

## **ASSOCIATION HEALTH PLANS IN PENNSYLVANIA**

### **FREQUENTLY ASKED QUESTIONS**

The U.S. Department of Labor recently issued a Final Rule under the Employee Retirement Income Security Act of 1974 (ERISA) affecting Association Health Plans (the "AHP Final Rule"). The preamble to the AHP Final Rule makes clear that the AHP Final Rule does not modify the states' existing authority to regulate Association Health Plans under state insurance laws. Nonetheless, since the enactment of the AHP Final Rule, the Pennsylvania Insurance Department has received a number of inquiries regarding Pennsylvania law governing AHPs. Accordingly, the Pennsylvania Insurance Department issued these Frequently Asked Questions. These FAQs may be periodically updated.

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#### **1. May an association that meets the requirements of Pennsylvania law provide for health care coverage for its members in PA?**

Yes. An association that meets the requirements of Pennsylvania law<sup>1</sup> may provide for health care coverage for its members, if, but only if, the association is properly formed as specified in Pennsylvania law. That is, the association must:

- Have a constitution and by-laws.
- Not have been organized by an insurer.
- Be maintained in good faith for purposes other than that of obtaining insurance.
- Obtain insurance covering at least twenty-five members, employees or employees of members of the association (including retired employees) for the benefit of persons other than the association or its officers or trustees.
- Have been in active existence for at least two years.
- Operate from offices other than the insurer's and be controlled by principals other than the insurer's.

#### **2. May an association that meets the requirements of Pennsylvania law purchase a fully-insured health insurance plan in Pennsylvania to cover its members?**

Yes. An association that meets the requirements of Pennsylvania law may purchase a fully-insured health insurance plan to cover its members.

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<sup>1</sup> 40 P.S. § 756.2(a)(2).

**3. Does Pennsylvania law apply to health care coverage an association provides to its members in Pennsylvania?**

Yes, the health care coverage issued to an association's members in Pennsylvania will be subject to all Pennsylvania legal requirements for health insurance, not only vis-à-vis licensure, but also pertaining to solvency, form and rating standards, examination provisions, and enforcement.

**4. May an association operate in Pennsylvania if it is formed for the primary purpose of providing health care coverage to its members?**

No. As a protection for consumers, Pennsylvania law<sup>2</sup> establishes qualifications that associations must meet prior to providing health care coverage to its members. Among those qualifications is a requirement that the association be maintained in good faith for purposes other than that of obtaining insurance.

**5. What type of entity may provide insurance to a properly formed association in Pennsylvania?**

An entity that obtains a certificate of authority to operate as an insurer in Pennsylvania may provide fully-funded insurance to a properly formed association. A health plan formed directly by an association is a multiple employer welfare arrangement ("MEWA"). Pennsylvania law prohibits MEWAs from "doing an insurance business" in Pennsylvania without a certificate of authority from the Insurance Commissioner authorizing the association to do such business. "Doing an insurance business" includes the issuance or delivery of insurance contracts to Pennsylvania residents; soliciting applications for or negotiating insurance contracts; collecting premiums, membership fees, assessments or other consideration for insurance contracts; or the transaction of matters subsequent to the execution of the contracts and arising out of them.<sup>3</sup>

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<sup>2</sup> 40 P.S. § 756.2; see also 40 P.S. § 46.

<sup>3</sup> 40 P.S. § 46.

