

## Insurance Bulletin No. 205

### Vermont Association Health Plans

**June 13, 2019**

Recent decisions by the U.S. District Court for the District of Columbia (District Court) and the U.S. Department of Labor (DOL) regarding association health plans (AHPs) necessitate this guidance for AHPs and multiple employer welfare arrangements (MEWAs) operating in Vermont under Rule I-2018-01, Emergency Rule I-2018-02-E, and, if adopted, Rule I-2018-02.

The District Court invalidated the DOL's 2018 AHP Rule providing additional avenues for AHP formation (Pathway 2 AHPs), concluding the DOL exceeded its rulemaking authority under the Employee Retirement Income Security Act of 1974 by modifying the definition of "employer" to expand the availability of AHPs.<sup>1</sup> The District Court's ruling: (i) vacates the AHP Rule; (ii) remands it to the DOL for reconsideration; and (3) is in effect nationwide, including Vermont.

On April 26, 2019, the Department of Justice filed an appeal of the decision, but did not request a stay, meaning the AHP rule will remain vacated unless the District Court decision is overturned on appeal. The appeal's outcome is uncertain but is very unlikely to resolve before open enrollment for Plan Year 2020.

Since the appeal was filed, the DOL issued two separate guidance documents.<sup>2</sup> Collectively, the guidance provides comfort that existing Pathway 2 AHPs may continue to operate through Plan Year 2019 but new Pathway 2 AHPs cannot be created nor can existing Pathway 2 AHPs enroll new employer groups (or individuals who do not qualify for special enrollment within existing employer groups). Further, the guidance indicates that Pathway 2 AHPs may not advertise further or operate beyond the current plan year (PY2019) or policy term.

The Department of Financial Regulation (DFR) adopts the DOL approach to existing AHPs that they may continue to operate through Plan Year 2019 but may not enroll new employer groups (or individuals who do not qualify for special enrollment within existing employer groups).

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<sup>1</sup> *State of New York v. United States Department of Labor*, No. 18-1747 (JDB) (D.D.C. March 28, 2019).

<sup>2</sup> See <https://www.dol.gov/newsroom/releases/ebsa/ebsa20190429>;  
<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/ahp-q-and-a-court-ruling-part-2.pdf>.



Further, insurers must honor existing AHP policies and pay valid claims through the end of 2019 or at the expiration of the policy, whichever is later.

DFR cannot approve Pathway 2 AHPs to operate beyond PY2019 because the District Court's decision vacated the Pathway 2 AHP rule, a stay was not sought or granted, and the decision has nationwide effect. Further, Pathway 2 AHPs may not advertise for PY 2019 or PY2020.

Pathway 2 AHPs operating in Vermont shall post a public-facing notice prominently on their website stating that new groups cannot be accepted and that current plan members will have to seek alternative coverage during open enrollment for PY2020.

Pathway 2 AHPs shall work with DFR to send direct notices to current members by June 30, 2019 to inform them of the need to seek alternative coverage during open enrollment for PY2020. DFR must pre-approve the notice to ensure consistency of information.

In accordance with the DOL's guidance and federal law, Pathway 1 MEWAs and AHPs will be allowed to operate in Vermont consistent with the above-mentioned rules in PY 2019 and beyond.

This Bulletin is consistent with a reading of H. 524 that reasonably construes the statutory language so as to apply only to Pathway 2 AHPs, thus avoiding a conflict with federal law. Further, the limitations outlined in this Bulletin are consistent with H.524, which states that MEWAs and AHPs shall be allowed only "to the extent permitted under federal law."

Inquiries about this Bulletin, and requests for pre-approval of required notices, should be directed to Emily Brown, Director of Rates and Forms for Life and Health (emily.brown@vermont.gov).



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Michael S. Pieciak, Commissioner

06/13/2019

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