Association Health Plan Update

This Article will cover legal developments regarding the final Association Health Plan Regulations that occurred after the December, 2018 issue of "THE ECFC FLEX REPORTER." The December, 2018 issue reviewed the federal compliance structure for Association Health Plans (AHPs) after the US Department of Labor ("DOL") issued final regulations on June 21, 2018 with an effective date of August 20, 2018 ("Final Regulations").

Among other things, the Final Regulations provide employers with a new option for defining the term "Employer" in ERISA section 3(5), expanding the rules as to who can participate in a group or association acting as a "single multiple employer" sponsor of an AHP. This change permitted single employer association plans to include, for the first time, self-employed individuals, and permitted an AHP to be treated as one single large group for Affordable Care Act ("ACA") purposes. The Final Regulations also clarify that employers may still use the existing definition of an AHP under the DOL's sub-regulatory guidance.

On July 26, 2018, the State of New York, along with ten (10) other states and the District of Columbia filed a law suit in the US District Court for District of Columbia against the United Department of Labor, the Secretary of Labor and the United States of America to overturn the final regulations that the Department of Labor issued on June 21, 2018. The District Court ruled on the case on March 28, 2019 in *State of New York et al v. United States Department of Labor et al*. (*State of New York v. United States Department of Labor)* in a Memorandum Opinion. The U.S. Department of Justice filed an appeal on April 26, 2019. There also were Amici briefs filed as well.

The court's ruling provided that the current Administration's attempt to broaden the test for the acceptable types of association health plans under Title I of ERISA generally, and specifically for purposes of the ACA was "clearly an end-run" around the statutes. The court struck down and remanded the Final Regulations to the DOL for reconsideration.

Under ERISA section 3(5), and DOL sub-regulatory guidance, an AHP is a single plan sponsored by a bona fide employer group or association, a type of Multiple Employer Welfare Arrangement ("MEWA") that can be treated as a single plan for ERISA coverage purposes. For ACA purposes, AHPs were most often treated as a series of single plans being administered together, with the ACA requirements being determined on an employer-by-employer basis, with small employers in the association being given the small group protections. Under both current law and the Final Regulations, AHPs are both subject to ERISA and governed as MEWAs by State law.

The court's ruling concluded that the Final Regulations are unreasonable interpretations of ERISA, exceeded the Department of Labor's statutory authority by broadening the definition of a bona fide association to include self-employed "working owners," and for ACA purposes, by expanding the definition of large group, eliminating the protections for small employers and self-employed individuals.

Under ERISA's current statutory provisions, and the DOL sub-regulatory guidance, a bona fide association must be acting in the interest of its employer members. The three criteria set forth in the Final Regulations for a bona fide association ("purpose", "commonality of interest" and "control") are the same as the DOL guidance before the issuance of the Final Regulations, but the Final Regulations differ from prior regulatory

guidance on how to measure those criteria. The court found that the expanded "purpose" test fails to set meaningful limits on the character and activities of the association, and, most importantly, the court found that a "commonality of interest" cannot be ensured by the Final Regulation requirement of a common geographic location absent other shared interests.

In addition, the court concluded that the Final Regulations dismantle ERISA's governance of employer-sponsored health benefit plans by making the definition of employer so broad that it is illogical, noting that the Final Regulations would treat self-employed individuals who are working business owners as both employer and employee. The court then noted that the Final Regulations would allow an association of working owners with no employees to have a single ERISA-covered group health plan - a relationship that previously would have fallen outside the definition of an ERISA-covered plan.

The DOL released a policy statement regarding Association Health Plans ("AHP Release" or "Release") on April 29, 2019 to reassure employers who acted on the Final Regulations. In its statement the Department said that it disagrees with the district court's ruling in *The State of New York v. United States Department of Labor*.

In their Release, the DOL, joined by the Department of Health and Human Services ("HHS") said that they will not take enforcement action against parties for potential violations resulting from actions taken before the district court's decision in good faith reliance on the AHP rules being valid. However, the parties must pay health benefit claims as promised. The Department of Labor also said that it will not take action through the remainder of the applicable plan year or contract term against existing AHPs for continuing to provide benefits to members who enrolled in good faith before the district court's order.

According to the AHP Release, the Department of Labor will work with affected parties, HHS, and the States to mitigate any disruptions or hardships that result from confusion regarding the status of the AHP rule and legal compliance requirements. The focus of the Department of Labor's efforts will be on ensuring that participants and beneficiaries get their health benefits claims paid as promised, and on reducing the risk of adverse consequences to affected employer associations, and their employer members, that relied in good faith on the rule.

The Department of Labor followed up its April, 2019 AHP Release by announcing in a second release dated on May 13, 2019, in "QUESTIONS AND ANSWERS – PART TWO" that it will not take action against AHPs that comply with its final regulations issued on June 21, 2018, even though the Final Regulations were partially overturned. The Department of Health and Human Services has advised the Department of Labor that it too will not pursue enforcement actions during this time period. Except for as series of Q's and A's that appear at the end of Part Two, the balance of the second release is very similar to the Release that was issued on April 29, 2019.

The second release ends by discussing "Pathway 1" AHPs and "Pathway 2" AHPs. Q/ A 1 provides that Pathway 1 AHPs essentially are the AHPs that were formed before the Department of Labor issued its final regulations on June 21, 2018 and described in DOL sub-regulatory guidance such as the publication "MEWAs - A Guide to Federal and State Regulation". Q/A-1 clarifies that preexisting sub-regulatory guidance on the criteria for a group or association of employers to be considered an ERISA "employer" is unaffected by the court's ruling. As provided before the Final Regulations were issued, Pathway 1 AHPs may not allow participation by working owners or establish commonality among employers based solely on geography.

"Pathway 2" AHPs are those AHPs that were formed under the new coverage option provided by the Final Regulations. The guidance on Pathway 2 AHPS provides that only Pathway 2 AHPs that were in existence

on May 13, 2019 may continue to exist and enroll new participants. Q/A-3 confirms that DOL enforcement relief extends through the remainder of the plan or contract year that was in effect at the time of the court's ruling. It also references HHS's corresponding enforcement policy, and notes that the agencies encourage states to adopt a similar approach.

In summary, this is a period of uncertainty for employers that have elected to participate in AHPs after the DOL issued the Final regulations that have taken advantage of the relaxed rules that were available under the Final Regulations. Also please remember that litigation continues on this issue. The continued litigation could uphold the positions taken in the expanded regulations.