**6. Is a fully-insured AHP required to meet the requirements of Pennsylvania law in order to operate in Pennsylvania?**

Yes. The health care insurance coverage issued to an association's members in Pennsylvania will be subject to all Pennsylvania legal requirements for health insurance, not only vis-à-vis licensure, but also pertaining to solvency, form and rating standards, examination provisions, and enforcement. The AHP Final Rule does not modify or otherwise limit existing state authority.<sup>4</sup> A fully-insured health plan for employer members of an association in Pennsylvania will provide policy forms and rates, compliant with Pennsylvania law and the Affordable Care Act, that are consistent with the rules applicable to the specific employer member — i.e., a sole proprietor member of an association will have coverage compliant with individual policy requirements, an employer member with 2-50 employees will have a policy compliant with small group policy requirements, and an employer member with more than 50 employees will have a policy compliant with large group policy requirements.<sup>5</sup>

**7. Is an association the same as an AHP?**

An association is not the same as an AHP. An association is a business arrangement, while an AHP (association health plan) is a benefit plan for the members of an association or employees of its members. An association may be a "single employer" for certain purposes under ERISA, but an AHP that it sets up is nonetheless a "multiple employer welfare arrangement" ("MEWA") under both ERISA and Pennsylvania law.<sup>6</sup> MEWAs wishing to provide health insurance coverage to their members must comply with Pennsylvania law, including applicable licensure requirements.<sup>7</sup>

**8. May self-funded AHPs operate in PA? If not, why not?**

The Pennsylvania General Assembly enacted legislation that requires any entity doing the business of insurance in the Commonwealth, including a self-funded association plan (or self-funded MEWA) to obtain a certificate of authority to operate as an insurer.<sup>8</sup> The General Assembly established this legal requirement in order to protect consumers. Unfortunately, as the Department has too often seen, when associations or other groups are not subject to the same requirements as other licensed insurers, there is greater risk that the association might miscalculate the financial costs associated with health insurance benefits or claims or that there may be some other form of financial mismanagement, thereby increasing the risk that an association or group will be unable to pay claims. Without the consumer

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<sup>4</sup> 83 Fed. Reg. at 28936 ("The Department agrees that the final rule does not modify or otherwise limit existing State authority"); see also, e.g., id. at 28959 ("The Department agrees that the final rule does not modify existing state authority."). See also Letter from G. William Scott, U.S. DOL, to Commissioner Altman, August 20, 2018.

<sup>5</sup> See 40 P.S. § 3801.301 (incorporating PHSA definition of "small group"); 42 U.S.C. § 300gg-91(e)(6)(A) (aggregation of employer rules reference IRC "control group" provisions); see also CMS Insurance Standards Bulletins – Sept. 1, 2011, Transmittal No. 02-02 (August 2002) and Transmittal No. 02-03 (August 2002) ("look through" approach described).

<sup>6</sup> 83 Fed. Reg. at 28919 n. 18 ("AHPs are one type of MEWA"); 28959 ("MEWAs, including AHPs (which are a type of MEWA)").

<sup>7</sup> 40 P.S. § 46.

<sup>8</sup> 40 P.S. § 46.

protections in place, covered individuals and small businesses may be left without viable coverage when they have health care needs.

**9. May an association, organized in another state, market its self-funded AHP in Pennsylvania?**

No, unless the association and AHP comply with all applicable Pennsylvania laws and regulations. An association organized in another jurisdiction, and its agents, may not market (i.e., sell, solicit, or negotiate) its AHP, whether insured or self-funded, in Pennsylvania without compliance with applicable Pennsylvania laws and regulations.<sup>9</sup>

**10. May a Pennsylvanian, insured by an association's group policy issued in the other state, be covered by that policy?**

Yes, but the referenced Pennsylvanian will not have the protections provided by Pennsylvania's insurance laws.

**11. If a sole proprietor or a group becomes a member of an out-of-state association that operates a self-funded AHP, can it be assured that the AHP has enough funds to pay all unpaid claims its beneficiaries might incur?**

No, the Department cannot provide such assurance. The solvency requirements of the other state or the federal government, if any, would apply to the AHP under these circumstances.

