



**DEPARTMENT OF INSURANCE, FINANCIAL
INSTITUTIONS AND PROFESSIONAL REGISTRATION**

P.O. Box 690, Jefferson City, Mo. 65102-0690

INSURANCE BULLETIN 18-04

Health Coverage Issued through Association Health Plans

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The following Bulletin is issued by the Missouri Department of Insurance, Financial Institutions and Professional Registration ("Department") to inform and educate the reader on the specified issue. It does not have the force and effect of law, is not an evaluation of any specific facts or circumstances, shall not be considered a statement of general applicability and is not binding on the Department or an insurer. See §374.015, RSMo. (2016)

To: All insurers and entities issuing, providing, offering, or contracting to provide health benefit plans in the State of Missouri and all other interested stakeholders

From: Chlora Lindley-Myers, Director

Re: Association Health Plans

The Department is issuing this Bulletin to provide information to insurers and entities regarding Association Health Plans (AHPs). Readers with questions about specific facts or circumstances regarding an AHP are encouraged to contact the Department with those questions. Any requirements in Missouri insurance laws are in addition to any information identified in this Bulletin and readers should carefully review all Missouri insurance laws in their entirety to ensure compliance.

Missouri law has long recognized AHPs. Various provisions of Missouri insurance law address standards and criteria applicable to AHPs and the health coverage issued to Missourians through AHPs. As reference, see [Sections 376.421, 376.431, 376.432, 376.450, 376.452, 376.454, 379.930, and 379.938, RSMo.](#)

On June 21, 2018, the U.S. Department of Labor, Employee Benefits Security Administration, (US DOL), published a final rule relating to AHPs. [83 Fed. Reg. 28912](#). The US DOL's stated intent in promulgating the rule is to expand access to AHP coverage options. The final rule establishes new standards and criteria for the creation of AHPs and, by providing additional clarifications of existing criteria, the rule dramatically expands access to health coverage through AHPs. Through the final rule, employers from non-related industries and trades from the same geographic areas and working owners (e.g., sole proprietors with no employees) can now access health coverage through AHPs.

Since the issuance of this final rule, the Department has extensively reviewed and analyzed existing Missouri laws, the provisions of the final rule, and other sub regulatory guidance from the US DOL. The Department acknowledges the US DOL has repeatedly stated its intent to not preempt state law, both in the preamble of the final rule, as well as in other communications. However, several areas of direct conflict between Missouri law and the final rule were identified. Many of these conflicts are contained in the statutes identified above.

The Department resolved to harmonize any conflicts in a manner that would provide maximum benefit and flexibility to Missouri employers and honor the decades of consumer protections enacted into law by the Missouri General Assembly. Also paramount was the objective that any analysis and resulting implementation provide a level playing field amongst insurers and market segments that would not further endanger or erode an already fragile health insurance market in the State of Missouri.

Discussion

To aid readers of this Bulletin in understanding how the final rule issued by the US DOL and Missouri law will impact AHPs in the State of Missouri, this Bulletin includes an informational chart as an Appendix. This informational chart provides a summary of various regulatory provisions and identifies applicable laws and guidance for additional review. Readers are encouraged to consult legal counsel for interpretation of specific provisions of state or federal law in the context of a specific situation.

The Department's analysis included a review of the information summarized here, and in the attached chart is based on the final rule as issued by the US DOL and other sub-regulatory guidance issued by the US DOL and other federal agencies.

Market Segment Categorization of Association Health Plan Coverage.

One issue that has repeatedly arisen since the final rule was issued is how AHPs are categorized in terms of market segment and the applicable market rules.

The US DOL has referenced previously issued sub-regulatory guidance from the Centers for Medicare and Medicaid Services of the U.S. Department of Health and Human Services (CMS). Specifically, they have cited a CMS "Insurance Standards Bulletin", issued September 1, 2011, with the Subject "[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.](#)” There are two coverage arrangements discussed in the 2011 CMS Bulletin that lead to a determination of the appropriate market segment and market rules which should be applied.

The first arrangement is referred to as “employment-based association coverage” arrangement, also referred to as a Non-Plan MEWA. In these Non-Plan MEWAs, the individual employer members of an Association are the Plan Sponsors under ERISA. The Association is **not** the ERISA Plan Sponsor. For Non-Plan MEWAs, one must “look through” the Association to the individual employer member to determine the market segment and which market rules apply.

The other arrangement, referred to as an “Association of Employers” is also referred to as a Plan MEWA. This is an arrangement where the Association is the Plan Sponsor under ERISA, not the individual employer members. As such, “*the association coverage is considered a single group health plan*” and the number of employees employed by all participating member employers determines the market segment and which market rules apply.

