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Court Ruling on Association Health Plans Could Imperil Association Retirement Plan Proposal

Prepared for Franklin Templeton by Davis & Harman LLP

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On March 29, 2019, a judge in the U.S. District Court for the District of Columbia issued a ruling striking down the Department of Labor's Association Health Plan (AHP) rule, which expanded the groups of employers that can join together in a single health plan.

Background. The AHP rule was finalized in June 2018, and was intended to facilitate the adoption of plans for small employers and self-employed individuals. The Trump Administration's goal was to create plans that could be considered "large group" plans, which are exempt from a number of requirements of the Affordable Care Act, even though each individual participating employer is small. Eleven states and the District of Columbia sued the DOL, alleging the AHP rule impermissibly expanded the meaning of "employer" under ERISA.

The court's ruling. The court held that the expansion of the term "employer" under the AHP rule "fails to establish meaningful limits on the types of associations that may qualify to sponsor an ERISA plan, thereby violating Congress's intent that only an employer association acting 'in the interest of' its members falls within ERISA's scope." The court determined that AHP's new test for employer commonality was unreasonable:

- The requirement that an association merely have at least one substantial business purpose unrelated to the provision of health care provides no meaningful limit on the associations that would qualify as "bona fide" ERISA "employers."
- The use of a geographic test for commonality creates no meaningful limit on these associations consistent with ERISA's requirement that the association is acting in the interests of an employer.
- The requirement of control by the sponsoring employers is only meaningful if employer members' interests are already aligned.

Finally, the court found that the AHP rule's inclusion of working owners with no employees is not reasonable because "Congress did not intend for working owners without employees to be included within ERISA—either as individuals or when joined in an employer association."

Effect on Association Retirement Plans. In October 2018, after the DOL issued the AHP rule, it proposed a similar regulation to allow employers to join together in a single retirement plan, which are called "Association Retirement Plans" (ARPs). This proposal hewed very closely to the AHP proposal, particularly with respect to the conditions that must be satisfied for an ARP to allow employers to join the plan. The ARP proposal would also allow self-employed individuals to join the plan.

The ARP proposal was largely seen as the Trump Administration's attempt to facilitate a structure as close to "open multiple employer plans" (open MEPs) as possible without a change in the law. Generally, the ARP structure would not be as "open" as the open MEP structure currently under consideration in Congress, but was viewed as a step forward. Generally, comments from the retirement industry supported the ARP proposal, although many urged the DOL to expand the proposal further. The ARP proposal is still pending.

If the court's ruling stands, however, it could call into question the rationale DOL used for the ARP proposal. This is because the court's ruling was critical of language in the AHP regulation that appears virtually word-for-word in the ARP proposal. While there may be arguments to distinguish the two regulations – for example the AHP proposal is intended to provide relief from provisions of the Affordable Care Act – the reasoning in the court's decision largely applies to both situations.

This is assuming, of course, that the ruling is not overturned on appeal. DOL has already stated that it disagrees with the ruling and is considering all available options in consultation with the Department of Justice.

Meanwhile, this ruling could provide additional momentum behind a Congressional solution. The longstanding open MEP provision was voted out of the House Ways and Means Committee unanimously on April 2 as part of the Setting Every Community Up for Retirement Enhancement Act of 2019" (the "SECURE Act").

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