Legal Challenge Update:

Association Health Plans (AHPs)

A Federal court has held provisions of the Department of Labor's (DOL) Association Health Plan (AHP) rule as unlawful, including specific provisions regarding eligibility for working owners (i.e. sole proprietors).
A petition to stay the rule, pending an appeal, is anticipated by DOL.

What is this case about?

On June 19, 2018, the Department of Labor (DOL) issued a final rule to expand access to health coverage through Association Health Plans (AHPs) by broadening the definition of "employer" to include "working owners" (sole proprietors/self-employed/independent contractors). Thanks to NAR's advocacy efforts, the final rule reflected important changes that ensured access to AHPs for independent contractors, increasing health insurance options that are better suited to the health care needs of members and their families.

However, in July of last year, twelve attorney generals (AGs) filed suit against DOL challenging the final rule in the U.S. District Court for the District of Columbia. State AG's include New York, Massachusetts, California, Delaware, Kentucky, Maryland, New Jersey, Oregon, Pennsylvania, Virginia and Washington, plus D.C. The AG's argued that DOL exceed its authority in issuing the rule, which would also circumvent protections put in place by the *Affordable Care Act* (ACA). NAR joined in amicus brief in support of DOL's rule through the Coalition to Protect and Promote Association Health Plans.

On March 28, 2019, the court held in favor of the AGs, striking down essential parts of the rule that would allow self-employed individuals to participate in an AHP and also for "unrelated" employers to band together to sponsor an AHP.

- The court held that DOL's redefinition of "employer" under the *Employee Retirement Income Security Act* (ERISA) to (1) re-characterize self-employed ("working owners") as eligible to join an AHP and (2) allow unrelated employers to band together under an AHP, exceeds the statutory authority delegated by Congress under ERISA.
- The court argued that the rule conflicts with the intent of the ACA to provide fundamental protections to individual and small group insurance market participants, as allowing working owners to join an AHP would forgo the ACA's individual market protections and put consumers' health and financial security at risk.

What will happen next?

It is anticipated that DOL will ask for a stay, allowing the final rule to remain effective while an appeal is pursued (which could take another 12-24 months). NAR is analyzing the potential nationwide impact of this decision and working with state and local REALTOR® Associations that have already implemented or are pursuing AHPs as a benefit option as we seek to better understand the impact on local Associations (see more below).

The typical standard is that a District Court ruling will not take effect until the appeals process is exhausted, but it is unclear if that standard will be followed here. The ruling itself does not indicate whether invalidation of the specific provisions of the rule will have an immediate effect. Also,

because the AHP rule has a severability provision, the court has remanded the rule for consideration of how vacating these specific provisions will affect the remaining portions of the regulation. This could mean the rule stays in effect until DOL considers the severability impact, however, it is uncertain at this point if that will be the case.

What does this mean for AHPs in operation?

It depends. Several states have enabling statutes or regulations that permit the creation of AHPs and function independently of the federal rule. In those states, AHPs remain permissible and thus there should be no disruption to those existing plans, or those that will soon be in operation. The DOL rule did not preempt states ability to regulate such insurance plans, so such laws should remain intact so long as there are no cross references to DOL's language in the rule. If such laws do cross-reference the DOL rule, they should be cleaned up by spelling out the same intent but without specifically referring to the DOL rule.

In states that lack such codified laws or regulations (but may have issued a bulletin or FAQs indicating support for AHPs), it will likely be up to the state to determine whether or not to enforce the court's decision and allow the existing AHPs to continue. A state could immediately require insurance providers to cancel existing AHPs, cease offering AHPs to new businesses, *or* not do anything until the appeals processes is exhausted, among several options.

Typically, states will pursue a "wait and see" approach so as not to disrupt existing coverage and face immediate backlash. This will likely be the case for many states that have already allowed AHPs to begin covering individuals and small employers. *In these states, insurance providers have already been reaching out to associations to provide affirmations that coverage will continue* despite the court's ruling, pending any contradictory information provided by the states' Insurance Department.

What does this mean for Associations looking to pass legislation or regulations to implement an AHP?

The rule, as it currently stands, does not preempt states' ability to regulate AHPs and therefore reliance on the federal rule is not necessarily required to pursue a course of action related to legislation or regulation at the state level in order to support implementation of AHPs. In other words, a state can pass its own law that follows the federal rule if it so chooses, and AHPs can still be formed in the state. However, should the rule be stayed, allowing the final rule to remain in effect, states will continue to have the ability to rely on the federal rule as needed. *In the meantime, it is advisable to pursue any state legislative or regulatory efforts without cross-references to the language of the DOL rule, rather it is advisable to spell out independently the intent to expand and enable AHPs.*

What does this mean for a national AHP offered by NAR?

Since the AHP rule was finalized last year, NAR has conducted extensive research through surveys and nationwide focus groups while also working with outside health insurance consultants to determine potential partnerships with large insurance companies for insurance options for members. These efforts will continue, but insurance companies from the beginning have been apprehensive to offer a national AHP to NAR or any other trade association, primarily due to the uncertainty surrounding the legal challenge. This latest ruling and subsequent appeals will further delay any commitment by insurance providers to collaborate on a national plan.

In denouncing the ruling, NAR issued the following statement from President John Smaby:
"*As independent contractors, Realtors® have long struggled to find and secure affordable health insurance options. This is why NAR strongly supports the U.S. Department of Labor's final rule expanding access to Association Health Plans. This rule has been successful and is growing in many states, providing high quality, lower cost coverage alternatives to many of NAR's 1.3 million members and their families.*

We are extremely disappointed in this week's District Court decision, which threatens the progress Realtor® Associations have made in offering much-needed health insurance solutions. NAR is reviewing this ruling to determine its potential nationwide impact and we vow to continue to fight for more affordable, quality health insurance options for our members."

In addition to supporting the fight against the court ruling, including alongside fellow members of the Coalition to Protect and Promote AHPs, NAR is working closely with state and local association partners to solidify favorable regulatory environments to allow for the creation of AHPs. NAR still must take a number of concrete steps to find workable solutions for a nationwide AHP, so stay tuned to https://www.nar.realtor/health-care-reform for the latest information.