Missouri law requires health carriers selling health benefit plans in the individual and small group markets to file rates with the Director. Section 376.465.4. With regard to small group coverage under Missouri law, readers are advised to pay particular attention to the provisions of the “*Small Employer Health Insurance Availability Act*” (sections 379.930-379.952, RSMo) with regard to rating rules. Specifically, sections 379.934, 379.936, and 379.940.1(2) (b) and .2 were amended in 2016 to limit their applicability to health benefit plans sold on or before March 23, 2010.

Pathway 1 and Pathway 2.

In their discussions of the Final Rule, the US DOL has referred to two different regulatory frameworks, or “pathways” by which Plan MEWAs or AHPs are created.

The first framework, known informally as “Pathway 1” is based on sub-regulatory guidance issued by the US DOL prior to the issuance of the final rule in June, 2018. Under Pathway 1, membership in an AHP is subject to a stricter “commonality of interest” test that requires participating employers to be engaged in a single industry or trade. Pathway 1’s requirements to qualify as an AHP are more stringent; however, the operational requirements are more relaxed.

Pathway 2 is the new regulatory framework outlined in the final rule which allows the creation of an AHP where the “commonality of interest” requirement for membership has been expanded to include geographic location. In addition, the new rule provides for the inclusion of working owners as employers participating in the AHP. AHPs formed under Pathway 2 are subject to nondiscrimination requirements outlined in the final rule.

Fully Insured and Self-Funded Options.

In the preamble to the final rule, the US DOL outlines the authority of states with regard to the regulation of AHPs:

“The Department agrees that the final rule does not modify or otherwise limit existing State authority as established under section 514 of ERISA. If an AHP is fully insured ERISA section 514(b)(6)(A)(i) provides that State laws that regulate the maintenance of specified contribution and reserve levels (and that enforce those standards) may apply, and State insurance laws are generally saved from preemption when applied to health insurance issuers that sell policies to AHPs and when applied to insurance policies that AHPs purchase to provide benefits. In addition, in the case of fully-insured AHPs, it is the view of the Department that ERISA section 514(b)(6) clearly enables States to subject AHPs to licensing registration, certification, financial reporting, examination, audit and any other requirement of State insurance law necessary to ensure compliance with the State insurance reserves, contributions and funding obligations. Furthermore, under this framework, if an AHP established pursuant to this final rule is not fully insured then, under section 514(b)(6)(A)(ii) of ERISA, any State law that regulates insurance may apply to the AHP to the extent that such State law is “not inconsistent” with ERISA.”

83 Fed. Reg. 28912, 28936.

In consideration of this statement the Department notes that its regulatory authority with regard to fully insured AHPs extends to regulation of the insurance company offering the health benefit plan to the association.

As to self-funded AHPs, the US DOL has reaffirmed in the final rule and in subsequent communications that states have broad authority under ERISA to regulate these arrangements, either as insurers or as alternative risk-bearing entities under a state licensure and solvency regime.

Accordingly, any entities wishing or seeking to form a self-funded AHP should carefully review the laws regarding these self-funded arrangements – [Sections 376.1000 to 376.1045 RSMo](#), and Specifically, subsection 1 of section 376.1005 provides “No multiple employer self-insured health plan may hold or obtain a certificate of authority unless it had not less than two hundred fifty covered employees during the preceding calendar quarter.” A plan may satisfy this requirement by providing to the Department with its Certificate of Authority application a list that includes the number of employees for each initial employer that has signed a letter of intent to participate in the plan. After the Certificate of Authority is issued, the plan will provide signed employer participation agreements from the initial employers to the Department at least ten (10) days prior to commencing providing coverage for those employers.

Appendix to Bulletin 18-04

The chart included with this bulletin is an informational chart of various provisions the Department has compiled to assist readers in ascertaining regulatory requirements applicable to the various AHP designs and funding mechanisms.

The chart is intended only to provide readers with a simplified summary of the Department's analysis. This chart directs readers to information and laws (e.g., the US DOL Final Rule, Missouri statute) that may be applicable to each subject or topic addressed. However, readers are cautioned that the chart is provided for informational purposes only to aid readers in reviewing the Bulletin.

As always, readers are strongly encouraged to consult with their own legal counsel to ultimately determine regulatory compliance with all applicable federal and state laws.

For further information

Any insurer or other entities wishing to organize or insure an AHP are encouraged to submit proposed form and rate filings to the Department. A submitted filing will enable the Department to review the individual facts and circumstances and address any specific organizational questions or concerns that interested parties may have.

