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Association Health Plans (AHPs) and States' Rights: An Accounting of How States Want to Regulate AHPs

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North Carolina's General Assembly recently passed a law — with significant bi-partisan support¹ — to allow “association health plans” (AHPs) to cover employers in different industries, as well as self-employed individuals with no employees that meet certain wage and hour requirements. This is the same policy that is set forth in the Department of Labor's (DOL's) final AHP regulations. On Sunday, August 25, Governor Cooper allowed North Carolina's AHP bill to go into law without a signature.

AN ACCOUNTING OF STATES THAT ALLOW AHPs TO COVER EMPLOYERS IN DIFFERENT INDUSTRIES ALONG WITH SELF-EMPLOYED INDIVIDUALS WITH NO EMPLOYEES

With the recent action in North Carolina, there are now 10 States that have enacted a law that allows

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¹ In the House, the bill passed 82 to 32, with 19 Democratic House members voting in favor of the bill. In addition, the Senate passed the bill by a 38 to 8 margin, with 11 Democratic Senators voting yes. See <https://www.ncleg.gov/BillLookup/2019/s%2086>.

AHPs to provide health coverage to employers in different industries, as well as self-employed individuals with no employees.²

In addition to these 10 States, 20 States have issued guidance or have taken actions also allowing AHPs to cover employers in different industries as well as self-employed individuals with no employees.³

That amounts to 30 States that appear to hold the position that the DOL acted reasonably when developing and issuing the final AHP regulations.

This is compared to the 11 States (California, Delaware, Kentucky, Massachusetts, Maryland, New Jersey, New York, Pennsylvania, Oregon, Virginia, Washington) and the District of Columbia (D.C.) that contend that the DOL acted unreasonably. And it is these 11 States, along with D.C., that sued to invalidate the final AHP regulations.

ELEVEN STATES AND D.C. ALREADY PROHIBIT CERTAIN TYPES OF AHPs

Currently, each of these 11 States and D.C. — with the exception of Kentucky — *already* prohibit certain AHPs from operating in their State. Most of these prohibitory laws were in place *prior* to June 21, 2018, when the DOL released the final AHP regulations.

² Arizona, S.B. 1085; Arkansas, Act 919; Florida, S.B. 322; Hawaii, H.B. 2208; Iowa, S.F. 2349; Kansas, H.B. 2209; Kentucky, H.B. 396; North Carolina, S.B. 86; Oklahoma, S.B. 943; South Dakota, S.B. 37.

³ Alabama, Insurance Bulletin 2018-05; Alaska, Insurance Bulletin B-19-02; Georgia, AHP Approval; Illinois, Company Bulletin 2018-07; Indiana, Insurance Bulletin 245; Louisiana, Insurance Advisory Letter 2018-03; Michigan, Insurance Bulletin 2018-21; Minnesota, Frequently Asked Questions; Mississippi, Insurance Bulletin 2018-8; Missouri, Insurance Bulletin 18-04; Nebraska, AHP Approval; Nevada, AHP Approval; North Dakota, Statement; Ohio, Frequently Asked Questions; South Carolina, Comment letter; Tennessee, AHP Approval; Texas, AHP Approval; Utah, Insurance Bulletin 2018-5; West Virginia, AHP Approval; Wisconsin, AHP Approval.

For example, California has prohibited the formation of self-insured AHPs for 24 years now.⁴ Washington State has similarly prohibited self-insured AHPs for 14 years now.⁵ In addition, D.C., Delaware, Massachusetts, and New York require a self-insured AHP to be licensed as an insurance company, which is a significant deterrent to self-insured AHP formation.⁶

New York, the lead counsel in the lawsuit to invalidate the DOL's final AHP regulations, *already* has a law that prohibits a fully insured AHP from being treated as one, single "large group" health plan, regardless of what the final AHP regulations may allow. Specifically, New York law provides that a small employer member of a fully insured AHP can only enroll in coverage that is subject to the "small group" market rules and that individual members of a fully insured AHP can only enroll in coverage that is subject to the "individual" market rules (i.e., no fully insured "large group" AHPs).⁷

Similar to New York, States like Delaware, Massachusetts, and New Jersey have laws that *already* prohibit fully insured AHPs from being treated as a "large group" health plan.⁸ At the beginning of this year, D.C. enacted a law prohibiting fully insured "large group" AHPs.⁹ Last fall, Maryland enacted a law that also prohibits fully insured "large group" AHPs.¹⁰ Oregon and Pennsylvania, while not having specific laws in place, have simply adopted a regulatory position that fully insured "large group" AHPs formed in accordance with the final AHP regulations cannot operate in their State. And, it appears that Virginia has adopted a similar position without issuing any guidance or enacting any laws.

ELEVEN STATES AND D.C. CAN OUTRIGHT PROHIBIT ANY TYPE OF AHP WITHOUT INVALIDATING THE FINAL AHP REGULATIONS

Importantly, federal law allows these 11 States and D.C. to augment their existing laws to prohibit any and all AHPs from operating in their State.¹¹ Based on this fact, isn't it reasonable to ask: Why are these 11 States and D.C. suing to invalidate the DOL's final AHP regulations when these 11 States and D.C. can outright prohibit any and all AHPs if they wanted to?

