LOUISIANA DEPARTMENT OF INSURANCE
JAMES J. DONELON
COMMISSIONER

ADVISORY LETTER 2018-03

TO: ALL HEALTH INSURANCE ISSUERS, HEALTH MAINTENANCE ORGANIZATIONS, AND HEALTH & ACCIDENT PRODUCERS

FROM: JAMES J. DONELON, COMMISSIONER OF INSURANCE

RE: STATE & FEDERAL REGULATION OF ASSOCIATION HEALTH PLANS; U.S. DEPARTMENT OF LABOR ASSOCIATION HEALTH PLAN FINAL RULE

DATE: AUGUST 30, 2018

Under existing federal law and regulations, fully-insured health insurance coverage offered or provided through an employer trade association, chamber of commerce, or similar organization, to individuals and small employers is generally regulated under the same federal standards that apply to insurance coverage sold by health insurers directly to these individuals and small employers, unless the coverage sponsored by the group or association constitutes a single ERISA[1]-covered plan, which is rare. Therefore, ordinarily, the size of each individual employer participating in the group or association determines whether that employer's coverage is subject to the small group or large group market rules. Additionally, under existing rules and guidance, self-employed individuals, such as sole proprietors or working owners, are excluded from entering the group market unless they have at least one additional common-law employee who is not also an owner or spouse or dependent of the owner.

On October 12, 2017, President Donald Trump issued Executive Order 13813, "Promoting Healthcare Choice and Competition Across the United States," which directed the Secretary of Labor to consider issuing regulations or revising guidance, consistent with law, that would expand access to more affordable health coverage by permitting more employers to form association health plans ("AHPs"). The Executive Order specifically directed the Secretary of Labor to consider expanding the conditions that satisfy the commonality of interest requirements under existing Department of Labor

[1] Employee Retirement Income Security Act of 1974, Public Law 93-406, 88 Stat. 829, 29 U.S.C. 1001 *et seq.*

advisory opinions interpreting the definition of an "employer" under section 3(5) of ERISA and to permit the formation of AHPs on the basis of common geography or industry. It is important to note that all AHPs, of any kind whatever, constitute multiple employer welfare arrangements ("MEWAs"), and are subject to regulation by states under ERISA section 514(b)(6).[2]

On June 21, 2018, the Department of Labor published a final rule in the Federal Register entitled "Definition of Employer Under Section 3(5) of ERISA-Association Health Plans," ("final rule").[3] The final rule permits the expansion of AHPs by altering the commonality of interest test and permits the inclusion of working owners as employer members of AHPs formed under the final rule. The final rule makes clear that the aforementioned changes regarding AHPs will exist concurrently with existing rules, regulations, and guidance. In other words, the opportunities created by the final rule do not replace or supplant the existing rules regarding MEWAs or AHPs not affected by the final rule. The final rule merely opens a new pathway while maintaining the existing pathways for MEWAs without modification. The purpose of Advisory Letter 2018-03 is to advise all issuers and producers of the interplay between existing federal regulations, the provisions of the final rule, and existing state law regarding MEWAs. Advisory Letter 2018-03 cannot constitute a complete summary of a final rule that runs nearly 200 pages in its original published form, and any persons or entities seeking to utilize existing statutes, rules, or regulations, or the recently published final rule, are strongly encouraged to engage in a thorough review of all controlling legal authority regarding MEWAs. Advisory Letter 2018- 03 outlines the options that exist for the formation of AHPs under both state and federal law following the promulgation of the final rule.

I. Types of MEWAs Following the Final Rule

It is important to note that the highest degree of preemption of state law by ERISA occurs primarily when a self-insured health plan is established and maintained by a single employer and/or an employee association[4]. Ordinarily, when more than one employer has formed a benefit plan, a MEWA is born. The preemption clause of ERISA, enacted

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[2] 29 U.S.C. 1144(b)(6).

[3] Vol. 83, No. 120 of the Federal Register, beginning at 28912.

