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Association Health Plans and Health Care Reform: A Trap for the Unwary

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Trade and professional associations that sponsor health plans for their members, and organizations participating in such plans, need to be aware of an important issue arising under the Patient Protection and Affordable Care Act ("PPACA"). Specifically, depending on how the association health plan ("AHP") is structured, insurance coverage might need to comply with the "small group market" provisions of PPACA, even though the AHP covers hundreds, if not thousands, of participants. The "small group market" provisions of PPACA are onerous and would affect the economics of, and possibly the viability of, AHPs beginning on January 1, 2014. The good news is that with proper structuring before January 1, 2014, an AHP should be able to avoid the "small group market" requirements and be treated as a "large group market" plan under PPACA.

Small Group and Large Group Markets

PPACA imposes different requirements on "small group market" and "large group market" insurance policies. Currently, in most states, the "small group market" includes plans covering 50 or fewer employees, and the "large group market" includes plans covering more than 50 employees. Beginning in 2016, PPACA will provide (as a matter of federal law) that the "small group market" includes plans covering 100 or fewer full-time equivalent employees (FTEs), and the "large group market" includes plans covering more than 100 FTEs. Given the nature of the requirements imposed on "small group market" plans, the insurance operations of an AHP would be significantly and adversely affected if it were viewed as covering "small group market" plans. For example, insurance for "small group market" plans must provide "essential health benefits," impose only limited cost sharing, and provide minimum actuarial value. In addition, insurers are permitted to vary premium rates for a particular type of insurance based only on coverage category (e.g., self-only, family, etc.), geographic area, age (using wide bands), and tobacco usage.

AHP – A Single Employee Benefit Plan, or a Funding Vehicle for Multiple Employee Benefit Plans?

For an AHP, the key issue is whether it is viewed as a single benefit plan, or alternatively, whether the AHP is viewed as a mere funding vehicle for multiple participating employer benefit plans. If the AHP is viewed as a single benefit plan, the number of participants will be determined collectively by reference to all participating employers, and the AHP would typically avoid the "small group market" provisions of PPACA. By contrast, if the AHP is viewed as a mere funding vehicle for multiple participating employer benefit plans, the number of participants will be determined separately by reference to each employer's plan, and some, if not most, of the covered employers are likely to be subject to the "small group market" provisions of PPACA.

Over the years, the U.S. Department of Labor ("DOL") has issued numerous rulings addressing whether a health plan covering multiple, unrelated employers (such as an AHP) is a single benefit plan, or a mere funding vehicle for multiple participating employer benefit plans. DOL looks at the details of the health insurance arrangement, including whether the group of covered employers is a *bona fide* group, and has adequate control over the arrangement. The DOL standards involve subtleties that need to be carefully considered.

In relatively short order, trade and professional associations should review the structure of their AHPs in light of DOL guidance, and, if necessary, make structural changes to achieve characterization as a single benefit plan (exempt from the "small group market" provisions of PPACA). Employers participating in AHPs also should ascertain whether the plans in which they participate are likely to need to deal with this issue.

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