

Oregon Division of Financial Regulation Bulletin No. DFR 2018-07

TO: Issuers of Health Benefit Plans to Associations in the Oregon Health Insurance Market, Association Purchasers of Health Benefit Plan Coverage, Multiple Employer Welfare Arrangements, and Agents and Producers Licensed to Sell Health Plans in Oregon

DATE: September 10, 2018

RE: Regulation of Association Health Plans in Oregon

I. Purpose

The Oregon Division of Financial Regulation (the division) has received numerous inquiries about its guidance concerning associations and Multiple Employer Welfare Arrangements (MEWAs).¹ This bulletin summarizes and clarifies guidance for issuers, associations, MEWAs, insurance agents, and producers in light of the recent United States Department of Labor (DOL) final regulation titled “Definition of Employer Under Section 3(5) of ERISA-Association Health Plans” (AHP rule).²

As explained below, the AHP rule does not preempt the Oregon Insurance Code, which limits the types of associations and MEWAs that may purchase or issue a health benefit plan in Oregon.³ The division will take action against an issuer, association, MEWA, agent, or broker for any failure to comply with or attempt to circumvent Oregon statutory or regulatory requirements with respect to health benefit plan coverage offered by or to an association. This includes Oregon’s requirements regarding the establishment of such groups, the provision of essential health benefits, and other consumer protections.

II. Background

The AHP rule seeks to establish new, less stringent criteria to determine whether a group or association is a “bona fide association” under federal law by redefining the term “employer” in Section 3(5) of ERISA.⁴ Importantly, the preamble to the final rule makes clear that the AHP rule does not modify or otherwise limit existing state authority to regulate association health plans (AHPs) under section 514 of ERISA.⁵

¹ See, e.g. *Division Bulletin 2013-3*, regarding “Association Coverage under the Affordable Care Act (ACA),” available at <https://dfr.oregon.gov/laws-rules/Documents/Bulletins/bulletin2013-03.pdf>.

² 83 Fed. Reg. 28912 (2018)

³ “Health benefit plan” is defined in ORS 743B.005.

⁴ See 29 CFR § 2510.3-5

⁵ 83 Fed. Reg. 28936 (2018)

In the case of a fully insured AHP, state insurance laws continue to apply to any insurance policies purchased by the AHP. States may subject fully insured AHPs to licensing, registration, certification, financial reporting, examination, audit, and any other requirement of state insurance law necessary to ensure compliance with state insurance reserve, contribution and funding obligations. In the case of a less than fully insured AHP, any state law that regulates insurance may apply to the extent the law is “not inconsistent” with ERISA. The AHP rule thus does not prohibit continued application of state insurance laws to coverage issued by or to an association.

As noted above, this bulletin is meant to summarize relevant Oregon law and guidance in response to inquiries received following issuance of the AHP rule.

III. Guidance for insurers and other regulated entities

The AHP rule clearly states that AHPs are a type of MEWA under ERISA. As noted above, the preamble to the AHP rule also says the rule has no impact on, and does not preempt state regulation of MEWAs pursuant to ERISA § 514.⁶ Indeed, the AHP rule states that the application and coordination of state insurance law remains the province of the states.⁷

As a result, AHPs – whether established in Oregon or another state – are subject to the same statutory and regulatory requirements as any other group or association of employers that may offer health benefit plan coverage in Oregon. The division will continue to enforce all Oregon laws applicable to health benefit plans issued by or to a group or association of employers as they existed prior to the issuance of the AHP rule without modification. These requirements are summarized below.

With respect to *fully insured* associations:

- For a group or association of employers to purchase a group health benefit plan in Oregon, the group or association must meet specific requirements under the Insurance Code. ORS 743.524 establishes the eligibility requirements for an association to be a group health policyholder in Oregon. ORS 743.524 prohibits an insurer from issuing a group health insurance policy to an association unless the Director determines that the association meets the requirements of ORS 731.098. Among other requirements, ORS 731.098 requires that an association be in existence for *at least one year* and be organized in good faith *primarily for purposes other than obtaining insurance*. [Emphasis added.]
- For purposes of determining which market requirements apply to health benefit plan coverage issued to an association, the division will continue to apply the “look through”

⁶ Despite this stated lack of preemption, the division is concerned about the negative effects the new DOL rule will have on Oregon’s individual and small group markets. Accordingly, on July 26, 2018, the State of Oregon, in conjunction with ten other states and the District of Columbia, filed a lawsuit in the United States District Court for the Southern District of New York. This suit alleges, among other things, that the AHP rule is contrary to settled law and legislative intent, that the rule exceeds the Department of Labor’s authority, and that the rule is impermissibly arbitrary and capricious. The plaintiff states seek various forms of declaratory and injunctive relief, including a request that the Court vacate and set aside the AHP rule. As evidenced by Oregon’s participation in the aforementioned lawsuit, the division believes that significant doubt exists as to the legality and enforceability of the AHP rule. Be that as it may, the AHP rule does not alter Oregon law governing AHPs.

