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CLASS ACTIONS

As the NLRA turns: Big labor-law changes afoot

by Jeffrey Slanker
Sniffen & Spellman, P.A.

The U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) recently released an opinion that happens to provide a pretty good overview of the big changes afoot with respect to how the National Labor Relations Act (NLRA) is interpreted. The changes are being driven by rulings by the U.S. Supreme Court as well as the National Labor Relations Board (NLRB). The 11th Circuit's opinion provides a valuable update for both unionized and nonunionized private-sector workforces, which different sections of the NLRA cover in full force.

Brief NLRA primer

The NLRA is the federal statute that governs private-sector labor relations. It regulates both unions and employers, and certain provisions extend to both unionized and nonunionized private-sector workforces. Indeed, a nonunionized workplace may come under fire under the Act for interfering in a union election or retaliating against someone for engaging in organizing activities.

Pertinent to the 11th Circuit's ruling, the NLRB has held that the maintenance of a work rule—say, in an employee handbook or policy and procedures manual—in and of itself can amount to an NLRA violation depending on how the rule is worded. As the opinion notes, though, the Board's position on how it determines whether such a rule violates the Act has changed.

One other key point before we get to the case: The NLRB has found the maintenance of handbook rules to be an NLRA violation if the employer's policy would "chill," or harm, employees' rights to engage in protected concerted activity, which is essentially union organizing or union-related activity.

Everglades College's arbitration waiver at issue

A rule in Everglades College's handbook required employees to arbitrate all employment-related claims individually, essentially forcing them to waive their right to file class or collective action lawsuits against the employer. Lisa Fikki refused to sign the provision in paperwork given to her by the college until she could get an attorney to review the policy. When the deadline to sign the papers came and went without the attorney having a chance to review them, Fikki hadn't signed the papers and was let go by the college.

The NLRB ultimately ruled that the class action waiver in Everglades College's arbitration clause was unlawful. The ruling's premise was that prohibiting class action claims and requiring that employment claims be litigated individually was a restriction on employees' ability to engage in protected concerted activity.

Law Offices of Tom Harper, Stearns Weaver Miller, P.A., and Sniffen & Spellman, P.A., are members of the *Employers Counsel Network*

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AGENCY ACTION

EEOC reports on age discrimination 50 years after ADEA. Age discrimination remains too common and too accepted 50 years after the federal Age Discrimination in Employment Act (ADEA) took effect, according to a report from Victoria A. Lipnic, acting chair of the Equal Employment Opportunity Commission (EEOC). The report, released June 26, 2018, says only about three percent of those who have experienced age discrimination complained to their employer or a government agency. Studies find that more than three-fourths of older workers surveyed report their age is an obstacle to getting a job. The report includes recommendations on strategies to prevent age discrimination, such as including age in diversity and inclusion programs and having age-diverse hiring panels. The report says research shows that age diversity can improve organizational performance and lower employee turnover and that mixed-age work teams result in higher productivity for both older and younger workers.

NLRB launches internal ethics review. The National Labor Relations Board (NLRB) announced in June it is undertaking a comprehensive review of its policies and procedures governing ethics and recusal requirements for Board members. The review is in response to criticism of Board member William J. Emanuel's participation in a case that his former law firm was involved in. After critics of an NLRB decision on joint employment claimed Emanuel should have recused himself, the Board tossed out its employer-friendly decision in the *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.* case. In the Board's June announcement, NLRB Chair John Ring said he has proposed a review to examine "every aspect of the Board's current recusal practices in light of the statutory, regulatory, and presidential requirements governing those practices." Among other things, the review will evaluate existing procedures for determining when recusals are required.

