

HARD LABOR ▶ SCOTT SINDER, KATE JENSEN AND CHELSEA GOLD

The Magic Bullet?

Feds expand use of association health plans in hopes of combating rising costs.

Since at least the second Bush administration, association health plans (AHPs) have been touted as a magic bullet to combat rising healthcare costs and dwindling coverage options in individual and small-group markets.

AHPs allow individuals and smaller groups to pool themselves into larger groups to take advantage of the laws of large numbers that tend to drive premiums—and premium volatility—down.

Affordable Care Act passage exacerbated the divide between the individual/small-group



markets and the larger-group markets. This was because ACA essential benefit plan mandates and community rating directives do not apply to the larger-group market. Indeed, a significant component of the Trump administration's executive order to deconstruct the ACA directed the Department of Labor to expand the use of AHPs. It also encourages the sale of health insurance across state lines.

The Labor Department has now issued a proposed rule designed to expand the use of AHPs. This begs the question: mission accomplished?

THE DOL RULE

The proposed rule would expand the types of AHPs that qualify under ERISA rules in two fundamental respects. It would eliminate the prior requirement that an association must be created for a purpose other than to offer/maintain an AHP.

The proposed rule, however, would still require the AHP to be organized around some “commonality of interest.” Labor provides examples of what would satisfy the more lenient “commonality of interest” test. Employers in the same trade, industry, line of business or profession would qualify, as would employers with principal places of businesses within the same state or metropolitan area (including metropolitan areas like New York and D.C. that cross state lines).

Second—and potentially of more importance—the proposed rule would redefine the relevant terms to allow individuals to participate directly in an AHP without an employer plan sponsor. In both scenarios—AHPs with

employer members and those with individual members—the rule would require underwriting at the AHP level. This would allow an AHP comprised of individuals or small businesses to be treated as a “large group” and so the AHP is not itself treated as an insurer.

The proposed rule also would require AHPs to comply with existing Health Insurance Portability and

Accountability Act nondiscrimination provisions. It would do this by:

- ▶ Requiring AHPs to comply with HIPAA's nondiscrimination rules governing eligibility for benefits and coverage premiums. This is the mechanism for requiring underwriting at the AHP level. It also bars discriminatory treatment of individual plan participants. It effectively puts AHPs in a position equivalent to other large-group plans, which are also subject to these requirements.

- ▶ Barring AHPs from restricting membership based on any health factor (i.e., health status or history, medical condition, claims experience).

State authority over MEWAs undercuts the potential for AHPs to serve as vehicles for insurance sales across state lines.

REGULATORY NEWS

compensation premium increases for all policies issued on or after April 17, 2018, if premiums will rise by more than 10% upon renewal. Employers must receive at least 30 days' notice before existing policy expiration. Applies only to insurer hikes—not changes in payroll, loss history or other factors related to the employer. Law brings workers comp in line with requirements on other insurers in the state. dfs.ny.gov

OHIO Bureau of Workers Compensation requests 12% decrease in private employer premiums effective July 1. No decision from BWC board at press time. ▶ New workers compensation guideline requires most employees with work-related back injuries to try alternative remedies for at least 60 days before resorting to spinal fusion surgery and prescription painkillers. Policy went into effect Jan. 1 and includes warning on opioids in the surgical restriction. ▶ Insurance

director Jillian Froment chosen by National Council of Insurance Legislators as chair of Interstate Insurance Product Regulation Commission. insurance.ohio.gov

OREGON Names Andrew Stolfi as administrator of Financial Regulation Division, which oversees insurance. He succeeds Laura Cali, who moved to CFO of Oregon Health Authority. Stolfi was most recently COO and chief counsel at

International Association of Insurance Supervisors in Basel, Switzerland. Before that, Stolfi was with the Illinois Department of Insurance, at one point as acting director. dfr.oregon.gov/Pages/index.aspx

PENNSYLVANIA Acting insurance commissioner Jessica Altman elected vice chair of NAIC's Health Insurance and Managed Care Committee. insurance.pa.gov

MEWA CONUNDRUM

The Labor Department says all AHPs created under this new expanded ERISA AHP authority would likely be subject to the rules governing (the dreaded) Multiple Employer Welfare Arrangements (MEWAs). MEWAs are defined under ERISA to include employee welfare benefit plans or “any other arrangements” that are established for the purpose of providing benefits to the employees or beneficiaries of two or more employers.