**12. What ACA consumer protections could a sole proprietor or group lose if it gets health care coverage through a self-funded AHP or an insured large group AHP issued in another state?**

A sole proprietor or group that gets health care coverage through a self-funded AHP or an insured large group AHP issued in another state may not have many of the important protections of the ACA. While the AHP may have some benefits, some important examples of potential limitations are:

- *No Promise of Guaranteed Availability and Renewability.* A self-funded AHP plan issued in another state may not have the ACA protections of guaranteed availability and guaranteed renewability requirements. While that AHP is subject to nondiscrimination rules, that AHP may structure itself in a way that will keep out sole proprietors or groups that may be anticipated to result in higher expenses. And because that AHP may be formed with a primary purpose of offering health care coverage and does not need to meet any longevity requirement, even if it purchases insurance coverage, it could re-form each year to exclude groups that have higher health care costs.

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<sup>9</sup> See 40 P.S. §§ 46, 756.2; see also 40 P.S. §§ 310.1 *et seq.* (producers); 40 P.S. §§ 324.1 *et seq.* (administrators).

- ***No Promise of Benefits Suited to Everyone.*** A self-funded AHP issued in another state or an insured large group AHP issued in another state may choose to limit its availability to sole proprietors or groups that are skewed towards a healthy population that is not expected to need certain health benefits. The sole proprietor or small group buying into such a plan issued outside of Pennsylvania may also find that it does not have access to many of the coverage benefits the ACA requires for small groups. So, for example, an AHP that is configured in such a way that it includes groups that are primarily young, healthy men, may choose to exclude maternity and pediatric coverage, and may severely limit other coverages that are more heavily used by older individuals.
- ***No Promise of Comprehensive Benefits.*** A self-funded AHP issued in another state or an insured large group AHP issued in another state is not required to cover the essential health benefits, including many benefits that a consumer would reasonably believe to be covered. Self-funded and insured large group plans do have to cover preventive services, but do not have to cover all of the essential health benefits that individual and small group plans are required to cover under the ACA. So, for example, a self-funded or insured large group AHP does not need to cover maternity care, laboratory services, prescription drugs, or even emergency room services.
- ***No Promise of Non-Discriminatory Premium Rates.*** A self-funded AHP issued in another state or an insured large group AHP issued in another state may also rate categories of employees very differently. So, for example, an association of retail stores could have different rates for cashiers and stockers, as long as those categories are not directed at any individual participants, even if it happens that most of the cashiers are older females and tend to use more health care services than the stockers (who happen to be mostly younger and male).<sup>10</sup>
- ***No Promise of Pennsylvania Protections (if self-funded).*** A self-funded AHP issued in another state or an insured large group AHP issued in another state may not have many of the important protections of Pennsylvania law. Some important examples are:
  - ***Benefits, such as:***
    - In-patient and out-patient services for mental health and substance use disorders.
    - Annual mammograms with no cost-sharing beginning at age 40, and for at-risk women under age 40. This is more expansive coverage than the preventive services requirement in the ACA.
    - Diabetic equipment, supplies and education.
    - Autism services.
    - Colorectal cancer screening (beyond the ACA preventive service requirement).
  - ***Rates Reviewed by the Insurance Department.*** The Department protects consumers against rates that may be excessive, but also rates that may be inadequate or unfairly

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<sup>10</sup> See 83 Fed. Reg. at 28963 (29 C.F.R. § 2510.3-3(d)(5)(Example 8)).

discriminatory. A self-funded AHP issued in another state or an insured large group AHP issued in another state would not have that protection.

- *Solvency Protection.* The Department monitors the financial solvency of an insurance company doing business in Pennsylvania to make sure the company can pay claims consumers submit. And, if an insurance company does fail, policyholders are protected by a guaranty fund that will pay claims. If the out-of-state coverage is with a self-funded AHP or a large group AHP, there is no Pennsylvania Department financial oversight or guaranty fund protection: if the AHP miscalculates its financial arrangements, or misappropriates funds, there is no financial backstop to pay claims.
- *Consumer Services and Information.* Self-funded AHPs and insurance companies operating out-of-state are not subject to the jurisdiction of the Department. If there is a misrepresentation or other unfair practice, the Department will not be able to require compliance with the state's insurance laws.

