

FEDERAL DISTRICT COURT RULING IN *STATE OF NEW YORK v. UNITED STATES DEPARTMENT OF LABOR* CONCERNING DEPARTMENT OF LABOR’S FINAL RULE ON ASSOCIATION HEALTH PLANS

QUESTIONS AND ANSWERS – PART TWO

May 13, 2019

On March 28, 2019, in *State of New York v. United States Department of Labor*, the United States District Court for the District of Columbia vacated portions of the Department of Labor’s (Department’s) final rule on Association Health Plans (AHPs). The AHP rule, published on June 21, 2018, established a new test as an alternative to that described in prior Department sub-regulatory guidance for determining who can sponsor an ERISA-covered AHP as an “employer.” The AHP rule was intended to expand access to affordable, high-quality healthcare options, particularly for employees of small employers. The Department disagrees with the district court’s ruling and filed a notice of appeal on April 26, 2019.

The Department recognizes that many businesses and employees have obtained health coverage from AHPs in reliance on the final rule before the district court’s ruling. The Department is committed to taking all appropriate action within its legal authority to minimize undue consequences on employees and their families. The focus of the Department’s efforts will be on ensuring that participants and beneficiaries get their health benefits claims paid as promised, and on reducing the risk of adverse consequences to affected employer associations, and their employer members, that relied in good faith on the rule. Accordingly, on April 29, the Department issued a statement to advise stakeholders the Department will work with affected parties, the Department of Health and Human Services (HHS), and the States to mitigate any disruptions or hardships that result from confusion regarding the status of the AHP rule and legal compliance requirements. Further, the statement explained that the Department will not pursue enforcement actions against parties for potential violations stemming from actions taken before the district court’s decision in good faith reliance on the AHP rule’s validity, as long as parties meet their responsibilities to association members and their participants and beneficiaries to pay health benefit claims as promised. Nor will the Department take action against existing AHPs for continuing to provide benefits to members who enrolled in good faith reliance on the AHP rule’s validity before the district court’s order, through the remainder of the applicable plan year or contract term that was in force at the time of the district court’s decision.

The statement also explained that HHS has advised the Department that HHS will not pursue enforcement against nonfederal governmental plans or health insurance issuers for potential violations of title XXVII of the PHS Act caused by actions taken before the district court’s decision in good faith reliance on the rule’s validity, through the remainder of the applicable plan year or contract term that was in force at the time of the district court’s decision. HHS has also advised the Department that HHS will not consider States to not be substantially enforcing the applicable requirements under title XXVII of the PHS Act in cases where the State adopts a similar approach with respect to health insurance coverage issued within the State.

The FAQs below are intended to provide additional clarification on the scope of the enforcement relief described in the Department’s prior statement.

Q1: Are Pathway 1 AHPs affected by the district court’s decision or the related enforcement policy?

No. AHPs formed under the Department’s pre-rule sub-regulatory guidance (sometimes referred to as “Pathway 1 AHPs”) are unaffected by the district court’s decision. The court’s decision vacated portions of the AHP rule (affecting what are sometimes referred to as “Pathway 2 AHPs”), but did not address the Department’s guidance on determining who can sponsor an ERISA-covered AHP as an “employer” under ERISA section 3(5). The Department’s pre-rule guidance remains in effect and employer groups and associations that meet that criteria continue to be able to act as an “employer” for purposes of sponsoring an ERISA-covered AHP.

Guidance regarding such Pathway 1 AHPs is available at:

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf>. Under that guidance, to be a Pathway 1 AHP, the AHP generally may not include working owners without other employees. In addition, Pathway 1 AHPs may provide benefits to employees of employers who have a sufficiently close economic (such as those that are in the same trade, industry, line of business or profession) or representational nexus to the group or association, but may not establish commonality based on geography.

Q2: Can a “Pathway 2” AHP formed pursuant to the Department’s final rule prior to the district court’s decision market to, and sign up, new employer members and remain within the scope of the Department’s enforcement relief?

No. Enforcement relief provided by the Department, as well as HHS, is limited to potential violations stemming from actions taken before the district court’s decision in good faith reliance on the AHP rule’s validity. For example, it is available for employer members who entered into a binding contract in good faith reliance on the AHP rule’s validity before the district court’s order. This relief does not extend to actions taken after the court’s ruling, including marketing to, and signing up, new employer members after the court’s decision.

Nevertheless, existing employer members can continue to enroll new employees upon special enrollment events (for example, upon marriage, birth, adoption, placement for adoption, or loss of eligibility for other coverage) and consistent with the plan’s terms for eligibility (for example, enrolling new hires) while the enforcement relief remains in effect.

Q3: How does the Department’s enforcement relief apply to insured AHPs formed under the Department’s final rule whose insurance contract term is longer than one year?

The Department’s enforcement relief extends through the remainder of the applicable plan year or, if longer, the contract term that was in force at the time of the district court’s decision. HHS has advised the Department that it will take the same approach with respect to enforcement of the potential violations of title XXVII of the Public Health Service Act.

The Department and HHS encourage states to adopt a non-enforcement policy similar to that adopted by the Departments. The Departments' non-enforcement policies were undertaken to mitigate any disruptions or hardships that result from confusion regarding the status of the Department's final rule, ensure that participants and beneficiaries get their health benefits claims paid as promised, and reduce the risk of adverse consequences.

Q4: My association was designed to meet the test established in the Department's sub-regulatory guidance for purposes of acting as an "employer" that is able to sponsor a "Pathway 1" AHP. May the association seek an advisory opinion from the Department to confirm that the association meets the test?

The Department has posted guidance on EBSA's website that AHPs and their legal counsel can use to confirm their status under Pathway 1, including many of the advisory opinions the Department has issued over the years. It is important to note that AHPs are not required to obtain an advisory opinion from the Department to qualify as Pathway 1 AHPs. However, if an AHP has a particular need for an official advisory opinion, the Department has published procedures for individuals or organizations to follow when asking for the Department's official opinion on their status under ERISA. It can take time for the Department to develop, clear and issue a formal written opinion. The Department's employee benefits law specialists can be reached by phone for informal discussions with AHP sponsors or their legal counsel. Many people have found that informal approach gets them the information they need.¹

AHPs interested in Pathway 1 guidance should visit the Department's website at www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/health-plans.

If you are interested in submitting a request for an advisory opinion or talking with an EBSA employee benefits law specialist, you can use the following contact information:

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
RoomN-5655
Washington, DC 20210

You can also call 1-866-444-3272. A benefit advisor will be able to get you to EBSA written guidance for Pathway 1 AHPs or forward your inquiry to an employee benefits law specialist.

¹ See ERISA Advisory Opinion Procedure 76-1. FR Doc. 76-25168, available at www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/filing-requests-for-erisa-aos.