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BULLETIN 18-15

Date: **August 20, 2018**

To: **Insurers, HMOs, Nonprofit Health Service Plans, health insurance producers and third-party administrators**

Re: **Association Health Plans**

On June 21, 2018, the U.S. Department of Labor ("DOL") published a final regulation to implement President Trump's executive order of October 12, 2017, to encourage the expansion of association health plans for small businesses and self-employed individuals. 83 Fed. Reg. 28912 (June 21, 2018). The purpose of this Bulletin is to address the DOL Rule ("Final Rule") in light of Maryland's existing statutory requirements with respect to an Association Health Plan ("AHP").

The Final Rule permits groups of employers, and self- employed individuals, to join together in order to form an AHP and purchase health insurance coverage as an employer under the Employee Retirement Income Security Act ("ERISA"). Such AHPs will be regulated under federal law as a large-group health plan, purportedly making them exempt from key components of the Affordable Care Act ("ACA") and other federal requirements that apply only to the individual and small-group markets. The Final Rule, however, recognizes and maintains the role of the states as the primary regulator of health insurance. Specifically, the Final Rule affirms the authority of the states to regulate both fully insured and self-insured AHPs.

Final Rule Changes to "Large Employer" and "Working Owner"

The Final Rule expands the class of "large employer" under the ACA to include a broad range of associations that may now be formed for the primary purpose of selling insurance to its members.[1] It does this in two significant ways. First, it redefines "employer" under ERISA by enabling numerous employers to join together in an association formed primarily to offer insurance to its members, though there must be an additional "substantial business purpose" not related to the offer of insurance. 83 Fed. Reg. at 28918. Assuming the association is a viable

[1] State law provides that carriers can sell to Maryland residents health benefit plans through associations that, among other things, have been in existence for at least 5 years and were not formed or maintained for the purpose of purchasing insurance. State requirements for carriers regarding AHPs are found in: §§ 15-302, 15-305, 15-1301 and 15-1401 of the Insurance Article, Annotated Code of Maryland.

entity even in the absence of acting as the sponsor of an AHP, the association may then offer a large group plan if the employers are merely in the "same trade, industry, line of business, or profession" or "have a principal place of business within a region that does not exceed the same State or the same metropolitan area (even if the metropolitan area includes more than one State)" 83 Fed. Reg. at 28922.

The Final Rule also deems self-employed individuals, through its "working owner" provision, to be both an employer and an employee. Therefore, the individual who is a working owner may now participate in an employer based association. It is important to note the Final Rule does require that in order to be qualified as a working owner who is eligible for participation in an employer based association, a working owner must work at least 20 hours per week (or 80 hours per month) or earn income that "at least equals the working owner's cost of coverage." 83 Fed. Reg. at 28964.

New Federal AHP Rules

AHPs under this Final Rule are considered group health plans and thus, under the ACA, (1) must cover preventive health benefits without enrollee cost-sharing, (2) must cap enrollees' annual out-of-pocket costs for covered benefits, and (3) cannot impose annual lifetime dollar limits on essential health benefits that are covered. AHPs, however, are not required, pursuant to the federal AHP Rule, to cover a minimum set of essential health benefits and are permitted to use age, gender, industry, occupation, or other demographic factors to set premiums for member employers and self-employed individuals.

Federal AHP Effective Dates

The Final Rule has three separate effective dates. For new fully-insured AHPs, the effective date is September 1, 2018; for existing self-insured AHPs the effective date is January 1, 2019; and for new self-insured AHPs, the effective date is April 1, 2019.

State Law Requirements for AHPs

Before an AHP may operate in the State of Maryland, carriers and producers should be aware of the applicable existing State requirements. Combining the risks of multiple employers through a Multiple Employer Welfare Arrangement ("MEWA") subjects the MEWA to state licensing requirements.[2] The risk of loss for multiple employers participating in an AHP, or offering a health benefit plan, may be handled by a MEWA in one of two ways.

Fully Insured MEWA Plans

The first way is to have the employer association purchase a fully insured group health benefit plan policy from a licensed insurer, nonprofit health service plan, or HMO ("Carriers") to cover the employers' members.

Carriers that issue coverage to AHPs are required to provide the State benefit mandates to Maryland residents who are employees of the employer groups that comprise the MEWA. This is true regardless of whether the AHP is in-State or out-of-State. In addition, a Carrier that insures a fully insured AHP which provides certificates of health insurance issued or delivered to a Maryland resident is subject to rate review under Title 11 subtitle 6 of the Insurance Article, Annotated Code of Maryland.[3]

Further, as part of the Maryland Health Care Access Act of 2018, the General Assembly clarified that the small group market laws apply broadly, including to "any health benefit plan offered by an association…or any other entity, including a plan issued under the laws of another state", if the health benefit plan covers eligible employees of one or more small employers, and any part of the premium or benefits is paid by or on behalf of the small employer or through payroll deduction. Acts 2018, Ch. 37; § 15-1202(c). Carriers that fail to provide at least the State benchmark plan to small employers as defined under Maryland law at §31-101(z) are subject to disciplinary action.

Finally, a Carrier must obtain approval from the Commissioner before it may solicit coverage in this State under a group health or blanket health insurance policy issued in another jurisdiction. This includes AHPs operating in another jurisdiction. COMAR 31.11.09.02.

Self-Insured MEWA Plans

The second way that a MEWA can offer coverage in Maryland is through a self-insured, or a not fully insured, AHP which pools the health insurance risk of the employers participating in the association health benefit plan. The MIA has consistently held that a self-insured MEWA is engaged in activities that constitute the business of insurance and is required to hold a certificate of authority to operate in Maryland pursuant to § 4-101.[4] See Bulletin 09-26 (November 9, 2009); § 4-205.

As previously noted, the Maryland Health Care Access Act of 2018 requires that any health benefit plan which covers eligible employees of one or more small employers must comply with the State's small group laws. Additionally, the plan and rating requirements of § 15-1205, § 31-115, § 31-116, and Title 11, subtitle 6 of the Insurance Article all apply and the State Benchmark plan requirements apply.

Finally, a producer who sells, solicits, or negotiates insurance contracts on behalf of a self-insured MEWA that does not hold a certificate of authority to operate in Maryland will be subject to disciplinary action. *See e.g.* § 27-406(2) (It is a fraudulent insurance act for a person to place insurance with an unauthorized insurer).

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[2] A MEWA is defined in ERISA and means, with some exceptions, any arrangement that provides a welfare benefit such as health insurance to employees of two or more employers. ERISA § 3(40), 29 U.S.C. § 1002(40).

[3] Unless otherwise specified, all subsequent statutory references are to the Insurance Article, Annotated Code of Maryland.

[4] A certificate of authority holder is required to meet the capital and surplus requirements of § 4-103 of the Insurance Article.

Questions about this Bulletin may be addressed to Robert D. Morrow Jr., Associate Commissioner for Life & Health at 410-468-2212 or bob.morrow@maryland.gov.

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By: signature on original

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