



THE STATE
of **ALASKA**
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Department of Commerce, Community,
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DIVISION OF INSURANCE

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Bulletin B 19-02

TO: ALL INSURERS AND ENTITIES ISSUING, PROVIDING, OFFERING, OR
CONTRACTING TO PROVIDE HEALTH CARE INSURANCE PLANS IN THE STATE OF
ALASKA AND ALL OTHER INTERESTED PARTIES

RE: HEALTH CARE COVERAGE ISSUED THROUGH ASSOCIATION HEALTH PLANS

The Division 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 Division with those questions. Any information identified in this bulletin is in addition to any requirements in Alaska insurance statutes. Readers should carefully review all Alaska insurance statutes in their entirety to ensure compliance.

Alaska statutes have long recognized AHPs. Various provisions of Alaska insurance statutes address standards and criteria applicable to AHPs and the health coverage issued to Alaskans through AHPs. As reference, see [AS 21.54.060](#), [AS 21.54.500](#), [AS 21.56.140](#), [AS 21.85.030](#), [AS 21.85.040](#), [AS 21.85.500](#), and [AS 21.97.900](#).

On June 21, 2018, the U.S. Department of Labor, Employee Benefits Security Administration (US DOL), published a final rule relating to AHPs ([83 FR 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 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 Division has reviewed and analyzed existing Alaska statutes, the provisions of the final rule, and other sub-regulatory guidance from the US DOL. The Division 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 Alaska statutes and the final rule were identified. Many of these conflicts are contained in the statutes identified above.

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

Discussion

To aid readers of this bulletin in understanding how the final rule issued by the US DOL and Alaska statutes will impact AHPs in the State of Alaska, 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 Division's analysis included a review of the information summarized here. 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.

The first arrangement is referred to as "employment-based association coverage", 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 which market segment and 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 which market segment and rules apply.

Alaska regulation (3 AAC 31.235) requires health carriers selling health care insurance plans in the individual, small, and large group markets to file rates with the director. With regard to small group coverage under Alaska law, readers are advised to pay particular attention to the provisions of the "*Small Employer Health Insurance Availability Act*" (AS 21.56.140) with regard to rating rules.

Pathway 1 and Pathway 2

In their discussions of the final rule, the US DOL has referred to two alternative regulatory “pathways” by which Plan MEWAs or AHPs are created.

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. For an association wishing to operate as an association-sponsored plan under Pathway 1, the Division requires that the insurer submit their own certification or obtain an advisory opinion from the US DOL. The group must demonstrate that the association sufficiently meets the ERISA definition of “single employer”. The US DOL has previously issued an advisory opinion (for Bend, Oregon’s Chamber of Commerce) which may assist in an insurer’s analysis. For further information regarding this process, please review the Division’s 10/11/13 Association Guidance found on our website.

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 and industry. 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 FR 28912, 28936.

In consideration of this statement the Division notes that its regulatory authority with regard to fully insured AHPs extends to regulation of the insurance company offering a health care insurance 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 state licensure and solvency oversight.

Accordingly, any entities wishing or seeking to form a self-funded AHP should carefully review the laws regarding these self-funded arrangements – [AS 21.85](#). Specifically, subsection (a)(1) of AS 21.85.030 requires “employers participating in the arrangement are members of a bona fide association or group of two or more businesses in the same or a closely related trade, profession, or industry that provides support, services, or supplies primarily to that trade, profession, or industry.”

Both insured and self-funded AHPs must file the association for review in accordance with 3 AAC 31.210(m), and the Association Filing Checklist posted on the Division’s website.

Appendix to Bulletin 19-02

The chart included with this bulletin is an informational chart of various provisions the Division 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 Division’s analysis. This chart directs readers to information and laws (e.g., the US DOL Final Rule, Alaska statutes and regulations) that may be applicable to each subject or topic addressed. However, readers are cautioned that the chart is provided for informational purposes only.

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 Division. A submitted filing will enable the Division to review the individual facts and circumstances and address any specific organizational questions or concerns that interested parties may have.

If you have any questions relating to this bulletin, please contact Sarah Bailey, Life and Health Section Supervisor, at sarah.bailey@alaska.gov or (907) 465-4608. For questions about self-funded MEWAs, readers may contact David Phifer, Chief Financial Examiner, at 907-269-7907.

Dated this 31st day of January, 2019, in Juneau, Alaska.



Lori Wing-Heier
Director

APPENDIX: This chart is provided as an appendix to Bulletin 19-02. It is provided only as a reference document. Readers should review Bulletin 19-02 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 approved	Yes 3 AAC 31.210(m)	Yes 3 AAC 31.210(m)	Yes 3 AAC 31.210(m)	Yes 3 AAC 31.210(m)	Yes 3 AAC 31.210(m)
Annual License Fee	\$2,000 3 AAC 31.050(a)(12)	N/A	N/A	\$2,000 3 AAC 31.050(a)(12)	N/A
Premium Taxes	2.7% of direct premium AS 21.09.210(b)(1)	2.7% of direct premium AS 21.09.210(b)(1)	2.7% of direct premium AS 21.09.210(b)(1)	2.7% of direct premium AS 21.09.210(b)(1)	2.7% of direct premium AS 21.09.210(b)(1)
Reserve Requirement	Yes AS 21.85.050	N/A	N/A	Yes AS 21.85.050	N/A

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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 permitted to solicit. AS 21.85.030(a)(7)	No	No	Yes. Cannot be offered or advertised to the public generally. Agents/Brokers can't solicit. AS 21.85.030(a)(7)	No
Association/ arrangement must have 75 employees	Yes AS 21.85.030(a)(6)	No 83 FR 28912	No 83 FR 28912	Yes AS 21.85.030(a)(6)	No 83 FR 28912
Must provide Alaska mandated benefits and comply with mandated policy provisions	Yes AS 21.85.100(9)	Yes AS 21.42.599	Yes AS 21.42.599	Yes AS 21.85.100(9)	Yes AS 21.42.599
Rates Required to be Filed?	Yes AS 21.85.070	Yes 3 AAC 31.235	Yes 3 AAC 31.235	Yes AS 21.85.070	Yes 3 AAC 31.235

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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 Alaska's Small Group Rating Requirements Apply?	No. The small group rating law only applies to insured plans. AS 21.56.250(19)	Yes. AS 21.56.250(19)	Yes. AS 21.56.250(19)	No. The small group rating law only applies to insured plans. AS 21.56.250(19)	Yes. AS 21.56.250(19)
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. CMS 9/2011 Bulletin	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. CMS 9/2011 Bulletin	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 Division under the provisions of AS 21.54.015 and 3 AAC 31.235. CMS 9/2011 Bulletin 3 AAC 31.235	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 Division under the provisions of AS 21.85.070. AS 21.85.070	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 Division under the provisions of AS 21.85.070. CMS 9/2011 Bulletin 3 AAC 31.235