EEOC examines barriers facing women in federal public safety jobs. The EEOC in June issued a report claiming women still face employment barriers in gaining public safety positions within the federal government. The report, "Recruitment & Hiring Gender Disparities in Public Safety Occupations," is part of the EEOC's effort to aid the federal government in serving as a model employer. The report identified the following barriers women face: lack of work-life balance, misperceptions that women are uncomfortable with carrying firearms, misperceptions that women are uncomfortable with physically strenuous job functions, hiring officials' concerns that women can't meet rigorous fitness exam requirements, and too few initiatives aimed at the recruitment of women. ✤

Consequently, the NLRB also found Fikki's termination to be unlawful because it was premised on her refusal to sign off on the arbitration language that required her to give up her right to be a part of a class action claim. The Board also found that the arbitration provision violated the NLRA because it would cause employees to believe they were barred or restricted from filing unfair labor practice charges with the Board.

11th Circuit cites Epic, upholds college's class action waiver

The 11th Circuit overturned the NLRB's order and noted that the class action waiver at issue in *Everglades* had been ruled *not* to be in violation of the NLRA by the U. S. Supreme Court in its recent decision *Epic Systems Corp. v. Lewis,* which was released after the Board issued its ruling. The Supreme Court held that such agreements must be enforced under the federal law governing arbitrations.

The 11th Circuit also overturned the NLRB's ruling as it related to whether the maintenance of the arbitration agreement itself would cause workers to believe they could not file unfair labor practice charges with the Board. The appeals court noted the Board reached that determination relying on a standard of whether an employer's allegedly facially neutral policy, such as the arbitration provision at issue, would reasonably lead an employee to believe she could not file an unfair labor charge with the NLRB. That standard was overturned by the Board very recently for a new one elucidated in *The Boeing Co.* case.

The NLRB's new rule for evaluating whether the maintenance of a neutral policy violates the NLRA first looks to see if the rule clearly restricts protected activity under the Act. If the rule isn't explicitly unlawful, the Board will look at its potential impact on protected concerted activity and the employer's legitimate business justifications for maintaining the rule. If the justifications outweigh the potential impact on protected concerted activity, the rule will be deemed lawful, and vice versa.

The 11th Circuit reversed the NLRB with instructions for it to consider the class action waiver, as well as the legality of Fikki's termination, in light of the new *Boeing* standard. *Everglades College v. National Labor Relations Board* (Case no. 16-10341, US CA, 11th 2018).

Takeaway for Florida employers

Changes are happening at the NLRB, and the *Everglades* opinion does a good job of explaining many of them. The NLRA's breadth applies to both unionized and nonunionized employers, and all private-sector employers should keep abreast of the changes in Board law. Those changes affect everything from whether individual discipline decisions are lawful to whether maintaining a seemingly benign work rule is acceptable under the NLRA. As *Everglades* makes clear, the rules have become less restrictive after recent rulings by both the Supreme Court and the NLRB, and those shifts are why you should continue to pay close attention.

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ASK ANDY

Obligations, limits of intermittent, reduced schedule FMLA leave

by Andy Rodman
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Q *When is an employer required to allow intermittent or reduced schedule Family and Medical Leave Act (FMLA) leave? May an employer ever deny a request for intermittent or reduced schedule leave and instead require the employee to take continuous FMLA leave?*

A An eligible employee has the right to take FMLA leave intermittently or on a reduced schedule *under certain circumstances.* Typically, intermittent leave is taken in separate blocks of time for a single FMLA, qualifying reason, such as leave taken in one- or two-day increments over several months for cancer treatment. On the other hand, a reduced leave schedule typically takes the form of a change in the employee's schedule, such as from full-time to part-time or from five to four days per week on account of a serious health condition.

Medical necessity. An eligible employee doesn't have an absolute right to take FMLA leave intermittently or on a reduced leave schedule. Rather, if the leave is taken for the employee's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, then the employee must demonstrate a *medical need* for the leave and that it is best accommodated through intermittent or reduced schedule leave. This information typically can be determined from the healthcare certification form provided to the employee with the FMLA Notice of Rights and Responsibilities.

