

MEWA 101

MEWA is an acronym for a multiple employer welfare arrangement. It means an employee welfare benefit plan, or any other arrangement, that provides a welfare benefit, (such as health insurance) to the employees of two or more employers (including one or more self-employed individuals). ERISA exempts certain arrangements from this definition.

THE MEWA Advantage

1

Administrative convenience.

Establishment and maintenance of a health benefit plan carries with it numerous obligations, including compliance, vendor management, and billing. An employer that does not want to devote time and resources to those obligations can offload them to the MEWA.

2

Market Clout.

A small employer has little ability to negotiate with insurers and other vendors for better rates or services. Participation in a MEWA plan that covers many employees gives the employer the benefit of leverage that it could not exert on its own.

3

Plan Flexibility.

Small employers are not prohibited from establishing a self-insured plan but most chose not to do so because of the risk as well as the enormous administrative overhead that comes with such an arrangement. Participation in a self-insured MEWA affords an employer the ability to enjoy the generally lower costs that self-insurance offers as well as greater flexibility in plan design (though with some increase in risk.)

4

The Magic Number 50.

If an employer with 50 or fewer employees wants to offer a fully-insured health plan, it will have to purchase a policy that is substantially constrained by the ACA's insurance mandates, including the offering of ten essential health benefits and small group community rating rules. A small employer in a fully-insured MEWA (with 51 or more participants) will be deemed to be a large employer and therefore can be covered under a group policy that is not subject to the insurance mandates and community rating.

We began by saying that a MEWA is a “health plan or other arrangement” that covers the employees of two or more employers. We listed several advantages that employers (particularly small employers) might enjoy when offering health coverage to their employees through a MEWA. However, there is one important caveat. Most of the advantages of being in a MEWA are available only if the MEWA is a health plan, as opposed to some “other arrangement”. The Department of Labor has offered guidelines for MEWAs that wish to qualify as health plans. Practically speaking, the only MEWAs that will qualify as health plans are those sponsored by trade associations whose membership is limited to employers in the same trade, industry, line of business or profession.

These guidelines establish 3 primary requirements:

1

The association must consist only of employers.

Accordingly, an association that includes in its membership sole proprietors without employees will not qualify as an association of employers. An association that includes such sole proprietors and wishes to offer health coverage to its member employers must create a sub-group within the organization that consists solely of employers. That sub-group must be the entity that sponsors, maintains and governs the operation of the plan. Sole proprietors without employees cannot be covered under the plan.

2

The employers within the association must be united by a “commonality of interest.”

The DOL uses a “facts and circumstances” test to determine whether a commonality of interest exists. The test includes the following factors:

- how the association solicits members
- who is entitled to participate and who actually participates in the association
- the process by which the association was formed
- the association’s purposes; the main purpose of the association must be to advance the business interests of the members and not to provide insurance
- the relationship of its members outside the organization; employers must have a genuine organizational interest unrelated to the desire to provide insurance
- the powers, rights, and privileges that a member enjoys as a result of joining the association

The practical upshot of the way that this test is applied is that only associations that are limited to employers in the same line of business (commonly referred to as “trade associations”) are likely to meet these qualifications.

3

The employers within the association must actually control the association and the health plan both in form and in substance.

Thus, the control element must be included in the organizational documents of the arrangement and the members must actually exercise that control. This could be achieved by giving the members the ability to select and remove plan trustees and ensuring that the trustees themselves are not merely rubber stamps for decisions made by the association.

Compliance Obligations

A MEWA that is a health plan is subject to the same ERISA requirements as any other ERISA plan.

There are a few particulars that deserve special mention:

Form 5500

A MEWA that is itself a health plan is required to file a **Form 5500**. Participating employers are not required to file.

Form M-1

All MEWAs (regardless of their status as health plans) must file a Form M -1 no later than 30 days before operating in any State. “Operating” means conducting any activity, including but not limited to: marketing, soliciting, providing, or offering to provide benefits consisting of medical care.

Thereafter, the form M-1 must be filed annually by March 1.

Additional M-1’s must be filed:

- Within 30 days of knowingly operating in any additional State or States that were not indicated on a previous M-1;
- Within 30 days of the MEWA operating with regard to the employees of an additional employer (or employers, including one or more self-employed individuals) after a merger with another MEWA;
- Within 30 days of the date the number of employees receiving coverage for medical care under the MEWA is at least 50 percent greater than the number of such employees on the last day of the previous calendar year; or
- Within 30 days of experiencing a material change as defined in the Form M-1 instructions. The instructions define a material change as any of the information in Part II of the M-1. Part II includes contact information for the MEWA, the administrator and trustees and the persons or entities providing services to the MEWA as well as compliance information.

Exceptions to the M-1 filing obligations:

- Plans consisting solely of expected benefits.
- Plans that are not subject to ERISA (i.e. governmental and church plans).
- Plans that provide coverage only to employees of a group of employers that are under common control.
- Plans that would not be a MEWA but for the fact that they provide coverage to persons (other than spouses and dependents of employees) who are not employees of the plan sponsor, provided that the total number of such persons does not exceed 1% of the total number of employees or former employees of the plan sponsor (determined as of the last day of the to be reported).

Compliance Obligations

HIPAA Privacy & Security

A MEWA is considered a “health plan” under the **HIPAA privacy** and **security** rules, regardless of whether it is a health plan for purposes of ERISA. The MEWA must institute processes and technical safeguards as described in those rules to ensure that PHI is not inappropriately used or disclosed and (in the case of electronic PHI) to ensure that the confidentiality, integrity, and accessibility of the PHI is maintained.

A MEWA that is an ERISA group health plan is also subject to the special privacy rules for such plans. This includes limitations on the ability to disclose PHI to plan sponsors and various administrative and documentation requirements.

Fiduciary Duties and Plan Assets

The plan administrator and trustees of a MEWA are fiduciaries. Contributions made by employers to a MEWA are plan assets. The MEWA is obligated to maintain those assets in a trust and the trustees are required to maintain fidelity bonds to ensure their compliance with their responsibilities.

Coverage Requirements

While a MEWA that is a health plan and covers more than 50 employees is not subject to many of the **ACA's** coverage requirements, various other requirements remain.

- MEWAs must cover preventive care without application of cost sharing.
- EEOC rules for coverage of pregnancy-related expenses must be covered on that basis as other medical conditions. Similarly, if the plan covers hospital stays in connection with childbirth, the 48 and 96-hour rules apply.
- If the plan covers any of the 10 essential health benefits, the maximum out-of-pocket rules apply as do the prohibitions on annual and lifetime maximums.
- State mandated-benefit rules continue to apply.
- COBRA ¹

PCORI Fees

PCORI fees are intended to fund the Patient-Centered Outcomes Research Institute. The fees are assessed against health insurers and the sponsors of self-insured health plans ². In the case of a self-insured MEWA, the fee must be paid by the “committee” that sponsors the plan. Plan assets may not be used to pay the PCORI fees.

¹ The IRS has not yet provided clear guidance on how COBRA applies to employers with fewer than 20 employees within a MEWA.

² Note that this fee applies only for plan years that end on or after October 1, 2012, and before October 1, 2029.