Until Congress amended ERISA in 1983, MEWAs enjoyed broad ERISA preemption status. But states clamored for greater oversight when many MEWAs failed to pay claims. They had managed to avoid state reserve and contribution requirements, which apply to insurers. Today, states can regulate MEWAs. Under a fully insured MEWA, all benefits must be guaranteed by an insurance contract with a qualified insurer.

State authority over MEWAs undercuts the potential for AHPs to serve as vehicles for insurance sales across state lines. States already are blocking such moves by, among other approaches, making it

impossible for self-insured MEWAs to get licensed in the state, imposing physical presence requirements on MEWAs and putting heightened reserve requirements on MEWAs.

Labor’s proposal may make it marginally easier for some AHPs to be considered a single, large ERISA-covered group plan. But ultimately, because of the statutory structure for MEWAs, it is not clear how, without concerted voluntary action or inaction by the states, the Labor Department can meaningfully ease AHP administrative burdens and regulatory variation across state lines.

It is also unclear how, without wholesale statutory changes, AHPs can be the magic reform bullet the administration and others continue to hope they will be.

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FEMA Allows Churches Disaster Aid

Certain nonprofit houses of worship, formerly excluded from eligibility for disaster assistance from the Federal Emergency Management Agency, will now be considered community centers under new rules. Houses of worship owned or operated by private nonprofit organizations may now apply for financial assistance from FEMA if their facilities are damaged by a major catastrophe and they can’t get a Small Business Administration loan sufficient to pay for repairs. The rule applies to disasters declared on or after Aug. 23, 2017, and applications pending with FEMA from Aug. 23 forward. Such houses of worship must apply with the SBA for a loan to make repairs, and FEMA coverage will respond if the loan is denied or doesn’t cover the costs of repair. Several Texas churches that were damaged by Hurricane Harvey sued FEMA for religious discrimination.

“This [**Morrisons class-action data-breach**] decision is significant in several ways. Firstly, it shows that U.K. companies can be held **vicariously liable for criminal acts committed by their employees** in data-breach cases. Secondly, and perhaps more significantly, it highlights that **U.K. courts will allow compensation claims for emotional distress** in data-breach cases, which is a key difference from what we see in the U.S., where courts typically only recognize financial losses directly attributable to a data breach.”

—Patrick Cannon, claims manager, Tokio Marine Kiln, on first data-leak class action lawsuit in the U.K., brought by supermarket employees whose private data was stolen by a fellow worker

SOUTH CAROLINA Gov. Henry McMaster directs state health officials to limit initial opioid prescriptions for Medicaid recipients to five days for post-op or acute pain control. Patients have to make further request for more drugs. Similar restrictions planned for state employee benefits health plans. McMaster also wants legislature to consider statewide law for all residents. doi.sc.gov

TEXAS H.B. 2492 took effect Jan. 1, allowing domestic surplus lines insurers (DSLIs) to domicile in the state and write surplus lines there. Previously, only out-of-state insurers could write surplus lines there. Starr Surplus Lines Insurance Co. was first DSLI to receive certificate to domicile in the state. Surplus Lines Stamping Office of Texas posts all eligible insurers on its website. tdi.state.tx.us

VERMONT Named R Street Institute’s best insurance regulatory environment for fourth straight year—fifth time in six years. Was only state to earn A+ on 2017 report card. bishca.state.vt.us

WISCONSIN Gov. Scott Walker tells legislature he wants state law prohibiting insurers from denying health insurance due to preexisting conditions. He also wants to obtain a federal waiver to offer

reinsurance to insurers for extreme healthcare cases and secure a lifetime federal waiver for state’s discount prescription drug program. SeniorCare. Says moves are needed since Congress failed to pass replacement for Affordable Care Act. oci.wi.gov/pages/homepage.aspx