its Notice of Appeal to the D.C. Circuit Court.]

(2) The Court's Order does not affect the pre-AHP Rule guidance, which remains in effect and may be relied on by a group or association to form an AHP.

(3) Certain AHPs may be able to fairly easily tweak their operations so they comply with the pre-AHP Rule guidance, i.e., AHPs formed on a basis other than "geography" to support a "commonality of interest" and/or that did not include "working owners" with no common law employees in their group or association.

(4) The Court's decision should not affect AHPs operating prior to the AHP Rule in compliance with pre-AHP Rule guidance. In addition to leaving the pre-AHP Rule guidance in place, the DOL also clarified that state authority to regulate AHPs was unaffected by the AHP Rule. The bigger concern for pre-AHP Rule AHPs, then, will be the bevy of new state-level laws and regulations being enacted in "blue states" in response to the Trump Administration's desire to expand access to AHPs. For example, Delaware recently issued regulations requiring fully-insured AHPs to register with and obtain licenses to operate from the Department of Insurance and to subject self-funded AHPs to all requirements of its insurance code.

(5) AHPs relying on the AHP Rule will have to decide whether to continue operating or to change operational models while the court case plays out. The issuance of transitional relief by the DOL or

a stay of the Court's Order (or the lack of either) is likely to influence this decision. If these AHPs need to change structures, it is likely they will shift to operating as "trade or industry" or "commercial" MEWAs. This may complicate compliance because each employer would be considered as sponsoring its own welfare benefit plan and group health plan for purposes of ERISA and the Affordable Care Act, which means the plan would potentially need to satisfy the requirements of the individual, small group, and large group markets. For now at least, it appears most organizations are continuing to operate despite the Court's order in anticipation of a stay or an appeal by the DOL

(6) States will consider how to respond to the Court's decision. If a state has issued approval for an AHP to operate under the AHP Rule, the state may consider whether it needs to unwind any such approvals or place limitations on an AHP's operations. This could lead to a patchwork of transitional guidance while the lawsuit is ongoing. Vermont's Department of Financial Regulation, for example, issued a bulletin on April 23, 2019, which prohibits all existing AHPs and MEWAs operating in the state from enrolling new employer groups or marketing coverage to new groups and requiring them to post a notice on their website stating that new groups cannot be accepted until the bulletin is rescinded or superseded.

(7) The Court's opinion includes the Court's ruling that the states had standing to sue and that the DOL's rule was not reasonable under the "Chevron Deference" framework. These will be key points in any appeal. The "Chevron Deference" question may become even more important in the case, as there is currently pending before the Supreme Court a case with the potential to rewrite the standard of deference to an executive agency that is appropriate upon judicial review.

We will continue to follow the lawsuit and future guidance from the DOL.

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