[4] A plan operated by two or more employers under common ownership or control may also be considered a single-employer plan for purposes of ERISA. The term common control is defined by the DOL in a manner that is consistent with section 414(c) of the Internal Revenue Code. With two extremely narrow exceptions, all other benefit plans involving more than one employer constitute MEWAs.

by Congress in 1983 as the Erlenborn-Burton Amendment directly authorized the regulation of MEWAs by state insurance laws. Louisiana, as have many states, has enacted laws regulating MEWAs in order to protect the public from abusive and fraudulent management activities. As stated earlier, all AHPs are MEWAs, because the definition of MEWA in ERISA is broad—it includes both self-insured and fully-insured MEWAs, whether formed by employers or not[5]. Section I of Advisory Letter 2018-03 broadly identifies the different types of MEWAs based upon how they are regulated. Essentially, there are seven options under state and federal law for any entity that seeks to establish a MEWA, although several of them are subject to the same laws, rules, and regulations. Following the Erlenborn- Burton Amendment in 1983, the regulation of MEWAs in this state is carried out primarily by the Louisiana Department of Insurance ("LDI"), although the LDI has a close working relationship and formal legal cooperative agreement with the Department of Labor in order to protect the public from abusive and fraudulent practices by MEWAs.

The first three types of MEWAs are entirely unaffected by the final rule published by the Department of Labor. They are authorized in Louisiana law and by existing rules and guidance from the Department of Labor.

A. Existing Types of MEWAs Prior to AHP Final Rule

The Louisiana Insurance Code, consistent with federal law both before and after the promulgation of the final rule by the Department of Labor, authorizes three types of MEWAs, whether fully-insured or self-insured. The Louisiana Insurance Code does not actually utilize the term MEWA: rather, it uses the term "group self-insurer," which is synonymous with MEWA. The Insurance Code Subpart governing MEWAs begins at La. R.S. 22:451. The extent to which MEWAs are regulated is directly related to whether the MEWA is self-insured or fully-insured. Fully-insured MEWAs are subject to less regulation because the LDI exercises complete regulatory authority over all products issued by issuers, and because the products issued to fully-insured MEWAs are covered by the Louisiana Life and Health Insurance Guaranty Association ("LLHIGA")[6]. It is important to remember that, unlike the AHPs authorized by the final rule, the existing types of MEWAs may not consider sole proprietors to be an employer group for the purposes of ERISA section 3(5).

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[5] The definition of MEWA in ERISA Section (3)(40) only requires that employees of two or more employers be provided benefits, as defined, in order to constitute a MEWA. The definition of MEWA, furthermore, does not require that the arrangement be established or maintained by those employers. In such situations, a MEWA exists, but it does not qualify as an ERISA-covered plan, which places the arrangement in a precarious position—in a sense, those MEWAs exist but are not permissible by state law. If a MEWA provides benefits to employees of employers that satisfy the requirements detailed in I(A) or I(B) of Advisory Letter 2018-03, then the MEWA is an ERISA-covered plan, subject to both state and federal law.

[6] La. R.S. 22:2081 et seq.; Regulation 40, codified in Title 37 of the Louisiana Administrative Code, Part XIII, Chapter 9.

New and already-established MEWAs will be governed by a static set of laws and regulations. MEWAs cannot simultaneously make use of novel provisions of the AHP final rule and existing rules and statutes at the whim of each MEWA. For example, existing self-insured MEWAs may rate employer members by each employer group. Under the AHP final rule, self-insured AHPs may not rate by employer group (but can engage in limited rating across employer groups under the final rule). An existing MEWA could not "mix and match" the rules and laws governing MEWAs before the final rule with special rules created for the limited subset of AHPs under the final rule.

The three types of already-authorized MEWAs are:

Self-Insured MEWAs

1. Group Self-Insurer (often simply called a "MEWA")

This is an arrangement of multiple employers by which a health plan has been established and maintained. The multiple employers form the MEWA through an association, as authorized in La. R.S. 22:451 et seq. It has been suggested that the language of the Insurance Code permits the formation of a self-insured MEWA by two or more employers without the common interest or nexus that exists with *bona fide* associations; such an arrangement between two or more employers is no more an ERISA-covered plan than is any other insurance policy sold to an employee benefit plan. In such cases, all the employer groups have done is possibly create an unauthorized insurer, or several separate and distinct single-employer plans as the case may be, as explained in footnote 5 herein.

2. Association-Sponsored Self-Insured Trust

This type of MEWA is formed by a trade or professional association, which through a trust instrument, establishes a health plan. The associations that can establish this specific type of MEWA are extremely limited by the terms of the statute, La. R.S. 22:458.1. This special, limited statute for association-sponsored self-insured trusts has lower capital requirements but requires solidary liability on the part of the employer members.