Birth or placement of healthy child. When FMLA leave is taken after the birth or placement of a healthy child for adoption or foster care, an eligible employee may take leave intermittently or on a reduced leave schedule *only if the employer agrees* to the arrangement. For example, some women may prefer, often for financial reasons, to return to work on a part-time basis shortly after giving birth, rather than taking 12 weeks of continuous unpaid FMLA leave. Some employers may agree to that arrangement, particularly if the employee's absence for 12 continuous weeks would result in business hardship. An employer, however, may not request or require the employee to agree to the arrangement.

While employer consent is required for intermittent or reduced schedule leave taken in connection with the birth or placement of a healthy child for adoption or foster care, things do not always go according to plan. If, for example, the mother or the child develops a serious health condition, then employer consent is no longer required for intermittent or reduced schedule leave because the qualifying FMLA event becomes a serious health condition (and is no longer birth or placement for adoption or foster care).

Scheduling for medical treatment. If an eligible employee requests intermittent or reduced schedule leave for scheduled or planned medical treatment, then the employee must make a reasonable effort to schedule the event so that it does not unduly disrupt business operations. To the extent possible, that could mean scheduling the treatment on the employee's day off, during a lunch break, or in the early morning or late afternoon hours.

Transfer as an option. If an employee needs intermittent or reduced schedule leave for planned medical treatment (including a period of recovery from the employee's own serious health condition or that of a spouse, parent, son, or daughter or a serious injury or illness of a covered servicemember), then the employer may require the employee to transfer temporarily to an available alternative position for which he is qualified and that better accommodates recurring periods of leave. The alternate position must have equivalent pay and benefits but does not have to have equivalent duties. Notably, however, an employer may not use the possibility of transfer as a "threat" designed to discourage the employee from taking FMLA leave. Also, the employee must be returned to his original (or an equivalent) position when the leave ends.

Addressing intermittent or reduced schedule FMLA leave requests can be very tricky. In addition to the rules addressed above, the federal regulations govern the manner in which FMLA leave is tracked and counted against the 12-week (or 26-week) allotment, and those "counting rules" are complex in and of themselves. Make sure you consult with your employment counsel when dealing with these issues.

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Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

SEXUAL HARASSMENT

Company freed from liability in harassment case based on prompt complaint response

by Lisa Berg
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On June 25, 2018, the 11th Circuit held that a district court did not err in rejecting a jury verdict in favor of an employee on her sexual harassment claim and granting judgment in the employer's favor. After all, the employer took prompt remedial action by immediately instructing the alleged harasser to stay away from the employee, investigating the complaint, and then firing the accused six weeks later when an independent investigation found that he committed the harassment. This article explains the court's reasoning about why firing the harasser after a six-week investigation was deemed "prompt" enough to prevent employer liability.

Facts

Felicia Wilcox was a corrections officer working for Corrections Corporation of America (CCA). On July 10, 2009, coworker Larry Jackson slapped her on the buttocks twice. That same day, she filed a complaint with her employer. In response, CCA instructed Jackson to stay away from Wilcox and retained an outside investigator to look into her complaint.

In the days following her complaint, Jackson repeatedly rolled his eyes at Wilcox and once punched a metal machine in her presence to intimidate her. On July 23, 2009, she submitted a second complaint, adding that she was afraid Wilcox would touch her again, that this was not the first time he had touched her, and that he had told her he could touch her anytime he wanted.

When interviewed on August 27, Wilcox conceded that Jackson never touched her or made any inappropriate comments to her after her July 10 complaint. She also described two earlier incidents of inappropriate conduct and sexual comments. On September 9, the investigator submitted a report finding that Jackson had sexually harassed Wilcox and other coworkers. On September 14, CCA fired him.

Sexual harassment suit

Wilcox filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) as well as a lawsuit against CCA for sexual harassment under Title VII of the Civil Rights Act of 1964. At trial, she testified she had complained to the company that her coworker had sexually harassed her but that the company failed to take prompt remedial action.

