

Department of Labor: Notice of Proposed Rulemaking

Association Health Plans (AHPs)

On January 5, 2018, the Department of Labor (DOL) issued a [Notice of Proposed Rulemaking](#) that would expand access to health coverage through Association Health Plans (AHPs) by broadening the definition of “employer” to include “working owners” (sole proprietors/self-employed/independent contractors).

“The Department of Labor’s Association Health Plan proposal is a potentially important step in expanding health coverage opportunities for small businesses and self-employed individuals, including real estate professionals. NAR will submit comments to help ensure the interests of our Realtor® members are reflected in the final proposed rule intended to provide more affordable health care options.” – NAR President Elizabeth Mendenhall

By expanding access to AHPs, small employers and self-employed individuals may have increased health care insurance options with more flexibility in health plan design, a change that might result in lower costs.

Background on the proposed rule:

- **The proposed rule has the potential to create a framework that could allow trade associations to offer health insurance coverage to their members through a “large group health plan,”** which is different from a small group or individual market health plan.
 - Under the proposal, working owners in the same industry/profession and located in different geographic locations could participate in an AHP established by other “related” employer members. Working owners in different industries and professions that are unrelated could also join an AHP, so long as there is a common geographic area, as described in the “commonality of interest” requirement below.
 - As a result, small businesses and self-employed individuals participating in an AHP would no longer be subject to Affordable Care Act (ACA) small group and individual market rules, such as certain benefit requirements, but may still be subject to state benefit mandates.
- **The proposed rule treats independent contractors as both an employer and an employee who is able to participate in an AHP.** There are several requirements that must be met for an individual to qualify as a “working owner” eligible to participate in an AHP including:
 - Has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including partners and other self-employed individuals;
 - Earns wages or self-employment income from the trade or business for providing personal services to the trade or business;
 - Is not eligible to participate in any subsidized group health plan maintained by any other employer of the individual or the spouse of the individual; and
 - Either:
 - Works at least 30 hours per week or at least 120 hours per month providing personal services to the trade or business, or
 - Has earned income from such trade or business that at least equals the working owner’s cost of coverage for participation by the working owner and any covered beneficiaries in the group health plan sponsored by the group or association in which the individual is participating.

- A group or association sponsoring the AHP may rely on written representations from the individual seeking to participate as a working owner as a basis for concluding the aforementioned requirements are satisfied.
- If enacted in its current form, employer and/or sole proprietors could also establish an AHP for the *sole purpose of offering health insurance* even if there (1) is no pre-existing organization and (2) the AHP is established for the sole purpose of offering health coverage. This is not allowed now.
- Under the proposed rule, a “group” forming an AHP must be formally organized and functionally controlled by its members. For example, there must be a formal governing body with by-laws or another organizational structure explaining the activities of the governing body; members must control the functions and activities of the AHP.
- The proposed rule would also expand DOL’s “commonality of interest” requirements that determine what kinds of employers can band together to form an AHP. The new test allows for employers to band together if they either are:
 - In the same trade, industry, line of business, or profession; or
 - Have a principal place of business within a region that does not exceed the boundaries of the same State or the same metropolitan area (even if the metropolitan area includes more than one State).
- The proposed rule requires that a group or association does not make health coverage available *other than* to the employers/working owners, the employees and former employees of employers/working owners, and the family members or other beneficiaries of those employers/working owners, their employees, and former employees.
- **The proposed rule subjects AHPs to nondiscrimination rules that bar all group health plans from conditioning eligibility, benefits, or premiums on health status, which the Department argues would mitigate any risk of adverse selection in the individual and small group markets.**

NAR Actions

NAR is currently reviewing the proposed rule and will submit comments advocating for broader inclusion of self-employed/independent contractors, as there are some requirements that appear unnecessary or redundant.

After the public comment period ends on March 6, 2018, DOL will review the submitted comments and issue a final rule. It is anticipated that there will be legal challenges of the final rule. Likely opponents of the rule include governors, state insurance commissioners, and insurers. As a result, any legal challenges may delay the implementation of any proposed changes.

As NAR prepares its comment and assesses the potential impact for members, advocacy efforts will remain focused on reforms to the health insurance markets that self-employed individuals and small employers depend upon for coverage.

Additional Resources

[NAR’s Advocacy efforts on health care reform.](#)

[Background on insurance challenges for independent contractors.](#)