

# COMPLIANCE OVERVIEW

Provided by Creative Benefits, Inc.

## Association Health Plans (AHPs)

On June 21, 2018, the Department of Labor (DOL) issued a [final rule](#) that gave small businesses more freedom to join together as a single group to purchase health insurance in the large group market or to self-insure. These benefit arrangements are called association health plans (AHPs).

By forming AHPs, small employers can avoid certain Affordable Care Act (ACA) reforms that apply to the small group market. However, in exchange for lower premiums, AHPs may cover fewer benefits. Because AHPs are also regulated at the state level, the availability of these plans depends on each state's regulatory approach.

**UPDATE:** On March 28, 2019, a federal district court [ruled](#) that key parts of the DOL's final rule on AHPs are invalid. The DOL is appealing the district court's ruling to a higher court.

### LINKS AND RESOURCES

- DOL's [final rule](#) on AHPs
- [IRS guidance](#) on how the ACA's employer shared responsibility rules apply to AHPs
- [Association Health Plans – ERISA Compliance Assistance](#), a DOL publication for employers

### HIGHLIGHTS

#### KEY POINTS

- The DOL's final rule made it easier for small employers to join together to purchase health insurance.
- According to the DOL, the changes expanded access to affordable, high-quality health care coverage.
- A federal court has vacated key parts of the final rule.

#### KEY DATES

- **Sept. 1, 2018** – Final rule applied to fully insured AHPs
- **Jan. 1, 2019** – Final rule applied to existing self-insured AHPs
- **April 1, 2019** – Final rule scheduled to apply to new self-insured AHPs
- **March 28, 2019** – Federal judge invalidates key parts of the final rule

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

## BACKGROUND

An AHP is a type of group health plan that is sponsored by a **group or association of employers** (instead of a single employer) to provide health coverage to employees of the AHP's members.

On Oct. 12, 2017, President Donald Trump signed an [executive order](#) that directed the DOL to consider issuing regulations that would permit more employers to form AHPs as a way to expand access to more affordable health coverage. The DOL was specifically instructed to consider expanding when an AHP may be treated as a single plan under the Employee Retirement Income Security Act (ERISA).

The criteria for treating an AHP as a single ERISA plan have been narrow. Under these narrow rules, an AHP may qualify as a single ERISA plan only if the employers have a sufficiently close economic (such as those in the same trade, industry, line of business or profession) or representational interest. Employers cannot establish commonality based on geography under these rules.

As a result of these narrow rules, most multiple employer health plans have been treated as a collection of plans that were separately sponsored by each of the participating employers. The size of each participating employer determined whether its coverage was subject to the small group or large group market rules. Thus, each participating small employer's coverage was subject to the ACA's requirements for the small group market, including the essential health benefits (EHB) coverage requirement.

On June 21, 2018, the DOL published a [final rule](#) that allowed more employer groups and associations to join together as a single group to purchase health coverage. The final rule allowed AHPs to offer coverage to some or all employers in a state, city, county or multistate metro area, or to businesses in a common trade, industry, line of business or profession in any area, including nationwide.

### ***Court Ruling and DOL Response***

After the final rule was issued, 11 states and the District of Columbia sued the DOL, claiming that the final rule's interpretation of the definition of "employer" in ERISA was unlawful. The federal district court agreed, and [vacated](#) the relevant portions of the final rule. In its ruling, the court stated that the final rule was an "end-run" around the ACA and that the DOL exceeded its authority under ERISA. The court specifically ruled that the DOL's expansion of the term

***On March 28, 2019, a federal district court struck down key portions of the DOL's final rule on AHPs. Employers and business owners that have joined an AHP, or are considering doing so, should review how their plans may be affected by the court's ruling.***

“employer” to include associations of disparate employers and working owners without employees was an unreasonable interpretation of ERISA.

The DOL disagrees with the district court’s ruling. On April 26, 2019, the DOL appealed the court’s decision to a higher court. The DOL also released a [policy statement](#) and [questions and answers](#) (Q&As) regarding the current status of AHPs. According to the DOL, employers that are currently participating in insured AHPs can generally maintain that coverage through the end of the current plan year or, if later, contract term. However, at the end of the plan year, health insurance issuers will only be able to renew coverage for small employer members of AHPs that were formed pursuant to the final rule if the coverage complies with the small group market requirements (that is, the EHB coverage requirement and premium rating rules).