The jury found in Wilcox's favor and awarded her $4,000 in compensatory damages and $100,000 in punitive damages, but the district court overturned the jury verdict and ruled in CCA's favor. She appealed and argued that the jury was entitled to find that the employer failed to act promptly on her complaint. The court affirmed, however, because CCA remedied the harassment promptly and there was no recurrence.

Burden of proof

To prevail in a lawsuit against the employer for a coworker's sexual harassment that resulted in a hostile work environment, an employee must prove five elements:

(1) She belongs to a protected group;

(2) She was subjected to unwelcome sexual harassment;

(3) The harassment was based on sex;

(4) It was severe or pervasive enough to alter her terms and conditions of employment; and

(5) It's a basis for holding the employer liable.

Only the fifth element was at issue in this case.

Knowledge

When the harasser isn't the employee's supervisor, the employer will be held directly liable only if it knew or should have known of the harassing conduct but failed to take prompt remedial action. Here, the 11th Circuit found no evidence supporting Wilcox's argument that CCA should have known about the harassment before her first report on July 10, when Jackson smacked her on the buttocks. She claimed the company should have known about additional harassment involving the inappropriate hugging of her female coworkers. She testified, however, that she never reported the hugging, and the other evidence of hugging in the record did not support the inference that it was widespread or that others considered it offensive.

The court also found that even if CCA had constructive knowledge of the harassment, it was insulated from liability because it had adopted an antidiscrimination

policy that was comprehensive, well-known to employees, vigorously enforced, and stocked with alternate avenues of redress. Although Wilcox argued that the policy wasn't vigorously enforced, the court found it was properly enforced—given that the alleged harasser was admonished, investigated, and then terminated.

Effective and prompt remedial action

Because CCA's actions prevented recurrence of the harassment it knew about, the 11th Circuit found the company's action was effective and that a "reasonable jury would not have a legally sufficient evidentiary basis to find otherwise." Jackson never touched Wilcox after her July 10 complaint, notwithstanding her fear that he might do so.

The remaining issue in the case was whether CCA's action was sufficiently prompt. Although there is no clear rule for promptness, the 11th Circuit held that the company ordered Jackson not to be around Wilcox immediately after her first complaint and then fired him two weeks after the investigator interviewed her and learned of her other complaints against him.

Wilcox argued that six weeks between her first complaint and the investigator's interview was too long. The 11th Circuit disagreed, finding that "there were a lot of moving parts in the company's investigation, and each of those workings took time." For example, both of Wilcox's written complaints had to be examined internally and then referred out to the company's ethics office, other employees' allegations had to be investigated, and another investigator had to be brought in from out of state to interview 16 employees.

Based on the facts that culminated in Jackson's termination, the 11th Circuit decided that no reasonable jury would find CCA had failed to act promptly. Consequently, the employer was found not liable. *Wilcox v. Corrections Corporation of America*, No. 14-11258 (11th Cir., June 25, 2018).

Lessons learned

It's important for Florida employers to implement antiharassment policies with comprehensive complaint procedures, conduct training so employees are aware of the standards, respond promptly to complaints by conducting thorough investigations, and take appropriate and effective remedial action designed to stop the conduct.

Although the court found the six-week gap between Wilcox's initial complaint and the ultimate termination to be a "prompt" response, you should not assume that this period of time will always be deemed sufficiently prompt. The court's holding in this case was very fact-specific, and CCA had a good explanation for why the investigation took six weeks. Therefore, you'd be well-advised to document your good-faith basis for any delays when conducting harassment investigations to ensure you can meet the test for promptness.

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WORKPLACE TRENDS

Research finds people of color less likely to get requested pay raises. Research from compensation data and software provider PayScale, Inc., shows that people of color were less likely than white men to have received a raise when they asked for one. The research, announced in June, found women of color were 19% less likely to have received a raise and men of color were 25% less likely. The research also notes that no single gender or racial/ethnic group was more likely to have asked for a raise than any other group. The most common justification for denying a raise was budgetary constraints (49%). Just 22% of employees who heard that rationale actually believed it. Of those who said they didn't ask for a raise, 30% reported their reason for not asking was that they received a raise before they felt the need to ask for one.