Fully-Insured MEWAs

1. Association Health Plan

Some associations have long had association health plans that are sponsored by the association, but offer members fully-insured products from issuers. As stated earlier, the size of the employer group in a fully-insured association determines whether the policy issued to individual employer groups is governed by small group or large group market rules. If sole proprietors acquire a policy through a fully-insured association health plan, the policy is governed by individual market rules. These fully-insured AHPs are authorized in La. R.S. 22:1000.

B. New Types of MEWAs Under the AHP Final Rule

In addition to the types of MEWAs that may exist prior to the promulgation of the AHP final rule, the AHP final rule essentially creates another four types of MEWAs, two of them self-insured and two of them fully-insured. The basis for the creation of these new types of MEWAs is the aforementioned final rule; however, the final rule does not supplant state regulation of MEWAs. It creates a new avenue for certain types of AHPs, and preempts only state laws that directly conflict with the final rule. As such, almost the entirety of the laws governing MEWAs in the Louisiana Insurance Code are applicable to the MEWAs created by the final rule, particularly in the case of self-insured AHPs under the final rule. The primary difference between AHPs authorized by the final rule and MEWAs prior to the final rule is that under the new rule, AHPs can offer coverage to sole proprietors and consider those sole proprietors to be employer groups, and secondly, AHPs need not meet the existing *bona fide* association or group requirements. There are other distinct differences between MEWAs under existing law and MEWAs authorized by the final rule, which are generally recounted later in Part IV of Advisory Letter 2018-03.

Self-Insured AHPs Under the Final Rule

1. Association Health Plan: Same Trade, Industry, Line of Business, or Profession

2. Association Health Plan: Geographic (each employer's principal place of business is in the same region that generally does not exceed the boundaries of a single state, except in the case of metropolitan areas).

Fully-Insured AHPs under the Final Rule

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The specific requirements and limitations on the AHPs established in the final rule can be found in 29 C.F.R. 2510.

II. Preemption of State Laws Regarding AHPs formed under the Final Rule

Article VI, Clause 2 of the United States Constitution states that the U.S. Constitution and laws enacted pursuant thereto are the supreme law of the land, all others in conflict notwithstanding. Article VI, Clause 2 of the Constitution is often referred to as the "Supremacy Clause." It is not necessary to expound upon the various types of preemption recognized by jurisprudence, other than that which is applicable in the current circumstances. Although ERISA section 514 contains a preemption clause, it also has a "savings clause" that saves from preemption state laws regulating the business of insurance. In that same section, however, there is a "deemer clause" that prohibits states from deeming non-insurance activities to be the business of insurance in order to exercise authority that is otherwise preempted by the preemption clause. With respect to MEWAs, however, the 1983 Erlenborn-Burton Amendment specifically exempts state insurance laws from preemption by ERISA for self-insured MEWAs. Generally speaking, for fully-insured MEWAs, state insurance laws were already applicable because state insurance regulators can regulate the issuers as well as the insurance policies issued to fully-insured MEWAs. The end result of the language of ERISA's preemption clause and subsequent jurisprudence is that, with respect to MEWAs, which again includes AHPs, only those state laws which are directly in conflict with ERISA (including regulations promulgated thereunder) are preempted to the extent that those state laws stand as an obstacle to the accomplishment of the full purposes and objectives of federal law.

With that in mind, the AHP final rule seeks to broaden the scope of MEWAs, using associations as a vehicle, by allowing multiple employers, including sole proprietors, to band together and form single, large groups, whether fully-insured or self-insured. The only state laws and regulations regarding MEWAs that are preempted by the final rule are those which directly inhibit the accomplishment of that objective of the final rule. As is stated numerous times in the final rule by the Department of Labor, state authority over MEWAs is preserved otherwise. Again, it is important to note that any AHP that intends to use the final rule as a vehicle to provide health insurance to employer members must elect to utilize the final rule in a manner prescribed by the LDI, which will be supplemented by state MEWA laws and regulations which are not preempted. Part IV of Advisory Letter 2018-03 contains an illustrative list of rules and requirements for all MEWAs, whether AHPs or not, and which kind of MEWAs are governed by each rule. The list in Part IV is not the full extent of laws or requirements applicable to MEWAs.