In addition, according to the DOL, the court’s AHP ruling does not affect AHPs formed under the DOL’s prior guidance. Employers that meet these narrow criteria may continue to form AHPs.

## FINAL RULE

The following is a summary of the [final rule](#) as issued by the DOL in June 2018. *As explained above, a federal court has invalidated key parts of the final rule.*

### **Overview**

The final rule allows more employers to join together and sponsor AHPs that are treated as single plans under ERISA. When an AHP is treated as a single ERISA plan, all employees covered by the plan are considered when determining the insurance market rules (that is, small group or large group) that apply to the plan. According to the DOL, this provides small employers—many of whom are facing higher premiums and fewer coverage options—with a greater ability to join together and gain many of the regulatory advantages enjoyed by large employers, as well as increased bargaining power.

Some consumer groups, however, have expressed concern that AHPs will attract small employers with healthier workers, diverting them from the small group and individual markets—including the ACA marketplaces—which could see an increase in premiums as a result.

Critics have also pointed out that, while AHPs may have lower premiums, they are also exempt from some key consumer protections under the ACA. For example, most AHPs will not be subject to the EHB coverage requirement, which mandates that small group plans cover a core set of items and services, such as mental health care, maternity and newborn care, prescription drugs and emergency services. Most AHPs will also be exempt from the ACA’s rating restrictions for the small group market, which means that AHPs may base premiums on factors such as age, industry and gender.

## *Eligible Employers*

The final rule allows more employer groups and associations to form AHPs. Employers may join together to form an AHP that is a single ERISA plan if either of the following requirements is satisfied:

- ✓ The employers are in the **same trade, industry, line of business or profession**; or
- ✓ The employers have a **principal place of business** within a region that does not exceed boundaries of the same state or the same metropolitan area (even if the metropolitan area includes more than one state).

In addition, the final rule allows working owners without other employees, such as sole proprietors and other self-employed individuals, to join AHPs to receive health coverage for themselves and their families.

The final rule does not affect existing AHPs that were allowed under prior DOL guidance. These plans may continue to operate under the same rules as before or they can elect to follow the new rules if they want to expand within a geographic area, regardless of industry, or cover working owners. New plans can also form and elect to follow either the new rules or the old rules.

## *Additional Requirements*

To distinguish single plan AHPs from commercial insurance-type arrangements, the final rule requires AHPs to satisfy the following conditions:

- ✓ The primary purpose of the group or association may be to offer and provide health coverage to its employee members; however, the group or association also must have at least **one substantial business purpose** unrelated to offering and providing health coverage or other employee benefits to its members.
- ✓ Each employer member of the group or association participating in the group health plan must be the employer of **at least one employee** who is a plan participant.
- ✓ The group or association must have a **formal organizational structure** with a governing body and bylaws or other similar indications of formality.
- ✓ The group or association's member employers must **control its functions and activities**, including the establishment and maintenance of the group health plan.
- ✓ Participation in the group health plan sponsored by the association must be limited to **employees and former employees** of the current employer members (and family members of those employees and former employees).

- ✓ The group or association must **not be a health insurance issuer** (or be owned or controlled by an issuer or by a subsidiary or affiliate of an issuer).

In addition, the final rule requires AHPs to comply with certain consumer and anti-discrimination protections that apply to the large group market. For example, AHPs may not charge higher premiums or deny coverage to people because of pre-existing conditions, or cancel coverage because an employee becomes ill. Additionally, AHPs cannot charge employers different rates based on the health status of their employees.

### ***Applicability Date***

AHPs may be established under the new final rule as follows:

- ✓ All associations (new or existing) may establish a fully insured AHP starting on **Sept. 1, 2018**.
- ✓ Associations that sponsored a self-insured AHP on or before June 21, 2018, may expand within the context of the new AHP rule starting on **Jan. 1, 2019**.
- ✓ All other associations (new or existing) may establish a self-funded AHP starting on **April 1, 2019**.

## **OTHER COMPLIANCE ISSUES UNDER FINAL RULE**

### ***Employer Shared Responsibility Rules***

The IRS has released a [Q&A](#) on the ACA's [employer shared responsibility rules](#) to explain how these rules apply to employers that offer health coverage through an AHP. The employer shared responsibility rules apply only to applicable large employers (ALEs), which are employers with 50 or more full-time employees (including full-time equivalent employees). These rules require ALEs to offer affordable, minimum-value health coverage to their full-time employees or pay a penalty.