I think it is also reasonable to ask this: Should these 11 States and D.C. be permitted to dictate how 30 other States should regulate their insurance markets? After all, don't all States have their own independent authority to regulate their insurance markets the way they see fit?

This last question goes both ways. That is, from a State's rights perspective, the 11 States and D.C. *should* have a right to regulate their insurance markets in such a way where they can outright prohibit all AHPs. And similarly, these 30 other States *should* have the right to allow AHPs that cover employers in different industries and self-employed individuals with no employees to operate in their State.

The bottom-line is this: Reports indicate that roughly 30,000 individuals living in States like Alabama, Arizona, Florida, Georgia, Michigan, Missouri, Minnesota, Nebraska, Nevada, Oklahoma, Tennessee, Texas, West Virginia, and Wisconsin are covered by an AHP formed in accordance with the final AHP regulations. If the Court of Appeals for the District of Columbia Circuit — like the District Court for the District of Columbia — finds that the final AHP regulations are invalid,¹² these 11 States and D.C. will effectively take away quality and affordable health coverage from tens of thousands of individuals who do *not* live in their State/jurisdiction.¹³

In the end, employees of small employers and self-employed individuals with no employees currently

⁴ See Cal. Ins. Code §742.23, which requires self-insured multiple-employer welfare arrangements (MEWAs) to obtain a certificate of compliance from the Department of Insurance (DOI) to operate within the State. Since 1995, the DOI ceased providing such certificates.

⁵ See R.C.W. 48.125.020, which requires self-insured MEWAs to obtain a certificate of authority. Since 2005, the Office of the Insurance Commissioner ceased providing such certificates.

⁶ See D.C. Code §31-3303.13c(a), 18 Del. Admin. Code 505(d), M.G.L. c. 175, and N.Y. Ins. Law §1102(a)

⁷ See N.Y. Ins. Law §2231(g) and §4317(d).

⁸ See 18 Del. Admin. Code 1308-3.3, M.G.L. c. 176J, and N.J.S.A 17B:27A-19(j)(1), N.J.S.A 17B:27A-2.

⁹ See D.C. Code §31-3302.06a, §31-3303.01(b).

¹⁰ See Md. Code, Ins. Law §15-1202(c).

¹¹ See Employee Retirement Income Security Act §514(b)(2)(A), §514(b)(6)(A).

¹² On March 28, the District Court for the District of Columbia ruled that the Department of Labor's final "association health plan" (AHP) regulations are invalid. The Department of Justice appealed the ruling to the Court of Appeals for the D.C. Circuit. On May 10, the Circuit Court granted an expedited review of the District Court ruling. A final ruling from the Circuit Court has not yet been rendered.

¹³ Reports indicate that AHPs formed in accordance with the final AHP regulations *voluntarily* cover all 10 of the ACA's "essential health benefits" (EHBs), including pediatric services, although many of them do not cover pediatric dental or vision, which is a component of the 10th EHB. The reason the insurance policies for these AHPs do not cover pediatric dental or vision is that the Board (i.e., the fiduciary) governing the AHP determined that pediatric dental and vision benefits can best be provided through a

enrolled in an AHP formed in accordance with the final AHP regulations will face a choice: (1) they will experience a 10% to 30% premium increase (depending on the savings under their existing AHP) or (2) they will go without coverage.

Oral arguments in the litigation involving the DOL's final AHP regulations have been scheduled for November 14, which means the Court of Appeals for the D.C. Circuit is unlikely to confirm whether the regulations are valid or not until December, at the earliest. Once a final ruling is rendered, however, we will know whether the 20 of the 30 States will need to pass a State law if they still want to allow AHPs to cover employers in different industries, as well as self-employed individuals with no employees. We will also have to determine whether the "look-through" rule developed by the Department of Health and Human Services (HHS)¹⁴ pre-empts these State laws. The previous administration took the position that

stand-alone product that is readily made available, instead of through the insurance policy itself.

¹⁴ In 2011, the Obama Administration issued guidance explain-

HHS's "look-through" rule pre-empts any State law that was in conflict with the rule. However, no State has ever challenged HHS's pre-emption argument in a court of law.

ing that an insurance company underwriting an AHP must "look-through" the group sponsoring the fully insured AHP to the underlying size of the AHP member. If the individual AHP member employs 50 or fewer employees, the insurance company must apply the ACA's "small group" market reforms to that member's AHP health coverage. In addition, if an individual AHP member has no employees, the insurance company is required to impose the ACA's "individual" market reforms to this member's coverage. However, the Obama Administration further explained that in cases where a fully insured AHP is sponsored by a "bona fide group or association of employers" as defined under ERISA, an insurance company must treat the AHP as one, single group health plan. In this case, the number of employees of the employer-members of this "bona fide group" determines whether the AHP health coverage is subject to the "small group" or the "large group" market rules. If — upon aggregating the employees of the employer-members — an insurance company determines that the "bona fide group" includes 51 or more employees, the insurance company must treat the fully insured AHP health plan as a "large group" market plan (and thus apply the "large group" market insurance rules to the AHP health coverage).