How the Expansion of Association Health Plans Undermines the Safeguards of the ACA

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On October 12, 2017, President Donald Trump issued an executive order entitled "Promoting Healthcare Choice and Competition Across the United States." This order states that the Administration will focus on changing, among others areas, the regulations surrounding association health plans (AHPs). This blog post explores the expansion of association health plans and its consequences.

Department of Labor's Proposed New Rule

The executive order specifically called upon the Department of Labor to allow more employers to participate in AHPs. As a result, on January 4, 2018, the Department of Labor issued a proposed rule that expands its interpretation of "employer" under the Employment Retirement Income Security Act (ERISA). Under the current interpretation, employer associations must have a common interest *besides providing benefits* in order to qualify as a large group plan under ERISA. Associations that do not meet these specific requirements are considered individual plans and therefore subject to Affordable Care Act (ACA) and state regulation. The proposed rule will soften these requirements by allowing employers to form associations and be considered a single large group plan for the purpose of providing benefits.

It is important to note that large group plans (unlike small and individual plans) with over 50 enrollees are exempt from many significant ACA provisions such as the requirement to provide essential health benefits and important health insurance premium requirements. (1) Thus, a new rule making it easier to become a large group plan will result in more employers in the healthcare market sidestepping crucial ACA regulations.

How the Proposed Rule Would Work

To understand how the proposed rule would work, it's necessary to understand how the Department of Labor currently evaluates association health plans.

In order for employers in an association to be considered a large group plan, they must qualify as "bona fide employers," which means there must be a "sufficiently close economic or representational nexus to the employers and employees that participate in the plan." (2) This is known as the commonality of interest requirement. To satisfy this requirement, the Department looks at **1)** "whether the group or association is a bona fide organization with business/organizational purposes and functions *unrelated to the provision of benefits*;" **2)** "whether the employers share some commonality and genuine organizational relationship *unrelated to the provision of benefits,*" and **3)** "whether the employers that participate in a benefit program, either directly or indirectly, exercise control over the program, in both form and substance." (emphasis added) (Id).

The new rule would expand the commonality of interest requirement to allow employers to come together for purpose of providing benefits and to qualify as a large group plan. In addition, the rule would allow employers to form an association based on common industry or geographic proximity. It further proposes that associations in a similar geographic area could

function across state lines. (Id). These changes carry potentially detrimental effects on the current market as we know it.

Why This Change Is Significant

Large group plans, unlike small and individual plans, are exempt from many significant ACA provisions that protect the health insurance market. Most notably, large group plans do not have to provide the essential health benefit package mandated by the ACA, which includes emergency, hospitalization, maternity, mental health, prescription drugs, laboratory, wellness, and pediatric services. Because large group plans don't have to cover these services, AHPs will likely offer bare bones plans with lower premiums. These lower premiums will likely attract healthy individuals who are looking for cheaper plans and don't mind the limited coverage. If healthy individuals leave the small and individual markets, the remaining risk pool will be unbalanced with more sick people. This imbalance will in turn create a spike in premiums as insurers attempt to cover the higher costs of insuring the sicker patient pool. (3)

Additionally, large group plans are exempt from the ACA's single risk pool requirement, which prohibits small and individual plans from varying their rates based on different pools and forces insurers to offer one set rate based on one single pool. (4) It ensures that issuers cannot skew their rates for the same coverage. Moreover, large groups are not required to participate in the risk adjustment program which "transfers funds from plans with lower-risk enrollees to plans with higher-risk enrollees" (Id.) And finally, large groups are exempt from certain premium rules "that prohibit issuers from varying premiums except with respect to location, age, (within certain limits), family size, and tobacco use (within certain limits)." (Id). In other words, associations will be able to vary premiums based on certain

individual criteria.

What's more, the new rule will allow plans to engage in shady underwriting practices that the ACA has specifically tried to prevent. (5) For instance, although AHPs may not technically discriminate based on health status or preexisting conditions, under the proposed rule, they still can engage in de facto discrimination by maintaining plans that don't meet specific patient needs. (Id.) For example, AHPs can exclude pregnant mothers or patients with mental illness by not offering maternity care or mental health services in their plan. This is not the kind of health care system our leaders should be striving for.

Our current regulations work to keep the health care market steady by requiring insurers to engage in community rating that ensures a balance between healthy and sick individuals in the insurance pool. If there are more unhealthy individuals in a particular pool, costs of health care will rise and premiums will be higher. The proposed rule allows plans to sidestep many of the ACA regulations that ensure this balance, and as a result many people will be left with skimpy coverage and many more will face exorbitant costs. The Department of Labor is accepting comments on this proposed rule until March 6, 2018.

(1, 3, 5)

Tim Jost, *Trump Executive Order Expands Opportunities for Healthier People to Exit ACA*, Health Aff. Blog, Oct. 12, 2017, https://www.healthaffairs.org/do/10.1377/hblog20171022.762005/full/

(2)

Definition of Employer Under Section 3(5) of ERISA-Association Health Plans 84 Fed. Reg. 6144(proposed Jan. 4, 2018) (to be codified 29 CFR Pt. 2510)

(4) Michael J. McCue et. al, *Comparing Individual Health Coverage On and Off the Affordable Care Act's Insurance Exchanges*, Common Wealth Fund, Commonwealth Fund, Aug. 18, 2015, http://www.commonwealthfund.org/publications/issue-briefs/2015/aug/comparing-coverage-on-off-aca-exchanges