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Pooling Employer Group Health Plan Risk: MEWAs and Association Health Plans

Introduction

Employers and their advisors have always been interested in pooling the financial risk associated with employer group health plans, particularly for smaller employers that cannot take full advantage of the large group insurance market. There are many approaches to pooling risk in this space, and a robust state and federal regulatory landscape that limits or precludes many approaches. While not exhaustive, this Insight outlines common approaches to pooling risk through MEWAs and Association Health Plans, its regulatory and legislative landscape, and discusses practical challenges.

Multiple Employer Welfare Arrangements (MEWAs)

The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement, that provides employee welfare benefits to the employees of two or more employers that are not part of the same control group of businesses.[1] A control group of businesses exists where there is a sufficient level of common ownership among multiple entities.[2] Where that is the case, those entities can sponsor and provide health coverage to employees under a single group health plan. Where sufficient common ownership among entities does not exist, a plan that covers the employees of those unrelated entities is generally considered a MEWA.

Employers often form MEWAs intentionally, but MEWAs can also be formed accidentally, usually where a plan covers the employees of entities that are related, but do not have sufficient common ownership to be considered members of the same control group. In addition, employers can form MEWAs by covering a group of non-employees, such as independent contractors.

***Example**: ABC Corp. and XYZ Corp. are both wholly owned by 3 members of the Jones family, and the employees of both ABC and XYZ are covered under a single plan. The Jones family sells more than 50% interest in XYZ Corp. to 4 members of the Smith family. ABC and XYZ are no longer a controlled group of corporations and, if the groups continue to cover the employees of both entities with a single plan, it will become a MEWA.* [3]

Is MEWA a Bad Word? A Little History

The Employment Retirement Income Security Act of 1974 (ERISA) governs employer welfare benefit plans, including employer group health plans. ERISA contains an expansive preemption clause that prohibits state laws that relate to any employee benefit plan that is subject to ERISA. In other words, plans that are subject to ERISA are generally not required to comply with state insurance mandates, or other state laws that relate to the benefit plan.[4] As a result of ERISA preemption, in the 1980s certain MEWAs used ERISA as a shield to avoid state insurance laws, including those designed to insure solvency to pay claims. Many of these MEWAs were ultimately unable to timely pay claims or pay them at all. As a result, Congress enacted the Multiple Employer Welfare Arrangement Act of 1983 which expressly permitted

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[1] A MEWA is not the same as a multi-employer Plan, which is a collectively bargained plan maintained by more than one employer, usually within the same or related industries, and a labor union. These plans are often referred to as "Taft-Hartley plans."

[2] For a thorough discussion of the controlled group rules, see our Alliant Insight on this topic.

[3] Certain rules apply that allow time to transition the single plan to two separate plans.

[4] ERISA does however permit states to regulate insurance. As a result, an ERISA plan that is funded by an insurance contract, rather than self-funded by the employer, is subject to state insurance mandates and certain other state law by way of the insurance contract.

state regulation of MEWAs, whether or not they were ERISA plans. Its stated purpose was to counter abuse by operators of bogus "insurance trusts" and remove legal obstacles on the ability of the states to regulate MEWAs to assure the financial soundness and timely payment of benefits under these arrangements. Since that time, MEWAs have been an enforcement priority for the Department of Labor and remain so today.

How MEWAs Are Regulated at the Federal Level

The ERISA definition of a MEWA refers to both "employee welfare benefit plans" and "other arrangements". ERISA applies to employee welfare benefit plans, but where "other arrangements" exist, ERISA generally applies at the individual participating employer level, rather than at the MEWA level.[5] Whether an ERISA plan is deemed to exist at the MEWA level or whether each participating employer is deemed to maintain its own ERISA plan is an important determination in order to understand what state and federal law applies, and which entity is responsible for compliance, including the following federal group health requirements under ERISA:

- Form 5500 filings
- SPD and other ERISA disclosure requirements
- Application of HIPAA portability and privacy rules
- COBRA
- Healthcare reform

ERISA Application at the MEWA level

In order to understand whether ERISA applies at the MEWA or the participating employer level, it is necessary to understand certain fundamental ERISA requirements. In order to be an ERISA plan, a plan must (among other things) be established or maintained by an employer. An employer is defined as, "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." In the single employer context, this is a simple determination, but where multiple employers come together to sponsor a plan the analysis becomes more complex. Accordingly, to be treated as a single ERISA plan at the MEWA level, a MEWA must be maintained by a group or association that is considered an employer under the ERISA definition. There are two approaches for determining if a group or association falls within the definition of "employer" for this purpose. Under certain subregulatory guidance (DOL opinion letters and court cases), a group or association is an employer under ERISA if it is a "bona fide" group or association of employers—this requires that the group or association satisfy both the "commonality of interest" and "control" tests.

Commonality of Interest

The commonality of interest test requires that the entity maintaining the plan and the individuals benefiting from it, be tied by a common economic or representational interest, beyond the provision and receipt of welfare benefits. The following facts and circumstances are relevant in making this determination:

- how the association solicits members
- who is entitled to participate and who actually participates in the association
- the process by which the association was formed
- the association's purposes
- the relationship of its members outside the organization
- the powers, rights, and privileges that a member enjoys as a result of joining the association

[5] Where participating employers are not subject to ERISA, e.g., non-federal governmental plans, ERISA does not apply.

Employers in the same line of business and in the same geographic location have been found to have the requisite commonality of interest, while employers that share only a common size or geographic location have been held not to demonstrate sufficient commonality.