For questions about this Bulletin, readers may contact Angela Nelson, Director, Market Regulation Division or Amy Hoyt, Health Counsel at 573-751-2430. For questions about self-funded MEWAs, readers may contact John Rehagen, Director, Company Regulation Division at 573-751-4126

APPENDIX A – This chart is provides as an appendix to Bulletin 18-04. It is provided only as a reference document. Readers should review Bulletin 18-04 in its entirety.

	Non-Plan MEWAs		Plan MEWAs		
	Self-funded Non-Plan MEWA	Fully Insured Non-Plan MEWA	Fully Insured Association-Sponsored Plan under Existing Regulatory Framework (aka Pathway 1)	Self-Funded Association-Sponsored Plan (aka Pathway 2)	Fully-Insured Association-Sponsored Plan (aka Pathway 2)
MEWA/Trust/Association must be licensed	Yes	N/A	N/A	Yes	N/A
Link	§376.1002			§376.1002	
Annual License fee	2% of Missouri claims paid	N/A	N/A	2% of Missouri claims paid	N/A
Link	§376.1005			§376.1005	
Premium Taxes	2% of direct premium	Yes	Yes	2% of direct premium	Yes
Link	§376.1037	§148.370	§148.370	§376.1037	§148.370
Reserve requirement	Yes	N/A	N/A	Yes	N/A
Link	§376.1017			§376.1017	

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	Self-funded Non-Plan MEWA	Fully Insured Non-Plan MEWA	Fully Insured Association-Sponsored Plan under Existing Framework (aka Pathway 1)	Self-Funded Association-Sponsored Plan (aka Pathway 2)	Fully-Insured Association-Sponsored Plan (aka Pathway 2)
Marketing Restrictions	Yes. Cannot be offered or advertised to the public generally. Agents/Brokers can't solicit.	No	No	Yes. Cannot be offered or advertised to the public generally. Agents/Brokers can't solicit.	No
Link	§376.1040, §376.1042			§376.1040, §376.1042	
Association must have 50 members and been in existence for 2 years	N/A	No	No	N/A	No
Link		83 Fed. Reg. 28912	83 Fed. Reg. 28912		83 Fed. Reg. 28912
Must provide Missouri mandated benefits and comply with mandated policy provisions	Yes	Yes	Yes	Yes	Yes
Link	§376.1035	§376.426	§376.426	§376.1035	§376.426
Rates Required to be Filed?	Yes	Yes	Yes	Yes	Yes
Link	§376.465	§376.465	§376.465	§376.465	§376.465

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	Self-funded Non-Plan MEWA	Fully Insured Non-Plan MEWA	Fully Insured Association-Sponsored Plan under Existing Framework (aka Pathway 1)	Self-Funded Association-Sponsored Plan (aka Pathway 2)	Fully-Insured Association-Sponsored Plan (aka Pathway 2)
Do Missouri's Small Group Rating Requirements Apply?	No. The small group rating law only applies to Grandfathered plans.	No. The small group rating law only applies to Grandfathered plans.	No. The small group rating law only applies to Grandfathered plans.	No. The small group rating law only applies to Grandfathered plans.	No. The small group rating law only applies to Grandfathered plans.
Link	§379.934	§379.934	§379.934	§379.934	§379.934
Rate Standards	Under this plan structure, there is a "look-through" to the employer member to ascertain market segment. Not subject to federal rating requirements because these plans are self-funded, subject to state oversight and they are not part of single risk pool. The Department is considering promulgating a rule to clarify standards applicable to these plans.	Under this structure, there is a "look-through" to the employer member to ascertain market segment. Subject to federal rating standards for small group and individual market, as applicable. Rates to be submitted for review to the DIFP under the provisions of Section 376.465.7 RSMo.	If 51+ employees, group would be rated as a single large group, observing the rating restrictions set out in the Final Rule. Rates to be submitted for review to the DIFP under the provisions of Section 376.465.5 RSMo.	If 51+ employees, group would be rated as a single large group, observing the rating restrictions set out in the Final Rule. Rates to be submitted for review to the DIFP under the provisions of Section 376.465.5 RSMo.	If 51+ employees, group would be rated as a single large group, observing the rating restrictions set out in the Final Rule. Rates to be submitted for review to the DIFP under the provisions of Section 376.465.5 RSMo.
Link	CMS 9/2011 Bulletin	CMS 9/2011 Bulletin §376.465.7 RSMo.	CMS 9/2011 Bulletin §376.465.5 RSMo.	CMS 9/2011 Bulletin §376.465.5 RSMo.	CMS 9/2011 Bulletin §376.465.5 RSMo.