III. Licensure of All Self-Insured MEWAs Prior to Operation Required; Fully-Insured MEWA Filing Requirements; Enforcement by the LDI

No self-insured MEWA, whether formed under existing laws or pursuant to the final rule, may operate in this state without a certificate of authority issued by the commissioner. There is a lengthy, formal process through which applicants may apply for and obtain a certificate of authority. Regardless of minimum capital standards required by statute, the LDI will not issue a certificate of authority to a self-insured MEWA if the commissioner has determined that the applicant is not financially sound and responsible. Following the effective date of the final rule, any prospective MEWA that intends to utilize the final rule to create and maintain an arrangement must expressly notify the LDI during the application process that it is doing so. If an applicant does not give notice of utilization of the final rule, the applicant will be presumed not to be doing so.

Fully-insured MEWAs are not required to obtain certificates of authority. Fully-insured MEWAs are primarily regulated by the LDI through the regulation of the issuer that issues the contract of insurance to the MEWA. However, Regulation 78, codified in Title 37 of the Louisiana Administrative Code, Part XIII, Chapter 101, requires that for fully-insured policies issued to an association, the issuer must file, as part of a complete filing for a health insurance contract, the association's constitution, by-laws, membership application, membership agreement, and brochure of membership benefits for review to determine that the association meets the requirements of the Insurance Code. Existing fully-insured MEWAs that intend to utilize the provisions of the final rule are directed to notify the Licensing Division of the LDI in writing of their intent to do so.

With the few limitations previously described herein, the LDI has the same regulatory authority over MEWAs that it had prior to the promulgation of the final rule. As the states are still the primary enforcers of federal law regarding employee welfare benefit plans that are not preempted, the LDI has the authority to ensure that AHPs utilizing the final rule are in full compliance with the provisions of the final rule that are applicable only to those AHPs utilizing the final rule. Therefore, such AHPs are advised to maintain the records necessary to demonstrate that the AHP is in strict compliance with the final rule. For example, the AHP is responsible for ensuring that a working owner or sole proprietor meets the eligibility requirements under 29 C.F.R. 2510.3-3.

IV. Laws & Regulations and Applicability to the Types of MEWAs

Part IV of Advisory Letter 2018-03 contains a listing of some of the laws and regulations applicable to each type of MEWA—it does not contain the entirety of requirements applicable to MEWAs.

	MEWA (self-insured trust) [R.S. 22:451 et seq.]	MEWA Limited Association (association-sponsored self-insured trust) [R.S.22:458.1]	MEWA Association (fully-insured) [R.S. 22:1000]	AHP MEWA (self-insured trust) (industry, profession, etc., or geography) [created by final rule]	AHP MEWA (fully- insured) (industry, profession, etc., or geography) [created by final rule]
Must obtain certificate of authority? [R.S. 22:253]	Yes.	Yes.	No.	Yes.	No.
Fidelity bond required? [R.S. 22:453]	Yes.	Yes.	No.	Yes.	No.
Applicant must be determined to be financially sound and responsible? [R.S. 22:453]	Yes.	Yes.	No.	Yes.	No.
Insolvency deposit required?	Yes. Greater of $100,000 or 30% of reserve liabilities. [R.S.22:454]	Yes. Greater of $100,000 or 30% of reserve liabilities. [R.S.22:458.1]	No.	Yes.	No.
Administrator must be licensed as a producer? [R.S.22:455]	Yes.	Yes.	No.	Yes.	No.
Subject to the Network Adequacy Act? [R.S.22:1019.1 et seq.]	Yes.	Yes.	Yes. Issuers issuing policies are subject to the Act.	Yes.	Yes. Issuers issuing policies are subject to the Act.
If plan effected or maintained by trust, maintain unimpaired assets—capital requirements? [R.S. 22:458]	Yes. Must maintain minimum of $1,000,000 in unimpaired assets. [R.S. 22:458]	Yes. If plan effected or maintained by trust, must maintain unimpaired assets of at least $100,000 in the first year. [R.S. 22:458.1]	No.	Yes.	No.
Requires at least 5 or more businesses in same trade, or industry, including closely related businesses that provide support, services, or supplies primarily to that trade or industry? [R.S. 22:458]	Yes.	No.	No.	No.	No.

