National Alliance of Healthcare Purchaser Coalitions
Driving Innovation, Health and Value

Association Health Plans - States Push Back

August 2018 Update

On July 26, eleven states plus the District of Columbia filed a lawsuit in federal court against the Department of Labor (DOL). The lawsuit alleges that the recently-published final rules related to association health plans are unlawful. In publishing the final rules, the Administration stated that it was making it easier for small businesses to come together to provide affordable health insurance for their employees.

The states joining the lawsuit are California, Delaware, Kentucky, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Virginia, and Washington, plus District of Columbia.

February 22, 2018

Health Policy in Transit

A Purchaser Viewpoint

National Alliance of Healthcare Purchaser Coalitions is a national, non-profit, membership association of employer led coalitions across the country collectively serving 12,000 purchasers and 41 million Americans.

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Association Health Plans - Proposed Rules

A proposed rule by the U.S. Department of Labor would allow small businesses and certain self-employed individuals to band together and purchase health insurance without some of the regulatory requirements that the individual states and the Affordable Care Act (ACA) impose on smaller employers. The Notice of Proposed Rulemaking proposes expanding access to what the rule calls "small business health plans," which are more commonly known as association health plans. The rule modifies the definition of "employer" under the Employee Retirement Income Security Act (ERISA) regarding entities—such as associations—that could sponsor group health coverage. An association can be formed for the sole purpose of offering the health plan.

• The proposal allows employers to form an Association Health Plan on the basis of geography or industry. A plan could serve employers in a state, city, county, or a multi-state metro area, or it could serve all the businesses in a particular industry nationwide. A plan could also allow sole proprietors to join association plans. With the repeal of the individual mandate in the tax reform legislation and the potential for uncertainty in the exchanges, (see Health Reform in Transit: Movement on the Margins), this proposal may offer a more affordable option for health coverage for sole proprietors.

• The proposed rule would maintain current employee protections by preserving nondiscrimination provisions under both HIPAA and the ACA. It clarifies that an Association Health Plan cannot charge individuals higher premiums based on health status or refuse to admit employees to a plan because of health status.

Purchaser Implications

The proposed rules appear to offer the potential for new market solutions for certain individuals and small groups outside of the ACA Exchanges. While this is intended to provide a more cost-effective alternative, it is unclear how effective these proposed new Association Health Plans would be in providing a sustainable and affordable market alternative for those with self-insured "Multiple-Employer Welfare Associations."

• Since the proposed plans are required to offer the same "guaranteed issue" coverage as in the ACA marketplaces and cannot discriminate in pricing based on health status, there is likely to be the same challenges in sustaining a viable risk pool over time. Unlike the ACA Exchanges, there may not be a core set of participants that will be eligible for income-based subsidies and consequently the potential for an unstable risk pool is even greater. In addition, they may not be included in other risk stabilizing features of the ACA (e.g. reinsurance).

• If alternative Association Health Plans are to exist side by side with the ACA Exchanges, it is critical that a level playing field be maintained so that neither is unduly selected against and both achieve sustainable risk pools. However the Association Health Plans as proposed will likely not be able to sustain themselves if operated on a guaranteed issue basis independent of the current subsidies and other features that are part of the ACA Exchanges. The Association Plans could also result in further destabilizing the individual and small group market, and more stringent future regulations.

Comments on this proposed rule can be submitted via the following regulations.gov page (https://www.regulations.gov/docket?D=EBSA-2018-0001). The comment period closes March 6, 2018.

www.nationalalliancehealth.org

Access the February 22, "Association Health Plans" Health Policy in Transit

The lawsuit alleges:

- The new rules will place an increased burden on states and subvert the intent of the ACA by siphoning off presumably younger and healthier people from the ACA market into the large group market.
- The purpose of the rule is to "undo" the progress states have made under the ACA in decreasing uninsured rates, ensuring comprehensive coverage, and stabilizing the individual and small-group markets.
- It also asserts that the rule will harm states by forcing them to devote resources to policing an increasing number of potentially fraudulent plans offered by these newly-formed associations. There is a long history of problematic association health plan operators, with many civil and criminal enforcement actions ongoing at the state and federal levels.

Coalitions in these states may want to pay special attention to how their attorneys general and/or state insurance regulators are speaking publicly about association health plans. But, if this lawsuit moves forward, all states will be affected if changes to DOL's rules are required.

If the proposed AHP rules were not to take effect, the rules related to forming an AHP and the types of coverage that could be offered would remain consistent with the rules under ACA. This would not prohibit AHPs such as:

- Professional or trade association offering health insurance as an incidental benefit of membership
- Captive association of an insurance company used to market insurer's products.
- Association established by a Professional Employer Organization (PEO)
- Multiple Employer Welfare Arrangement.
- ERISA Association Health Plan.

This would not necessarily present a problem for coalitions wishing to offer comprehensive coverage through one of these permissible AHP structures. For more information, contact Colleen Bruce at cbruce@nationalalliancehealth.org