Promotions without pay raises found to be common. New research from staffing firm OfficeTeam finds that 39% of HR managers said their company commonly offers employees promotions without salary increases. That's a 17-point jump from a similar survey in 2011. The new research also determined that 64% of workers reported they would be willing to accept an advanced title that doesn't include a raise, up from 55% in 2011. The study found that more male employees (72%) are open to accepting a promotion without a salary increase than women (55%). Workers ages 18 to 34 are most willing to take a new title that doesn't include a raise.

Report explores strain on caregivers. A report from employee benefits provider Unum details how caregiving responsibilities can take emotional, physical, and financial tolls on caregivers and result in lower productivity and engagement at work. The report, "Adult Caregiving: Generational considerations for America's workforce," details findings from research fielded among caregivers of adult family members among Baby Boomers, Gen Xers, and Millennials. The report notes that what caregivers want most from their employers is flexible schedules, employer-paid family leave, and the ability to work from home.

Study finds organizations' confidence exceeds preparedness. Deloitte Global's 2018 crisis management survey finds that nearly 60% of organizations surveyed believe they face more crises today than they did 10 years ago, but many overestimate their ability to respond. An announcement from Deloitte says the study uncovered gaps between a company's confidence that it can respond to crises and its level of preparedness. The gap is even more evident when evaluating whether organizations have conducted simulation exercises to test their preparedness. ✤

UNION ACTIVITY

AFL-CIO launches campaign leading up to elections. The AFL-CIO kicked off its Labor 2018 campaign in June with a nationwide day of action aimed at educating voters in advance of the midterm elections. "We're unleashing the largest and most strategic member-to-member political program in our history, sparking change by doing what we do best: talking to each other," AFL-CIO President Richard Trumka said. "Street-by-street and person-by-person, we're having conversations about the issues that matter most: higher wages, better benefits, time off, a secure retirement, and a fair return on our labor." The campaign includes canvasses and phone banks taking place in at least 26 states.

Union leaders speak out against Janus decision. Union leaders spoke out against the U.S. Supreme Court's June 27 decision in the case of *Janus v. American Federation of State, County, and Municipal Employees (AFSCME),* with a statement from AFSCME saying the Court "sided with powerful CEOs, billionaires, and corporate special interests against public service workers and everyday working people." The Court overruled a 1977 decision that allowed unions to collect "fair-share" fees from workers who don't join the union but are covered under union contracts. AFL-CIO President Trumka said the decision "abandons decades of common-sense precedent." A statement from the AFSCME, the American Federation of Teachers, the National Education Association, and the Service Employees International Union (SEIU) said the Court's decision "was nothing more than a blatant political attack to further rig our economy and democracy against everyday Americans in favor of the wealthy and powerful."

Proposed DOL, Education Department merger criticized. The proposal to merge the U.S. Departments of Labor and Education announced in June met with disapproval from union leaders. AFL-CIO President Trumka called the proposal "a dangerous and bad idea that should be stopped." He said the core functions of the two departments—serving children and protecting working people—"are critical tasks that require the individual attention each receives" by having the departments separate. He also said the track record of the Trump administration includes attacks on public education and worker safety and health and therefore calls into serious question the intentions of the proposal. "Merging Education and Labor instead of the business-centric Commerce and Treasury departments is another indication that this is simply about increasing privatization and handing out more power to corporations at the expense of working people," Trumka said. ✤

UNIONS

'Fair-share' fee ruling brings new day for public employers, employees

With proponents of a U.S. Supreme Court decision against the collection of "fair-share" fees claiming a victory for First Amendment rights and critics calling the ruling an example of the Court siding with billionaires against workers, employers are adjusting to a major change in the world of agency shops in the public sector.

