

August 11, 2019

## And in this Corner...the Fight to Expand Association Health Plans Continues

The U.S. Department of Labor (DOL) issued [Advisory Opinion 2019-01a](#) to little fanfare on July 8, 2019, but the DOL's move was a little bigger than the attention it received. It marked Round #3 in the ongoing battle between certain states and the DOL over the [expansion of Association Health Plans](#) (AHPs).

### The Bottom Line

In its Advisory Opinion, the DOL agreed that Ace Hardware's<sup>1</sup> corporate operations and independently owned retail stores were employers within the same industry and approved their formation of a Pathway 1 AHP in a large number of states. Traditional Pathway 1 AHPs have historically been limited to the same state, and this appears to be a reaction by the DOL to the unfavorable court opinion given to Pathway 2 AHPs last March.

### A Quick Roadmap

The DOL refers to the two categories of AHPs as Pathway 1 and Pathway 2, and we'll use those terms in this article.<sup>2</sup> Both can enable member employers to participate in large group insurance coverage or potentially self-insure. Please see below for a discussion of Pathway 1 and Pathway 2 AHPs and how we got here.

### Pre-Fight

This was the AHP environment before the final rules expanding AHPs were issued:

Pathway 1 AHP
<b>AHP Member Employers Must:</b>
<ul style="list-style-type: none"> <li>• Be within the same industry, trade, line of business or profession</li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>• Be located within the same geographic location (usually within the same state)</li> </ul>

<sup>1</sup> Full disclosure: Ace Hardware is a client of Marsh & McLennan Agency.

<sup>2</sup> In our previous articles, we referred to Pathway 1 as the "Narrow Standard AHP" and Pathway 2 as the "Relaxed Standard AHP."

## Round 1

The final rules creating the Pathway 2 AHP were issued on June 18, 2018. There were staggered effective dates described in our earlier [expansion of AHPs](#) article.

Pathway 1 AHP	Pathway 2 AHP
<p><b>AHP Member Employers Must:</b></p> <ul style="list-style-type: none"> <li>Be within the same industry, trade, line of business or profession</li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>Be located within the same geographic location (usually within the same state)</li> </ul>	<p><b>AHP Member Employers Must:</b></p> <ul style="list-style-type: none"> <li>Be within the same industry, trade, line of business or profession (without regard to geographic location)</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>Have their principal place of business located within the same state or metro area (even if the metro area crosses state lines)</li> </ul>

Pathway 2 AHPs also permit broader participation by self-employed individuals.

## Round 2

Eleven States and the District of Columbia sued the DOL over Pathway 2 AHPs and received a [favorable ruling](#) on March 28, 2019. In an [earlier article](#), we indicated the ruling appeared to leave wiggle room for employers in the same trades or businesses to form Pathway 2 AHPs across state lines. In a set of [FAQs](#) released in May, the DOL indicated it would appeal the ruling but would restrict the expansion of existing or the formation of new Pathway 2 AHPs in the meantime.

Pathway 1 AHP	Pathway 2 AHP   SUSPENDED
<p><b>AHP Member Employers Must:</b></p> <ul style="list-style-type: none"> <li>Be within the same industry, trade, line of business or profession</li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>Be located within the same geographic location (usually within the same state)</li> </ul>	<p><b>AHP Member Employers Must:</b></p> <ul style="list-style-type: none"> <li>Be within the same industry, trade, line of business or profession (without regard to geographic location)</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>Have their principal place of business located within the same state or metro area (even if the metro area crosses state lines)</li> </ul>

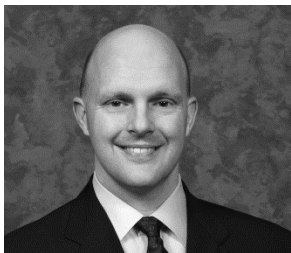
## Round 3

The DOL's recent Advisory Opinion has this effect:

Pathway 1 AHP	Pathway 2 AHP   SUSPENDED
<b>AHP Member Employers Must:</b>	<b>AHP Member Employers Must:</b>
<ul style="list-style-type: none"> <li>• Be within the same industry, trade, line of business or profession (without regard to geographic location)</li> </ul> <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> <li>• <del>Be located within the same geographic location (usually within the same state)</del></li> </ul>	<ul style="list-style-type: none"> <li>• Be within the same industry, trade, line of business or profession (without regard to geographic location)</li> </ul> <p style="text-align: center;">OR</p> <ul style="list-style-type: none"> <li>• Have their principal place of business located within the same state or metro area (even if the metro area crosses state lines)</li> </ul>

## What's Next?

It will be interesting to see if the DOL's Advisory Opinion encourages employers and insurance carriers/third party administrators to begin forming Pathway 1 AHPs across state lines or if most adopt a more general wait-and-see approach. It seems likely the States engaged in the current litigation with the DOL over Pathway 2 AHPs will also challenge this apparent expansion of Pathway 1 AHPs. The DOL appears to be on firmer footing with this Pathway 1 AHP expansion, and the position taken by the DOL also seems consistent with the language of the earlier court ruling from Round #2.<sup>3</sup>



### About the Author

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<sup>3</sup> Yes, we feel largely vindicated for our earlier interpretation that the court's ruling seemed to leave room for employers in the same trades or businesses to form AHPs across state lines.