

DEEP DIVE: DOL APPEALS FEDERAL COURT'S ASSOCIATION HEALTH PLAN RULING AND ISSUES INTERIM GUIDANCE

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As we predicted in our last Deep Dive, the Department of Labor (DOL) has appealed the District Court for the District of Columbia's ruling in *State of New York, et al. v. United States Department of Labor, et al.* which vacated key portions of the DOL's association health plan regulation (AHP Rule). The DOL filed its Notice of Appeal with the federal district court (D.D.C.) on April 26.

In response to the Court's ruling (and before filing its appeal) the DOL had published a Q&A-style discussion of the ruling's impact. After filing its appeal, the DOL published an official statement (DOL Statement) outlining interim guidance for previously-formed AHPs and employers who began participating in an AHP in reliance on the AHP Rule. The DOL Statement clarifies that these employers and AHPs may continue their coverage for the time being, yet leaves key questions unanswered. In welcome news for AHPs that sought to form under the AHP Rule, the DOL confirms its commitment to "taking all appropriate action within its legal authority to minimize undue consequences on employees and their families." As support, the DOL Statement reassures that:

- Employers participating in insured AHPs formed under the AHP Rule may continue their coverage through the later of the end of the current plan year or contract term and that the Department of Health and Human Services (HHS) confirmed employers have an independent right to continue coverage through that date under the guaranteed availability provisions of the Public Health Service Act put in place by the Patient Protection and Affordable Care Act (PPACA). At least for now, then, the law which the Court found the DOL was trying to avoid with its AHP Rule will serve as the backstop for employers in insured AHPs formed under the AHP Rule.
- The DOL will not pursue enforcement actions against parties for actions taken before the Court's decision in good faith reliance on the validity of the AHP Rule, provided the parties meet their responsibilities to association members and the AHP participants and beneficiaries to pay promised benefits.

- The DOL will not take action against existing AHPs for continuing to provide benefits to members who enrolled in good faith reliance on the validity of the AHP Rule before the Court's order through the remainder of the plan year or contract year in force at the time of the Court's order.
- HHS will not pursue enforcement against nonfederal governmental plans or health insurance issuers for potential violations of title XXVII of the Public Health Service Act (i.e., the individual and group market reforms of the PPACA), nor will it consider States to not be enforcing the applicable requirements where a state adopts a similar approach, through the remainder of the applicable plan year or contract term in force at the time of the Court's decision.

Despite these reassurances, however, important questions are not addressed in the DOL Statement, such as:

- Does the interim guidance apply to AHPs for actions taken after the Court's decision due to confusion surrounding the status of the AHP Rule and for which the interim guidance would otherwise apply?
- Does the interim guidance permit AHPs formed in good faith reliance on the AHP Rule to continue to enroll or solicit members? It appears that it may not, and that AHPs may have to freeze membership following the Court's decision.
- Will the DOL request a stay of the Court's order during the pendency of the appeal? The interim guidance suggests the DOL may not, as it provides for maintaining the status quo only until the end of the current plan year or contract term, at which time the rules that applied prior to the AHP Rule, such as the "look-through" for application of the PPACA's market reforms, will apply.
- Other than non-enforcement, what forms of relief will be available under the DOL's pledge to work with affected parties, HHS, and the States to "mitigate any disruptions or hardships that result from confusion regarding the status of the AHP Rule and legal compliance requirements"?

We continue monitoring and advising clients on this ongoing litigation and guidance from the DOL. In the meantime, please contact one of the authors or your trusted BCLP attorney if you need assistance with your association health plan or other employee benefits or insurance issues.

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