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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's¹ 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.² 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
AHP Member Employers Must:
<ul style="list-style-type: none"> • Be within the same industry, trade, line of business or profession <p>AND</p> <ul style="list-style-type: none"> • Be located within the same geographic location (usually within the same state)

¹ Full disclosure: Ace Hardware is a client of Marsh & McLennan Agency.

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

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

Round 3

The DOL's recent Advisory Opinion has this effect:

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

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 #2.³



About the Author

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³ 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.