⁷ 83 Fed. Reg. 28925 (2018).

approach established in previous bulletins and federal guidance.⁸ The Oregon Insurance Code generally requires that health benefit plan coverage issued to an individual or a small employer through an association must comply with the requirements that would otherwise apply in the individual or small employer market. These requirements include state rating and benefit requirements such as single risk pool, community rating, and provision of essential health benefits.

- The division has also recognized that, in limited circumstances, a group may be deemed to exist at the association level rather than the participating employer level.⁹ In this respect, the division has adopted the ERISA allowance for bona fide associations that existed *prior to the issuance of the AHP rule*. Under this standard, an association may be treated as the single sponsoring employer of a group health benefit plan if (and only if) the employer members of the association exercise control over the association's health benefit plan *and*, based on all facts and circumstances, the association has a sufficiently close economic or representational nexus (i.e. a "commonality of interest") with the employers and employees that participate in the plan.¹⁰ The division will continue to recognize this allowance for bona fide associations.
- Consistent with existing practices, a carrier that wishes to issue health benefit plan coverage to an association with Oregon members must receive the division's approval prior to issuing coverage. A carrier that wants to issue large employer coverage to an association based on the allowance for bona fide associations described above must have a corporate officer attest to the association's compliance with this standard and submit a legal analysis from an ERISA attorney demonstrating that the standard is met.¹¹ Similarly, if an association that was previously determined to meet this standard wishes to make changes, the carrier insuring that association must submit the proposed changes and receive the division's approval prior to implementing the changes.¹²

⁸ See Bulletin 2013-3, cited above. Also "Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through, Associations" available at https://www.cms.gov/CCIIO/Resources/Files/Downloads/association_coverage_9_1_2011.pdf

⁹ *Id.*

¹⁰ See U.S. Department of Labor Advisory Opinions 94-07A and 2017-02AC, both finding that "A determination whether a purported group or association of employers is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. In the view of the Department, the employers that participate in a benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program." See also U.S. Department of Labor Advisory Opinion 2008-07A, finding that the Bend, Oregon, Chamber of Commerce did not have a "common economic or representation interest or genuine organizational relationship unrelated to the provision of benefits," and therefore was not exempt from Oregon state insurance regulation.

¹¹ See the division's Form 440-2441A, "Transmittal and Standards for Group Health Coverage to be issued to an Association, Union Trust, Trust Group, Credit Union or fully insured Multiple Employer Welfare Arrangement (MEWA)" is available at: <https://dfr.oregon.gov/rates-forms/Documents/2441a.pdf>

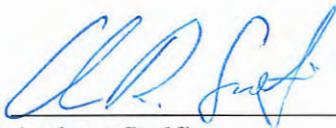
¹² ORS 743.524(3).

With respect to *less than fully insured associations*:

- The AHP rule does not modify the existing regulatory framework that subjects less than fully insured MEWAs to state insurance law under ERISA section 514. An association or group of employers that wants to provide health benefits through a MEWA in Oregon must obtain a certificate of MEWA under ORS 750.303 prior to offering health benefits and must comply with the requirements of ORS 750.301 to 750.341.
- ORS 750.307 establishes requirements for an association or group to establish a MEWA in Oregon. Among other requirements, ORS 750.307 requires that an association or group of employers maintaining a MEWA must be composed of five or more *employers in the same trade, business or industry*, must be *engaged in substantive business activity other than sponsorship of an employee welfare benefit plan*, and must have been *in existence for at least two years* prior to the date of application for a certificate of MEWA. [Emphasis added.] ORS 750.311 requires MEWAs established in another state to obtain an Oregon MEWA certificate before offering health benefits in Oregon.
- ORS 750.307(1) also requires that a MEWA be composed of employers in the same trade or industry. Accordingly, the division will not issue a certificate of MEWA to a group or association of employers that accepts employer members from multiple trades or industries, even if all employers participating in the MEWA have a principal place of business in the same geographic area.

Nothing in this bulletin shall be construed to limit the division's authority under the Oregon Insurance Code or its ability to continue enforcing the laws of the State of Oregon.

This bulletin takes effect immediately. It remains in effect until amended by a further Bulletin of the Division of Financial Regulation.



Andrew Stolfi
Administrator, Division of Financial Regulation
Insurance Commissioner



Date