The Control Test

Under the "control" test, employer members are required to control and direct the activities and operations of the benefit plan. This control must exist in both form and substance—the test is designed to exclude those entities that exist only for the entrepreneurial purpose of selling health coverage to employer-members. Specifically, the representative employer-members of the association must actually be involved in designing and administering the benefits available to their employees.

When the commonality of interest and control tests are not met, there is no ERISA plan at the MEWA level, and each participating employer is subject to ERISA and individually responsible for compliance. In addition, where ERISA applies at the individual employer level rather than the MEWA level, generally a collection of small plans exist, rather than a single large plan. As a result, and especially since the Affordable Care Act, these plans have been subject to the small group insurance market rules and unable to take advantage of economies of scale and the large group insurance market.

MEWA Regulation at the State Level

The degree to which MEWAs are regulated at the state level varies, some states specifically identify MEWAs as part of the insurance industry while others specifically carve them out to police separately. States can regulate MEWAs that are not ERISA plans in the broadest way possible. Unlike MEWAs that are themselves ERISA plans (and are thus subject to narrower state regulation under ERISA), the more common MEWA is not an ERISA plan at the MEWA level. A MEWA that is not an ERISA plan at the MEWA level is subject to any state insurance law (or other regulation) that the state deems appropriate, without regard to whether it is consistent with ERISA, meaning it must comply with any state-law benefit mandates.

However, the extent to which state insurance laws may be applied to a MEWA that is an ERISA-covered plan is dependent on whether or not the plan is fully insured. A fully insured MEWA that is an ERISA plan is subject to state insurance law that provides "standards, requiring maintenance of specified levels of reserves and specified levels of contributions" to permit payment in full of benefits when due. Whereas, a MEWA that is a self-funded ERISA plan is subject to *any* state insurance law except to the extent that it is inconsistent with Title I of ERISA. For example, a law adversely affecting a participant's right to request and receive plan documents would be inconsistent with Title I. On the other hand, a state law that requires ERISA plans to meet more stringent standards of conduct, or to provide greater protection to plan participants than required by ERISA will not be deemed "inconsistent."

Self-funded MEWAs: Not Impossible but Impracticable

While a self-funded MEWA may appear attractive in terms of minimizing the amount of fixed costs, lowering administrative overhead and gaining freedom from taxes and state-insurance mandates, there are some important concerns to consider. Many states do not allow for the recent formation of self-funded MEWAs so they are often limited to fully insured plan designs and in most states are regulated as an unlicensed insurance company. A multi-state MEWA often are exposed to financial risk with additional monetary spend on compliance and the maintenance of significant reserves in order to operate. In addition, self-funded MEWAs run into the issue of being unable to purchase stop-loss in the state in which its employees reside as it would violate state rating and coverage rules.

MEWAs and Health Care Reform

In addition to the ERISA compliance implications, a MEWA treated as a single plan may avoid certain Affordable Care Act (ACA) requirements applicable to the individual and small group insurance markets, such as essential health benefits, single risk pools, restrictions on risk underwriting, and medical loss ratio provisions. However, single plan MEWAs are still subject to other ACA requirements, such as the prohibition on annual and lifetime limits and excessive waiting periods, as well as annual out of pocket

maximums on essential health benefits. Notably, however, an employer that is not an applicable large employer (ALE) for purposes of Pay or Play under the ACA does not become an ALE solely due to participation in a MEWA, and an ALE continues to be subject to employer shared responsibility regardless of its participation in a MEWA. In other words, participation in a MEWA has no impact on the ALE status of an employer.

Association Health Plans are MEWAs

In order to be considered an AHP and pool multiple employers under a single ERISA plan, the plan must comply with the subregulatory guidance described above requiring an association satisfy both the "commonality of interest" and "control" standards. It is crucial to remember that an AHP is both an ERISA group health plan and a MEWA. Accordingly, these plans are subject to all applicable ERISA and MEWA compliance requirements.

An Attempted Expansion of AHP Rules

In June 2018, the DOL issued final regulations designed to expand the availability of AHPs.[6] These regulations were intended to provide additional ways for groups or associations to meet the definition of "employer" under ERISA. Specifically, the regulations would have made it easier to create AHPs by expanding the commonality of interest test in a way that would have expressly permitted groups or associations to exist solely for the purpose of providing health coverage to its members if the member employers were *either* in the same trade, industry, line of business or profession *or* if they had a principal place of business within the same geographic region or metropolitan area. Additionally, the rules would have allowed self-employed individuals to participate in AHPs and added certain nondiscrimination requirements. The impact of these rules would have been to permit small employers and self-employed individuals who were unrelated under the current rules to band together for the purpose of accessing large group coverage.

However, key portions of these rules were quickly vacated by the U.S. District Court for the District of Columbia in 2019. Shortly after, the DOL issued guidance implementing a nonenforcement policy and prohibiting AHPs formed under the new rule from marketing to or adding new employer members. As a result, these rules were never truly effectuated. Finally, in April 2024, the DOL issued a final rule officially rescinding the 2018 rule, leaving the original subregulatory guidance described above as the only valid method for an association of employers to satisfy the definition of an "employer" under ERISA.

Going Forward

Employers looking to pool the financial risk associated with employer group health plans should be cognizant of the potential hurdles in forming a MEWA. The heightened compliance obligations under both state and federal law should be taken into consideration when strategizing creative solutions. Employers should work closely with carriers, underwriters, and benefits counsel in order to help fully assess the administrative hurdles and risks associated with these types of plans.

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