

The DOL's new Association Health Plan Rules and What They Actually Mean

The President signed an Executive Order on October 12, 2017, directing the U.S. Department of Labor (DOL) to consider ways to make it easier to form an Association Health Plan (AHP) by expanding existing membership rules. After issuing proposed regulations in early 2018 and considering public comments, the DOL issued a set of final regulations intended to make it easier to form AHPs on June 18, 2018.

The final regulations do not replace the existing AHP rules and instead create a three-tier AHP system referred to in this article as the:

1. Narrow Standard AHP – These AHPs are available under the existing rules, but they can be difficult to form.
2. Relaxed Standard AHP – These AHPs are created by the new regulations. They are easier to form than a Narrow Standard AHP and can allow self-employed individuals to participate, but they do not allow as much flexibility in terms of plan design and underwriting (discussed in the chart below under “Plan Design and Underwriting”).
3. Non-Conforming AHPs – These are AHPs that do not meet either the Narrow or Relaxed Standards. We'll touch on these briefly at the end of this article.

Some Pros/Cons for Narrow and Relaxed Standard AHPs

Pros

- The combined membership of the member employers may enable the AHP to self-insure (but see “MEWA Status and State Regulation” in the chart below)
- Qualify as single employer group health plans for ERISA and other purposes, enabling many fully-insured AHPs to qualify as a large group insured plan based upon the number of covered lives
- Self-insured and large group insured AHPs are able to avoid certain requirements applicable to small group and individual plans under federal and state law, including:
 - The requirement to offer all essential health benefits (EHB) mandated by a state's EHB package (the AHP will still have to establish a reasonable definition for EHBs such as selecting a benchmark plan); and
 - Community rating requirements

This may enable AHPs to offer less expensive coverage alternatives to member employers as well as greater flexibility when setting premiums (but see “Plan Design and Underwriting” in the chart below)

- Greater buying power than individual member employers may have on their own
- The AHP's risk pool may be more favorable for smaller employers than the community rating in their applicable small group market(s)

Cons

- Not appropriate for many potential member employers and should be carefully evaluated on a case-by-case basis
- Do not avoid state regulation, even if self-insured (see “MEWA Status and State Regulation” in the chart below)
- Require a strong ongoing commitment to participate from member employers as turnover can cause AHPs to quickly fail
- Insurance carriers may be reluctant to insure AHPs that do not meet certain criteria established by the carrier (e.g. The insurance carrier may require a closer relationship between the member employers than the AHP rules require)

Comparing and Contrasting the Narrow and Relaxed Standard AHPs

The Relaxed Standard AHP information is based on the final regulations. There is no set of regulations for the Narrow Standard AHP, and the information below is an attempt to summarize decades of DOL advisory opinions and court decisions.

	Narrow Standard AHP	Relaxed Standard AHP
Formation	<p>Member employers must:</p> <ol style="list-style-type: none"> 1) be within same industry, trade, line of business or profession; <p><u>AND</u></p> <ol style="list-style-type: none"> 2) be located within same geographic location 	<p>Member employers must:</p> <ol style="list-style-type: none"> 1) be within same industry, trade, line of business or profession (without regard to geographic location); <p><u>OR</u></p> <ol style="list-style-type: none"> 2) have their principal places of business located within the same state or metropolitan area (even if the metropolitan area crosses state lines)
Association Purpose	<p>Association must already exist for a business purpose other than solely to provide the AHP to member employers</p> <ul style="list-style-type: none"> • The business purpose does not have to be a for-profit activity • Valid business purposes other than providing benefits include marketing/sales support, member education, the development and sharing of business strategies, and lobbying efforts 	<p>Association does not have to exist prior to offering the AHP to member employers</p> <p>Association’s primary purpose can be to offer the AHP to member employers, but the AHP must also have at least one other substantial business purpose</p> <ul style="list-style-type: none"> • The business purpose does not have to be a for-profit activity • Valid business purposes other than providing benefits include marketing/sales support, member education, the development and sharing of business strategies, and lobbying efforts
Governance	<p>A formal governance structure with a governing body and bylaws must exist enabling the member employers to exercise control</p> <ul style="list-style-type: none"> • Ability to elect or remove directors/officers/trustees who have authority over the AHP; or • Member employers must be able to directly vote on actions to form, amend, or terminate the AHP 	

