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## ASSOCIATION HEALTH PLAN (AHP) UPDATE

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By: **Matthew I. Whitehorn** and **Stephanie L. Searles**

Last Fall, the Trump Administration had proposed changes to the Employee Retirement Income Security Act of 1974, as amended (ERISA), to permit a new form of group health coverage, the “association health plan” (“AHP”). [Executive Order 13813, dated 10/12/2017]. The U.S. Department of Labor (DOL) has now issued proposed AHP regulations pursuant to that directive. These new rules would allow smaller employers to band together in an AHP based upon an expanded “commonality of interest” standard than that existing under current law. This broader definition would now specifically include employers with a principal place of business in the same metropolitan area (even across state lines) or state and, in addition, those employers in the same industry, trade or profession. While principally focused seemingly on small employers, there are no size restrictions on AHP membership. Further, sole proprietors/independent contractors would be treated as both employers and employees, so they too could establish or join such arrangements.

Of particular note is that, under the proposed regulations, AHPs would be exempt from many of the ObamaCare/ACA requirements that apply to insured small employer and individual health plans in that they must offer essential benefits (e.g. hospitalization, maternity and newborn care, preventive services, etc.). This exemption from ACA requirements would be similar to the treatment accorded to large employer plans under the ACA; however, the market reforms under the ACA, such as the annual and lifetime limits ban and the prohibition on pre-existing condition exclusions, would still apply to AHPs. AHPs would also be subject to rules that prevent discrimination in eligibility based on adverse health factors.

An AHP must meet certain other threshold requirements concerning its members including organizational structure, level of member control, limitations on persons eligible for coverage (that is, member employees, former employees or their family members or beneficiaries), premiums not to vary based on health factors and structure (the AHP cannot be a health insurer per ERISA §733(b)(2) or controlled by one.)

Although not entirely clear at this point, it would appear that AHPs would be subject to state insurance regulations, where applicable, as a multiple employer welfare arrangement (MEWA) under ERISA. The level of state regulation depends on whether a MEWA is self-insured or fully-insured.<sup>1</sup> While hailed in an editorial in The Wall Street Journal of January 8, 2018, entitled “Trump’s ObamaCare Lifeboat,” as a cost-saving measure for small employers, there have been some concerns expressed that AHPs will cause ACA exchanges to be transformed into expensive high-risk pools while younger healthier individuals migrate toward less costly coverage under AHPs,



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but that eventuality remains a large unknown. In any event, the DOL is soliciting comments on the proposed regulations with a deadline of March 6, 2018.

If you have any questions about the association health plan (AHP), contact [Matthew I. Whitehorn](#) or [Stephanie L. Searles](#).

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<sup>1</sup> The DOL has asked, in the preamble to the proposed regulations, for comments from the public as to whether it should exempt self-insured MEWAs from certain state laws under its given authority.