

Proposed AHP Regulations Issued on Dec. 20, 2023

Brief Summary and Thoughts on Regs

Rescind the ENTIRE 2018 Final Regulations

- In short, the proposed regs rescind the 2018 final regulations in their ENTIRETY.
 - I emphasize "entirety" because there was question whether the DOL would only rescind PORTIONS of the 2018 final regs.
 - BTW, I think it is "cleaner" for them to rescind the entire 2018 regs instead of keeping portions of it. That could lead to some confusion.
 - Also, rescinding the ENTIRE rule means that the prohibition against varying premiums by employer member for non-industry-based and self-employed individual AHPs is also GONE. We never liked that portion of the 2018 rule to begin with, and we feared that it could be extended to industry-based AHPs (but see below for requests for comments).

Industry-Based Groups

- The DOL said that it considered - but rejected - codifying the rules for industry-based AHPs in these proposed regs.
 - BUT, the DOL invited the public to submit comments on whether the DOL should issue a new proposed reg that codifies the rules for industry-based AHPs.
 - Importantly, the DOL also asked for public comments on whether the DOL should "create alternative criteria" for industry-based AHPs in any newly proposed reg.
 - The DOL hinted that this "alternative criteria" could prohibit industry-based AHPs from varying premiums by employer member.

Non-Industry-Based Groups

- The proposed regs also confirm that non-industry-based groups CANNOT establish a FULLY-INSURED large group AHP.
 - The regs do this by rejecting the 2018 rule change, and explaining why non-industry-based groups fail to meet the requirements to be considered a "bona fide group or association of employers."
 - Please note, even though a non-industry-based group CANNOT be considered a "bona fide group," this does NOT mean that a non-industry-based group is prohibited from establishing a SELF-INSURED AHP/MEWA as a "NON-bona fide group."
 - In other words, non-industry-based groups are still PERMITTED to establish SELF-INSURED AHPs/MEWAs as a "NON-bona fide group."

Self-Employed Individuals Without Employees

- The proposed regs also confirm that self-employed individuals without employees CANNOT participate in an AHP.
 - The regs do this by rejecting the 2018 rule change, and explaining why self-employed individuals without employees CANNOT be considered an "employer" and an "employee" under ERISA, thereby preventing them from participating in an AHP.
 - Note, I interpret this to mean that self-employed individuals without employees CANNOT participate in BOTH a FULLY-INSURED or SELF-INSURED AHP.

Business Purpose Standard

- The proposed regs also rescind what's called the "business purpose standard."
 - This is essentially of no consequence to us because we never liked this rule to begin with. For example, we rejected this rule - and we follow the pre-2018 rule requirement - in our AHP 2.0 bill.

My Thoughts

- Consistent with what we were hoping for, these proposed regulations do NOT set forth any NEW policy for AHPs.
- Instead, these proposed regs (1) rescind the 2018 final regulations and (2) ask the public for comments on what type of rules the DOL should consider issuing in future rule-making.
- Interestingly, the DOL indicates that the public comments they receive on these proposed regs will be considered "as part of a comprehensive reevaluation" of the rules relating to AHPs.
- To me, that signals that these proposed regs are just the shot-across-the-bow, and we could very well see a comprehensive set of new rules - including NEW policy - for AHPs some time in the future.
- The current Administration may run out of time compiling and then proposing a comprehensive set of new rules - including NEW policy - for AHPs. BUT, if there is another Democratic Administration after the Nov. 2024 elections, I believe that there is no doubt that we will see a comprehensive set of rules come out.