In an agency shop arrangement, employees can be required to accept the union as their exclusive representative or pay a fee to cover the cost of contract negotiations. In a 5-4 ruling on June 27, the Court struck down a 41-year-old precedent allowing unions of public-sector workers to collect those fees—often called fair-share or agency fees—from nonunion members in states that allow agency shops. Such fees were an important part of the financial structure of the unions that negotiate pay and benefits for public schoolteachers, police and fire personnel, and various other workers at all levels of government. With a new precedent in place, public-sector employers and unions are finding their way in a new labor-management landscape.

Background

The decision in *Janus v. American Federation of State, County, and Municipal Employees (AFSCME)* reverses precedent set in the 1977 *Abood v. Detroit Board of Education* decision, which allowed unions to collect a portion of union dues from employees who chose not to join the union but were covered under contracts the union negotiated. The collection of such fees was supposed to allow the union to cover the costs of collective bargaining without forcing workers who chose not to join the union to financially support the union's political aims.

The *Janus* case involved Mark Janus, an employee of the Illinois Department of Healthcare and Family Services, who objected to being required to pay fees to a union he chose not to join. He argued that requiring public-sector employees to pay even a portion of union fees required them to subsidize political speech in violation of their First Amendment rights. He maintained that even issues covered in contract negotiations are fundamentally political when they involve public employees.

The Court has tackled the constitutionality of fair-share fees before. The justices heard similar arguments in the March 2016 *Friedrichs v. California Teachers Association* case. Coming shortly after the death of Justice Antonin Scalia, the Court's decision in *Friedrichs* resulted in a 4-4 tie, which left the *Abood* precedent in place.

At the time, many predicted fair-share fees would have been struck down but for the death of Scalia. Scalia's replacement on the Court, Justice Neil M. Gorsuch, provided the fifth vote necessary to overturn *Abood.* He was joined by Chief Justice John G. Roberts Jr. and Justices Samuel A. Alito Jr., Anthony M. Kennedy, and Clarence Thomas. Dissenting were Justices Elena Kagan, who wrote the dissenting opinion, and Ruth Bader Ginsburg, Stephen G. Breyer, and Sonia Sotomayor.

Reaction to decision

After the *Janus* decision was announced, union leaders called on workers to recommit to unions and step up organizing drives. A statement from leaders and members of the AFSCME, the American Federation of Teachers (AFT), the National Education Association, and the Service Employees International Union (SEIU) said public-sector workers would be "more determined than ever" to band together in their unions.

"Today's decision sends our economy in the wrong direction. But it is also a rallying point," the statement said. "We call on elected leaders and candidates to do everything in their power to make it easier to unite in unions and build more power for all working people."

The National Right to Work Foundation called the decision a victory that "restores the First Amendment rights of free speech and freedom of association to more than 5 million public school teachers, first responders, and other government workers across the country."

Janus, the child support specialist for state government in Illinois who brought the case, called the Supreme Court's decision "a victory for all of us" that puts an end to the practice of nonunion members being forced to pay fair-share fees to keep their jobs.

What's next?

Some employer interest groups have warned that a ban on fair-share fees will discourage union leaders from agreeing to no-strike clauses in contracts since those clauses sometimes accompany agreements to collect fair-share fees. And in the wake of the decision, unions surely will be looking to bolster membership so that they won't be so reliant on fees from nonmembers.

Some have predicted that the *Janus* decision will be a crippling blow to public-sector unions, the one bright spot the labor union movement has seen in recent decades. Overall union membership has dwindled for years but has been healthier in the public sector.

Figures released in January from the U.S. Bureau of Labor Statistics (BLS) show that the unionization rate for private-sector workers remains far lower than the rate for public-sector workers—6.5 percent in the private sector versus 34.4 percent for workers in the public sector. So with the unfavorable Supreme Court decision, many predict more troubles ahead for labor.

