What’s in a Name? Association Health Plans and Association Retirement Plans: These Cousins Couldn’t Be More Different

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The Final AHP Regs: Pathway #1

• Pathway #1 is available for industry-specific groups that cover employers, but that do NOT cover self-employed individuals
  – Pathway #1 AHPs can offer coverage nationwide
  – Pathway #1 AHPs were NOT impacted by the District Court ruling
    • In other words, Pathway #1 AHPs can continue to form with or without the final AHP regs
The Final AHP Regs: Pathway #2

• Pathway #2 is available to employer groups with “unrelated” employer members (like a Chamber of Commerce and other business groups)
  – These “unrelated” employer groups are limited to a state
• Pathway #2 is also available to both industry-specific groups and “unrelated” employer groups that want to offer coverage to their self-employed members
  – All Pathway #2 AHPs are subject to certain “nondiscrimination protections” (Pathway #1 AHPs are NOT)
“Friendly” States

• To date, 10 states have enacted legislation that allows AHPs to provide health coverage to:
  – Employers in different industries
  – And self-employed individuals with no employees

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
“Friendly” States

• 20 other states have issued guidance or have taken actions conforming to the final AHP regulations:

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No More Pathway #2 AHPs

- In the wake of the District Court ruling invalidating the final AHP regulations, the DOL issued guidance shutting down Pathway #2 AHPs (irrespective of States wanting Pathway #2 AHPs to operate in the State)
- According to the DOL guidance, existing Pathway #2 AHPs (not to be confused with Pathway #1) can continue their health plan coverage through the end of the 2019 “coverage period”
- NO NEW ENROLLMENT for 2020
- For fully-insured Pathway #2 AHPs, can only re-enroll existing participants for 2020 in a “small group” or “individual” market plan
“UNFriendly” States

• 11 states (California, Delaware, Kentucky, Massachusetts, Maryland, New Jersey, New York, Pennsylvania, Oregon, Virginia, Washington) and the District of Columbia (DC) filed suit to invalidate the final AHP regulations
  – These states already prohibit certain types of AHPs from operating in their state

• Other “Unfriendly” states include:
  – Connecticut
  – Kentucky
  – Maine
  – Montana
  – New Mexico
DC Circuit Court Oral Arguments

- Oral arguments in the DC Circuit Court of Appeals were held on Nov. 14, 2019
- Two of the three judges seemed inclined to think that the DOL acted “reasonably” in the Department’s interpretation of ERISA
- Whether the DOL had the requisite authority remains an open issue
- The same two judges seemed to indicate that the DOL’s interpretation of ERISA did indeed change the application of the Affordable Care Act (ACA)
- However, the judges stated that if the Plaintiff States had a problem with how the ACA is impacted, the Plaintiff States should take the issue up with HHS, not the DOL
- The judges went so far as to say:
  - What if we issued a ruling where we deferred to the DOL under Chevron, and we left open the question of how the DOL’s interpretation of ERISA impacts the ACA?
- Self-employed individual issue not discussed
Update on ACA Litigation

• Challenge to the constitutionality of the ACA

• Challenge to federal regulations on religious exemption to contraceptive coverage mandate
  – *California v. U.S. HHS*, 941 F.3d 410 (9th Cir. 2019)

• Challenge to the association health plan regulations

• Challenge to federal regulations expanding short-term limited-duration plans in the individual market

• Challenge to Congress’s non-appropriation for risk corridors program
Challenge to AHP Rule

• Association health plan rule relaxed the standards under ERISA for recognizing legitimate AHPs
  – Employers need not be joined in common purpose other than the provision of health insurance
  – Applies to the self-employed
  – Sets up state-wide or regional AHPs
• Challenge focuses on rule’s supposed undermining of the ACA Exchanges
• Challenge also focuses on alleged insufficiency of reasoning for departure from earlier rules on subject, as well as ERISA’s statutory language
• Standing issue?
• On March 28, 2019, Judge John Bates overturns the rule
• Appellate oral argument occurred November 14, 2019 (Judges Henderson, Tatel, and Katsas)
• What’s next in the case?