### **13. May insurance producers sell, solicit and negotiate AHP coverage?**

Insurance producers are reminded that Department Notice No. 1992-2: "Joint State/Federal Statement on Regulation of MEWAs" (22 Pa. B. 3235, June 27, 1992),<sup>11</sup> is still in effect. In that Statement, the Department first reiterated a prior warning to "Pennsylvania agents of the penalties of selling for an unlicensed insurer, including personal liability for unpaid claims, license revocation, and monetary penalties." The Department and the Department of Labor then reminded producers that Pennsylvania law specifies that entities acting as insurers in Pennsylvania, including those operating MEWAs, are subject to Pennsylvania licensing requirements, and concluded that "agents that market any insurance products, including any program of health benefits, or sell any such products, should examine carefully whether the insurer has been issued a certificate of authority by the State and whether the product has been approved for use."

### **14. If and when the Department receives a consumer complaint regarding AHP coverage, will it be reviewed to determine the most likely responsible party or will it be submitted to both the insurer and association for a response?**

The Department regulates insurance entities. If the association is a third-party administrator or other licensed insurance entity, the Department will likely refer consumer complaints to both the insurer and the association. However, if the association is not a licensed insurance entity, the Department may refer consumer complaints to the insurer or other appropriate enforcement authority.

12/4/2018

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<sup>11</sup> The Pennsylvania Bulletin has not digitized records prior to 1996; accordingly, a copy of that Notice as sent to insurance agents at that time is attached.

U.S. DEPARTMENT OF LABOR  
Pension and Welfare Benefits Administration



COMMONWEALTH OF PENNSYLVANIA  
Insurance Department

April 24, 1992

INSURANCE DEPARTMENT NOTICE NO: 1992-2

**SUBJECT:** Joint State/Federal Statement  
on Regulation of MEWAs

**TO:** All Pennsylvania Insurance Agents

**FROM:** U.S. Department of Labor  
and  
Pennsylvania Department of Insurance  
Acting Commissioner Ronald Chronister

The Pennsylvania Department of Insurance has previously warned Pennsylvania agents of the penalties of selling for an unlicensed insurer, including personal liability for unpaid claims, license revocation, and monetary penalties. The Insurance Department has imposed penalties and brought civil litigation against agents for such activities. Despite this, Pennsylvania insurance agents have continued to market insurance products, primarily health benefit programs, on behalf of unauthorized insurers. These unauthorized insurers include operators of certain health benefit programs known as Multiple Employer Welfare Arrangements ("MEWAs") which conduct the business of insurance in Pennsylvania without a certificate of authority, in violation of 40 P.S. §46.

Pennsylvania insurance law, 40 P.S. §46, states that no person shall act as an insurer in Pennsylvania except as authorized by a certificate of authority issued to the insurer by the Pennsylvania Department of Insurance. This includes MEWAs which offer accident and health benefits to Pennsylvania participants.

You should be advised that on many occasions, these unauthorized insurers represent the programs as employee welfare benefit plans subject to only federal regulations, and therefore assert that Pennsylvania has no authority to enforce its insurance regulations.

Memo: All Insurance Agents  
April 24, 1992  
Page Two

The U.S. Department of Labor (the Department) joins in this bulletin to notify you that, in general, the federal law regulating employee benefit plans, the Employee Retirement Income Security Act ("ERISA"), will not interfere with the State's authority to enforce its own insurance regulations, including the State's authority to apply insurance licensing requirements to MEWAs under 40 P.S. §46. The Department notes that some operators may refer to a program of health benefits as "collectively-bargained" plans, or "employee-leasing" plans. A determination as to whether these particular programs may be regulated by the State usually may only be made on a case by case basis.

Accordingly, agents that market any insurance products, including any program of health benefits, or sell any such products, should examine carefully whether the insurer has been issued a certificate of authority by the State and whether the product has been approved for use.

For information regarding whether an entity has a Pennsylvania certificate of authority, call the Department of Insurance, 1-717-787-2735.

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