



Executive Order 13813 and why it is important for your association!

- On January 4th, 2018, the U.S. Department of Labor (Department) released a highly anticipated [proposed rule](#) that would significantly alter the way that association health plans (AHPs) are regulated. The proposed rule was developed in response to President Trump's recent [executive order](#) (Executive Order 13813, which was written on October 12, 2017) that directed the federal government to expand access to AHPs and other types of insurance products or arrangements, such as short-term limited duration insurance and health reimbursement arrangements.

This proposed rule is intended and expected to deliver benefits primarily to the employees of small businesses and their families, as well as the small businesses themselves. This proposed rule would encourage the establishment and growth of AHPs. AHPs may offer small businesses more, and more affordable, health benefit options than otherwise are available to them in the individual and small group markets, resulting in employer-sponsored coverage for more Americans, and more diverse and affordable insurance options.

AHPs may offer small businesses comparable coverage at lower prices, thereby delivering economic benefits to many working owners and employees of small businesses. If local individual and small group market premiums are not already at competitive levels, increasing competitive pressure from AHPs might force some individual and small group issuers to lower their own premiums.

Previous legislative proposals designed to foster the formation of AHPs would have made it easier for employers to form AHPs and set a uniform federal framework for regulation. In the absence of legislation, however, Executive Order 13813 directs the Department to consider proposing regulations or revising guidance under Title I of the Employee Retirement Income Security Act (ERISA), consistent with law, to expand access to health



coverage by allowing more employers to form AHPs by expanding the conditions that satisfy the commonality-of-interest requirements under existing Department advisory opinions interpreting the definition of an “employer” under section 3(5) of ERISA in the context of AHPs in a manner that would focus on the association rather than the individual members of the association when evaluating association coverage.

This proposal would broaden the conditions under which associations can sponsor/create AHPs, thereby increasing the number of small businesses potentially eligible to participate in AHPs and providing new, affordable health insurance options for many Americans.

It generally would do this in four important ways.

- First, it would relax the existing requirement that associations sponsoring AHPs must exist for a reason other than offering health insurance.
- Second, it would relax the requirement that association members share a common interest, as long as they operate in a common geographic area.
- Third, it would make clear that associations whose members operate in the same industry can sponsor AHPs, regardless of geographic distribution.
- Fourth, it would clarify that working owners and their dependents are eligible to participate in AHPs.

Consequently, for example, the proposal would newly allow a local chamber of commerce (or association) that meets the other conditions in the proposal to offer AHP coverage to its small business members, including working owners.

The DOL is looking for comments to clarify what the definition of an “employer” would be and is also looking to create a more flexible definition of the “commonality of interest” test under ERISA. This is where members of an association could benefit from this proposed rule change.



Proponents also contend that AHPs can help reduce the cost of health coverage because of increased bargaining power, economies of scale, administrative efficiencies, and transfer of plan maintenance responsibilities from participating employers to the AHP sponsor. AHPs may also help contain costs by creating a stable risk pool that may enable AHPs to self-insure rather than purchase insurance from commercial insurers.

Upon due consideration as directed by the Executive Order, the Department is proposing for public comment a revision to its long-standing interpretation of what constitutes an “employer” capable of sponsoring an “employee benefit plan” under ERISA in the context of group health coverage. Under the proposal, AHPs that meet the regulation’s conditions would have a ready means of offering their employer members, and their employer members’ employees, a single group health plan subject to the same State and Federal regulatory structure as other ERISA-covered employee welfare benefit plans.

The second prong of this proposal's definition relating to states and metropolitan areas will allow an AHP to satisfy the commonality requirement if its members have a principal place of business within a region that does not exceed the boundaries of the same state or metropolitan area, even if the metropolitan area includes more than one state. AHPs could also satisfy the commonality requirement by limiting themselves to a smaller geographic region, such as a city or county (i.e. state or local associations).

The proposal would expressly provide that working owners, such as sole proprietors and other self-employed individuals, may elect to act as “employers” for purposes of participating in an employer group or association and also be treated as employees of their businesses for purposes of being covered by the group or association’s health plan.

Basically, the proposed rule goes on to expand the availability of AHP group coverage to self-employed individuals referred to as “working owners.” Under the rule, a working owner would be considered both an employer



and an employee for purposes of enrollment in a group health AHP. This “dual treatment” would allow a self-employed individual to be an employer (to participate in the AHP and offer group coverage) and an employee (of their own business to qualify for the health coverage offered by the AHP).

So why is this important and what can we do as an association?

- About 35 million workers are employed by small businesses (those with fewer than 50 workers). Most small employers can no longer afford to offer health benefits. The only option for many of these workers is the failing Affordable Care Act exchange in their state.
- For firms that employ 3-24 workers, the percentage of workers covered by employer health benefits has fallen from 44% in 2010 to 32% in 2017.
- For firms that employ 25-49 workers, the percentage of workers covered by employer health benefits has fallen from 59% in 2010 to 45% in 2017.
- Many small business people are still “owners/employees” and do not have the buying power of larger companies.
- Comments to the Department of Labor will help the policy individuals at the DOL understand the importance of AHPs and how national and state associations could help further serve their members by helping them secure much needed affordable insurance.
- Your comments are needed for consideration in a final rule on this issue. While no regulation or law is perfect, this is the closest thing to real change with AHPs in over a decade.

Comments to the DOL need to be submitted by **March 6, 2018**. If you can get them in before that date even better. This is how you submit your comments (it is not very difficult and pretty quick):

You may submit written comments, identified by RIN 1210-AB85, by one of the following methods:

- *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the



instructions for submitting comments.

- *Mail:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, Attention: Definition of Employer—Small Business Health Plans RIN 1210-AB85.

Instructions: All submissions received must include the agency name and Regulatory Identifier Number (RIN) for this rulemaking. Persons submitting comments electronically are encouraged to submit only by one electronic method and not to submit paper copies. Comments will be available to the public, without charge, online at <http://www.regulations.gov> and <http://www.dol.gov/agencies/ebsa> and at the Public Disclosure Room, Employee Benefits Security Administration, Suite N-1513, 200 Constitution Avenue NW, Washington, DC 20210