Department of Labor Finalizes Rules on Permissible "Association Health Plans"

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The Department of Labor ("DOL") recently finalized new regulations providing that a "bona fide group or association of employers" that sponsor or maintain an employee welfare benefit plan may be an "employer" under Section 3(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The upshot of the new regulations is that small employers or sole proprietors which previously had difficulty affording health insurance can now band together and purchase large group market insurance plans (which might result in potential premium cost-savings and reduction of administrative costs).

ERISA applies generally to employee benefit plans, including employee welfare benefit plans "established or maintained by an employer." Critically, Section 3(5) of ERISA defines an "employer" to mean "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; ***and includes a group or association of employers acting for an employer in such capacity***." The new regulations provide a safe harbor for a "bona fide group or association of employers" to meet this definition of "employer" in ERISA and therefore qualify for potential cost-savings coincident with being in a large group market. Specifically, a "bona fide group or association of employers" would need to meet the following requirements to fit within this safe harbor:

1. The group or association may exist for the primary purpose of sponsoring a group health plan that it offers to its employer members, but if it does, there must be at least one other substantial business purpose unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees. While neither "business purpose" or "substantial business purpose" are explicitly defined by the new regulations, the new regulations do state that a "business purpose" would include promoting

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the common business interests of its members or the common economic interests in a given trade or employer community (and need not be for-profit activity) and that a "substantial business purpose" would exist if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan.

2. Each employer member of the group or association participating in the group health plan acts directly as an employer of at least one employee who is a participant covered under the plan.
3. The group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality.
4. The functions and activities of the group or association are controlled by its employer members, and the group's or association's employer members that participate in the group health plan control the plan. "Control" must be present both in form and in substance.
5. The employer members have a commonality of interest. "Commonality of interest" may be established by: (i) employers being in the same trade, industry, line of business, or profession; or (ii) employers having a principal place of business in a region that does not exceed the boundaries of the same State or the same metropolitan area;
6. The group or association does not make health coverage through the association available other than to employees and former employees (provided eligibility occurred when the former employee was an employee) of employer members and family members of those employees and former employees.
7. The group or association and health coverage offered by the group or association complies with HIPAA nondiscrimination provisions.
8. The group or association is not a health insurance issuer or owned or controlled by such a health insurance issuer.

The new regulation also permits the participation of a "working owner" (which would be deemed to satisfy the above restrictions on covering only employees), provided the individual:

- Has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including partners and other self-employed individuals;
- Is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and
- Either works at least 20 hours per week (or at least 80 hours per month providing personal services to the trade or business) or has earned 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 DOL made clear that the new regulations are not meant to supplant prior guidance on satisfactory association health plans, but are meant to provide an additional basis for meeting the definition of "employer" under ERISA.

There are staggered effective dates for the new rules: (i) September 1, 2018 for a plan that is fully insured and meets all other regulatory requirements: (ii) January 1, 2019 for self-funded plans in existence on June 21, 2018 which met applicable requirements in existence before June 21, 2018 and which choose to become an association health plan under the new regulatory requirements; and (iii) April 1, 2019 for any other association health plan.

Please note that employers might want to be cautious before creating or joining an association health plan, because: (i) the employer might lose its ability to negotiate its own benefit package; and (ii) the benefit package available from the association health plan might not be comprehensive.

For further information, or if you are interested in exploring establishing an association health plan, please contact the author of this bulletin or your Butzel Long Employee Benefits attorney.

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