According to the IRS' Q&A, the employer shared responsibility rules do NOT apply if an employer that is not otherwise an ALE offers coverage through an AHP. Whether an employer that offers coverage through an AHP is an ALE subject to the employer shared responsibility provisions depends on the number of full-time employees (and full-time equivalent employees) the employer employed in the prior calendar year. The determination of ALE status is unrelated to whether the employer offers coverage through an AHP.

The only circumstance in which multiple employers are treated as a single employer for purposes of determining whether the employer is an ALE is when the employers have a certain level of common or related ownership.

## ***ERISA Compliance***

The DOL’s compliance assistance for AHPs addresses [ERISA’s reporting and disclosure requirements](#) for these plans. According to the DOL, three of the most important disclosures for AHPs are the following:

- ✓ **Summary plan description (SPD)** – A plain language summary of the plan and explanation of the plan’s rules. It must be comprehensive enough to inform participants of their rights and responsibilities under the plan. AHPs must provide an SPD to each participant within 90 days of the individual becoming covered under the plan, and within 30 days after a written request.
- ✓ **Summary of material modifications (SMM)** – AHPs must also furnish an SMM to inform participants any time there is a material change to the AHP or the information required to be in the SPD.
- ✓ **Summary of Benefits and Coverage (SBC)** – The SBC is a disclosure that uses a uniform template to give AHP participants a clear, plain-language summary of the key features of a plan, such as covered benefits, cost-sharing provisions and coverage limitations. Plan administrators must provide an SBC as part of any written application materials, upon special enrollment, when coverage is renewed, and within seven business days of receiving a request.

In addition, AHPs, whether fully insured or self-insured, generally must file both a [Form 5500](#) and a [Form M-1](#) with the DOL. The Form 5500 is an annual report containing information about the plan, its finances and its operation. AHPs and other MEWAs must also file Form M-1s to register and report certain compliance information before operating in a new state, and on an annual basis.

As ERISA-covered group health plans, AHPs are generally subject to the following requirements:

<a href="#"><u>Benefit Claims Administration</u></a>	Group health plans must establish and maintain a claims procedure that participants and beneficiaries can use to apply for and receive the plan’s promised benefits. The DOL has issued rules setting minimum timing and content standards for benefit claims procedures and benefit determinations for ERISA plans (including insured and self-insured plans).
<a href="#"><u>COBRA</u></a>	COBRA requires continuation coverage to be offered to covered employees, their spouses, their former spouses and their dependent children when group health coverage would otherwise have been lost due to specific events. COBRA does not apply to employers with fewer than 20 employees. The DOL anticipates future guidance on the application of COBRA to AHPs that provide coverage to member employers with fewer than 20

	employees.
<b><u>Fiduciary Rules</u></b>	ERISA establishes standards and rules governing the conduct of individuals and companies responsible for running group health plans, including AHPs. In general, employers that are members of an AHP have a fiduciary duty to monitor the AHP and get periodic reports on the fiduciaries' management and administration of the AHP.
<b><u>Consumer Health Care Protections</u></b>	Various consumer protection provisions are also included in ERISA, including those contained in HIPAA, the ACA, the Mental Health Parity and Addiction Equity Act, the Newborns' and Mothers' Health Protection Act, the Women's Health and Cancer Rights Act, and the Genetic Information Nondiscrimination Act, among others.

### ***Regulatory Authority***

The DOL may issue a cease-and-desist order when it appears that a MEWA's conduct is fraudulent, creates an immediate danger to the public safety or welfare, or is causing or can be reasonably expected to cause significant, imminent and irreparable public injury. The DOL may also issue a summary seizure order if it appears that a MEWA is in a financially hazardous condition. More [comprehensive information](#) on the MEWA provisions applicable to AHPs is available from the DOL.

In addition, states have authority to regulate MEWAs. States can regulate health insurance issuers and the health insurance policies sold to AHPs, and they can regulate self-insured AHPs to the extent the regulation is consistent with ERISA. Employers and plan administrators should check with the applicable state insurance department for more information on that state's insurance laws.