<p>Participant Eligibility</p>	<ul style="list-style-type: none"> • Employees and former employees* of current member employers and their eligible dependents defined under the AHP <p>*Former employees eligible if they gained eligibility while an employee of the member employer. This effectively limits participation to COBRA participants and individuals who qualify for retiree coverage under the AHP (if offered)</p> <p>A sole proprietor or other self-employed individual (e.g. An independent contractor) is not an eligible employee and cannot participate as a member employer if operating a business with no common law employees</p>	<ul style="list-style-type: none"> • Employees and former employees* of current member employers • Beneficiaries of employees and former employees* defined under the AHP (e.g. Spouses, dependent children, and other tax dependents, if eligible) <p>*Former employees eligible if they gained eligibility while an employee of the member employer. This effectively limits participation to COBRA participants and individuals who qualify for retiree coverage under the AHP (if offered)</p> <p>A sole proprietor or other self-employed individual (e.g. An independent contractor) operating a business with no common law employees can qualify as a member employer and participate in an AHP as an eligible employee by meeting the “Working Owner” test:</p> <ol style="list-style-type: none"> 1) Works at least 20 hours/week or 80 hours/month for business <p style="text-align: center;"><u>OR</u></p> <ol style="list-style-type: none"> 2) Has earned income from the business at least equal to the cost of AHP coverage
<p>Plan Design and Underwriting</p>	<p>There are limits to an AHP’s ability to vary participant eligibility, covered benefits, and premiums based on health factors, but an AHP may develop and charge different premiums to different member employer groups based on each member employer’s actual health claims experience (i.e. The AHP can separately experience-rate member employers)</p> <p>Additional state law requirements may apply</p>	<p>An AHP’s ability to vary premiums is limited to bona fide employment-based classifications that are not specifically related to health factors, including:</p> <ol style="list-style-type: none"> 1) Full-time vs. part-time; 2) Different occupations (e.g. Corporate vs. retail, etc.); 3) Date of hire; 4) Geographic location (including urban vs. rural); 5) Union vs. non-union; 6) Length of service; and 7) Current vs. former employees <p>An AHP may not develop and charge different premiums to different member employer groups based on each member employer’s actual health claims experience (i.e. Experience-rating)</p> <p><i>Example: An AHP could charge higher premiums to member employers primarily located in cities than to member employers primarily located in rural areas so long as the member employers’ actual claims experience is not taken into account.</i></p> <p>Additional state law requirements may apply</p>

<p>MEWA Status and State Regulation</p>	<p>AHPs are considered multiple employer welfare arrangements (MEWAs) for ERISA purposes meaning ERISA pre-emption of state insurance laws does not apply</p> <p>This can make it very difficult to offer an AHP across state lines:</p> <ul style="list-style-type: none"> • Both self-insured and fully-insured AHPs will generally be subject to state insurance laws where the AHP coverage is issued • Self-insured MEWAs may be subject to additional state regulation similar to the regulation of insurance carriers within the respective State(s); these requirements will largely be dealt with by the insurance carrier for fully-insured AHPs • Most AHPs will also be subject to the federal Form M-1 filing requirement with the DOL <p><i>Note: The DOL indicated it may seek to limit state authority to regulate self-insured AHPs in the future if it appears that states are over-reaching and interfering with the formation of self-insured AHPs.</i></p>
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Odds and Ends

AHPs are generally subject to the reporting and disclosure requirements applicable to the underlying benefits, which may include providing summary plan descriptions, summaries of benefits and coverage, and Form 5500 filings. The DOL is still working out how certain other requirements may apply to AHPs. For example, the DOL indicated that existing HIPAA wellness rules apply to AHPs and the Mental Health Parity and Addiction Equity Act will apply if the member employers of the association have at least 50 employees in the aggregate, but the DOL is still considering how COBRA may apply and intends to issue additional guidance addressing this.

Non-Conforming AHPs

Many AHPs will not qualify as Narrow Standard or Relaxed Standard AHPs, typically because the association fails to meet the formation requirements described above. These Non-Conforming AHPs can still provide the advantages of greater purchasing power and the ability to separately experience-rate member employers like Narrow Standard AHPs, but Non-Conforming AHPs do not qualify for single employer plan treatment and are instead viewed as a separate plan maintained by each member employer. As a result, many member employers will still be subject to the small group and individual plan requirements that Narrow Standard and Relaxed Standard AHPs can avoid.

Effective Dates

There are three phase-in effective dates under the final regulations:

1. September 1, 2018 – New or existing associations may establish a fully-insured Relaxed Standard AHP.
2. January 1, 2019 – AHPs in existence on or before June 18, 2018 may establish a self-insured Relaxed Standard AHP.
3. April 1, 2019 – All other new or existing associations may establish a self-insured Relaxed Standard AHP.

There are no effective dates specific to Narrow Standard or Non-Conforming AHPs as these existed before the final regulations and are not directly affected by them.

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