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Must be comprised of at least two employer members and have at least 100 employee applications for coverage for effectuation of arrangement? [R.S. 22:458.1]	No.	Yes.	No.	No.	No.
Association responsible for trust's liabilities, with provisions for solidary liability for employer members of the trust? [R.S.22:458.1]	No.	Yes. In addition, in the event of insolvency, the commissioner may levy an assessment on all employer members.	No.	No.	No.
Board of trustees must be elected by employers participating in the plan? [R.S. 22:458]	Yes.	No.	No.	Yes.	No.
Trustees required to be bonded?	Yes. Trustee bonds for a minimum of $150,000 required. [R.S. 22:458]	Yes. Trustee bonds for a minimum of $100,000 required. [R.S. 22:458.1]	NA	Yes. Trustee bonds for a minimum of $150,000 required. [R.S. 22:458]	NA
Stop-loss coverage required to be maintained (both aggregate and specific stop-loss)? [R.S. 22:459]	Yes.	Yes.	No.	Yes.	No.
Annual audit required? [R.S.22:461]	Yes.	Yes.	No.	Yes.	No.
Subject to examination by the commissioner? [R.S. 22:462]	Yes. At least annually for first 3 years of operation, and once thereafter every 5 years, or at commissioner's discretion. [R.S.22:462]	Yes. At least annually for first 3 years of operation, and once thereafter every 5 years, or at commissioner's discretion. [R.5.22:462]	No.	Yes. At least annually for first 3 years of operation, and once thereafter every 5 years, or at commissioner's discretion. [R.5.22:462]	No.
Annual actuarial opinion required? [R.S. 22:463]	Yes.	Yes.	No.	Yes.	No.

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Subject to administrative supervision by the commissioner (Subpart H of Title 22) and Chapter 9 of Title 22: Rehabilitation, Liquidation, and Conservation?	Yes.	Yes.	No.	Yes.	No.
Must be a professional trade association in existence since 1950, among other requirements? [R.S. 22:458.1]	No.	Yes.	No.	No.	No.
Association must have existed for at least 5 years and been formed for purposes other than acquiring health insurance? [R.S.22:1000; 22:1061(5)(b)]	No.	No.	Yes.	No.	No.
Subject to individual, small group, large group market rating rules depending upon the size of each employer member?	No.	No.	Yes. *See* Insurance Standards Bulletin Series bulletin on association coverage issued on 9/1/2011 by the Centers for Medicare and Medicaid Services	No.	No.
MEWA prohibited from conditioning employer membership and enrollee coverage upon health-status related factor?	Yes. [29 C.F.R. 2590.702(b)]	Yes.	Yes. [R.S. 22:1061]	Yes.	Yes. [R.S. 22:1061; 29 C.F.R. 2590.702(b)]
MEWA permitted to rate individual employer groups by experience?	Yes.	Yes.	No. Issuers must follow the Insurance Code's Subpart on Rates [R.S. 22:1091 et seq.] and the Market Reforms of Title I of the Affordable Care Act	No. [29 C.F.R. 2590.7029(c)]	No. [29 C.F.R. 2590.7029(c)]

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MEWA permitted to rate similarly situated individuals differently, not within employer groups, but across all employer groups?	Yes.	Yes.	No. Issuers must follow the Insurance Code's Subpart on Rates [R.S. 22:1091 *et seq.*] and the Market Reforms of Title I of the Affordable Care Act.	Yes. [29C.F.R. 2590.702(c)]	Yes. [29C.F.R. 2590.702(c)]
Association must have some purpose in addition to the provision of health insurance?	No.	Yes. [R.S. 22:458.1]	Yes. [R.S.22:1061(5)(b)]	Yes. (29C.F.R. 2510.3-5]	Yes. [29C.F.R. 2510.3-5]
Subject to the final rule's special provisions on commonality of interest, classification of sole proprietors as employers, and association structure requirements? [29C.F.R. 2510.3]	No.	No.	No.	Yes.	Yes.

V. Establishment Dates Under the Final Rule

The final rule issued by the Department of Labor has specific dates upon which AHPs may begin utilizing the final rule. The dates depend upon the status of each AHP that wishes to utilize the rule:

Fully-insured AHPs (new or existing):	September 1, 2018
Self-insured AHPs in existence on 6/21/18:	January 1, 2019
All other self-insured AHPs (new or existing):	April 1, 2019

Regardless of the dates upon which AHPs may first commence operating under the final rule, no AHP of any kind, whether self-insured or fully-insured, may commence operating under the final rule without satisfying the applicable licensure requirements (self-insured AHPs) or filing requirements (fully-insured). The final rule prohibits issuers from owning or controlling AHPs, and the LDI will strictly enforce that provision. However, as long as the AHP maintains control over the plan of benefits, an issuer providing assistance in the establishment of a plan or association will not be considered as owning or maintaining control over the AHP.

Please be governed accordingly.

Baton Rouge, Louisiana, this 30th day of August 2018.

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COMMISSIONER OF INSURANCE