In spite of the unfavorable ruling, leaders of public-sector unions have vowed to fight to stay relevant. "Don't count us out," Randi Weingarten, AFT president, said after the ruling. "While today the thirst for power trumped the aspirations and needs of communities and the people who serve them, workers are sticking with the union because unions are still the best vehicle working people have to get ahead."

Weingarten cited Kagan's dissenting opinion, which claimed no justification for reversing *Abood*. "Not only was *Abood* well within the mainstream of First Amendment law, it has been affirmed six times and applied to other cases upholding bar fees for lawyers and student activity fees at public colleges," Weingarten said. ✤

EMPLOYEE BENEFITS

DOL loosens rules for association health plans

Employers may soon have new options to obtain group health insurance through association health plans (AHPs) under new regulations recently issued by the U.S. Department of Labor (DOL). A brief primer on the mechanics of insurance may be helpful before we dive into the new rules and what they could mean for you.

One of the foundational principles of insurance is that the more people you have participating in a group health plan, the lower your risk and therefore the lower your premiums over time. Larger groups have more premiums being paid into them. Therefore, a large claim isn't going to make as big of an impact on future rates. A million-dollar claim for a preemie baby on a large corporation's health plan will hardly be a blip on their rates, but the same claim on a smaller employer's policy could cause double-digit increases.

That is why AHPs are desirable. They theoretically offer employers the opportunity to join together to purchase insurance for their employees, thereby creating a larger risk pool and stabilizing their premiums over time. However, in the past, the rules for establishing an AHP were quite restrictive. The new regulations from the DOL attempt to make AHPs more available and give employers better options for obtaining affordable health insurance for their employees.

What has changed

Before the new regulations, the rules for AHPs were specifically designed to prevent associations from being formed solely for the purpose of offering health insurance and/or avoiding the oversight of state insurance departments. As a result of those rules, AHPs were difficult to form and operate and were relatively rare.

The new rules attempt to change that by scaling back the rules that apply to AHPs to the following core requirements:

- The primary purpose of the association must be to offer health coverage to its members.
- The association must have at least one "substantial business purpose" that is unrelated to providing health coverage or other employee benefits (but this is an extremely broad requirement and could be something as simple as promoting common business or economic interests).

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- The association's members must be either (1) in the same trade, industry, line of businesses, or profession or (2) in the same state, city, county, or metropolitan area (including one that crosses state lines).
- The AHP must satisfy certain requirements regarding the organizational control and operation.

On the whole, these requirements are significantly easier to meet than the existing rules for AHPs.

Who might benefit

For most existing AHPs, employer members of the plan are subject to the same regulatory requirements as if they were not participating in an AHP. In other words, small employers are still subject to the rules that apply to small groups (such as the requirement that all policies provide essential health benefits) and large ones are subject to the rules applicable to large employers (such as the employer mandate).

Under the new rules, however, the coverage offered through the AHP would be treated as part of a large group regardless of the size of the employer member. Thus, although employers of all sizes would be eligible for the rules' new AHP option, employers currently in the small group or individual market are likely to be most interested. Joining an AHP that covers 50 or more employees would put them in the large group market and give them more flexibility to offer reduced benefits at a lower cost to themselves and their employees. Not to mention that, as discussed above, joining a larger pool can spread the risk and help keep your rates down.

What the future holds

While AHPs sound good in theory, at this point it's impossible to tell whether they will really take off. State insurance departments still retain regulatory authority over them to some extent, and many have not been fond of AHPs historically because of a tendency toward fraudulent practices in the past.

In addition, there are legitimate concerns about such plans pulling in only healthy groups and members, leaving others with all the risk and rapidly rising premiums. It's likely that many states will take a close look at what they can do to avoid that type of scenario.

The long and short of it is that if you are offered an opportunity to join one of these plans, keep in mind that it's too soon to know how it is all going to play out, and it may not be a legitimate opportunity. A call to your benefits attorney may be advisable just to be safe. ✤

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