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## ALL PLAN LETTER

**DATE:** December 9, 2019  
**TO:** All Health Care Service Plans  
**FROM:** Sarah Ream, Acting General Counsel  
**SUBJECT:** APL 19-024 (OLS) – Association Health Plans

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This All Plan Letter (APL) reminds health plans, solicitors, brokers and others that in California, group coverage may not be sold to individual subscribers directly or “indirectly through any arrangement.”<sup>1</sup>

Likewise, large group coverage may not be sold to small employers through multi-employer welfare arrangements (MEWAs),<sup>2</sup> association health plans (AHPs),<sup>3</sup> voluntary employees’ beneficiary associations (VEBAs)<sup>4</sup> or any similar arrangements (collectively “associations”).

### **I. In California, large group coverage may not be sold to individuals or small employers via an association health plan.**

California law significantly limits the extent to which employers and individuals may join together to purchase health care coverage as an association. The Knox-Keene Act provides for “guaranteed associations,” but prohibits the formation of new guaranteed

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<sup>1</sup> Health and Safety Code sections 1399.802 and 1399.846. All statutory citations refer to the Health and Safety Code unless otherwise noted.

<sup>2</sup> A MEWA is “an employee welfare benefit plan, or any other arrangement... established or maintained for the purpose of offering or providing [welfare plan benefits] to the employees or two or more employers...or their beneficiaries.” 29 U.S.C. section 1002(40)(A).

<sup>3</sup> AHPs are a type of MEWA offered by employer groups and associations to provide health care coverage for employees.

<sup>4</sup> VEBAs are tax-advantaged vehicle for funding certain employee benefits, including health care coverage. Employees can participate in the VEBA based on their common employment-related bond, such as a common employer, coverage under one or more collective bargaining agreements, or membership in a labor union. A VEBA may be, but is not always, associated with an employee welfare benefit plan under ERISA.

associations.”<sup>5</sup> And, even with respect to guaranteed associations, the Knox-Keene Act considers them to be “small employers;” they are not eligible to purchase large group coverage for their members.

For all other associations (i.e. those that do not meet the definition of a guaranteed association), California law “looks through” the association to determine the appropriate market segment for the particular purchaser. Senate Bill 1375 (Stats 2018 ch 700 §3) codified this look-through by expressly stating: “The status of each distinct member of an association shall determine whether that member’s association coverage is individual, small group, or large group health coverage.”<sup>6</sup>

## **II. Recent federal rules regarding AHPs do not abrogate California’s law regarding associations.**

Federal law allows employers and individuals to come together to form an association to purchase or self-fund health care coverage. On June 21, 2018, the U.S. Department of Labor finalized a rule titled “Definition of ‘Employer’ Under Section 3(5) of ERISA— Association Health Plans” (AHP rule) with the stated goal of increasing employers’ access to the large group market. The AHP rule allows sole proprietors and small employers to more easily come together to form AHPs and buy health care coverage in the large group market by expanding the circumstances under which an AHP could be considered a single employer, relaxing the standards for forming an AHP, and treating sole proprietors as both employers and “employees” so they can qualify as small employers.

However, the fate of the AHP rule is unclear. Eleven states (including California) and the District of Columbia sued the Department of Labor and the court struck down much of the AHP rule. The Department of Labor appealed in late April, 2019, and that case is still pending.

Regardless of what happens with the pending litigation, however, the federal AHP rule will apply in a particular state only to the extent it does not conflict with state laws regarding insurance. As discussed above, California law strictly limits and regulates the sale of health care coverage through associations. Accordingly, notwithstanding the AHP rule, individuals (including sole proprietors without employees) may purchase individual coverage only, regardless of whether they are in an association. Similarly, small employers may purchase small group coverage only, regardless of whether that coverage is sold through an association.

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<sup>5</sup> To meet this definition the of a guaranteed association the association must, among other things: have been in active existence since 1992; be organized and maintained for purposes unrelated to insurance; and, the individuals and/or employers must be associated based “solely on participation in a specified professional or industry. (Section 1357.500, subdivision (I)).

<sup>6</sup> Section 1357.503, subdivision (a)(2).

Finally, it is unlawful for any entity not licensed in California as a health plan or insurer (or exempt from such licensure) to sell health plan or insurance coverage to individuals or employers in California.<sup>7</sup> The fact that the coverage may be offered via an association is irrelevant.

### **III. Phase out period for large group coverage currently in place for small employers and individuals**

The DMHC understands that some health plans have sold large group coverage to small employers (including sole proprietors) through associations. Plans may not enroll any new small employers into large group coverage. However, for those plans with such coverage currently in effect, the DMHC is implementing a “phase out” period. Through June 30, 2020, plans may renew coverage for those small employers currently purchasing large group coverage through an association; the term of those contracts may be for no longer than one year. Beginning July 1, 2020, plans must cease renewing existing large group contracts for small employers. As a result, by July 1, 2021, no small employers should be purchasing large group market coverage.

If you have questions or concerns regarding this APL, please contact Sarah Ream, Acting General Counsel, at (916) 324-2522 or via email at [sarah.ream@dmhc.ca.gov](mailto:sarah.ream@dmhc.ca.gov).

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<sup>7</sup> Section 1349.