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Multiple Employer Welfare Arrangements:
Affordable Coverage for Small Businesses and Self-Employed Individuals

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Key Points

- Multiple employer welfare arrangements (MEWAs) enable small businesses to pool their risk to purchase more affordable health coverage.
- The Trump administration's Department of Labor (DOL) adopted a rule expanding opportunities for small businesses and self-employed individuals to join MEWAs.
- Due to a federal court ruling, the Texas MEWAs that operated according to the DOL's rule had to shut down.
- Texas can enact legislation similar to the DOL's rule, giving Texas small businesses and self-employed individuals the opportunity to purchase more affordable health coverage through a MEWA.

Executive Summary

Health insurance is generally regulated at the state level. However, the Employees Retirement and Income Securities Act (ERISA) is a federal law that preempts state law by allowing employers to, among other things, establish health insurance for their employees and be exempt from many state regulations of insurance.

The cost of providing health coverage, which continues to rise, is the number one reported problem of small business owners (Wade & Heritage, 2020; Buttle et al., 2019). One way small businesses can access more affordable coverage is by forming a multiple employer welfare arrangement (MEWA) to offer healthcare benefits to their employees.[1] Under ERISA, a group or association of multiple employers can form a MEWA and be considered a single employer for the purpose of offering or providing benefits. This, in turn, enables the employer members to pool their risk, have more negotiating power, have access to an increased amount of less expensive plans, and avoid burdensome regulations.

Before 2018, to be considered a single employer under ERISA, the group or association had to have a primary purpose other than providing coverage, the employer members had to be in the same trade or industry, and the association could not include self-employed individuals. In 2018, the Trump administration's Department of Labor (DOL) issued a rule expanding the definition of "employer" to include groups or associations with the primary purpose of providing coverage, groups or associations of employers in different trades or industries but in the same state or metropolitan area, and groups or associations that include self-employed individuals.

The DOL's rule enabled the creation of Texas MEWAs like Decent, which offered coverage to small businesses and self-employed individuals that were not in the same trade or industry. Decent reported offering rates significantly cheaper than the market rates and boasted a customer satisfaction much higher than the industry average (Soman, 2020). In Texas, several chambers of commerce, which serve businesses within a geographic region but across industries, formed MEWAs.

In March 2019, a federal judge ruled much of the DOL's rule invalid in State of New York v. United States Department of Labor (2019), ruling that the expanded definition of "employer" violated ERISA because it did not meaningfully limit the

1 Many MEWAs are operated by associations and are commonly referred to as association health plans.

continued

Figure 1

Health Insurance Offer Rates and Average Yearly Premiums for Businesses With Less Than 50 Employees, 2000–2018

Note. Graph reproduced from *Small Business Problems & Priorities*, by H. Wade and A. Heritage, 2020, p. 8 (https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf#page8).

groups or associations that could be considered a single employer as originally intended by ERISA. As a result of the ruling, MEWAs operating according to the DOL's rule stopped providing coverage. The Trump administration appealed the ruling in April 2019 (DOL, 2019). Soon after President Biden took office, the D.C. Circuit said they would wait to issue a decision to give the Biden administration time to learn the case (McAfee, 2021); the Biden administration has not indicated any intentions to do anything about the case or appeal (Stein, 2022), leaving the district court ruling intact.

HB 3923 from the 87th Texas Legislature would have allowed MEWAs to continue to operate in a similar manner as was allowed by the DOL's rule by covering, under state law, employers in different trades or industries but in the same state or metropolitan area and self-employed individuals. The bill passed the House but was never given a vote in the Senate. By passing policy similar to this legislation, Texas can give more small businesses and self-employed individuals the opportunity to purchase more affordable health coverage. Such policy would remove three requirements for MEWAs offered by groups or associations considered a single employer: the requirements that they only include members of the same industry, that they have been operating for two years before entering into a MEWA, and that they exclude self-employed individuals. This would allow self-employed individuals to be included in such MEWAs

Introduction

According to the National Federation of Independent Business Research Center's surveys of its members, the cost of health insurance has been the number one cited problem faced by small business owners for 29 years (Wade & Heritage, 2020, p. 5). Fifty-one percent of small business owners also rank it as a "critical" problem, 20 percentage points higher than the next highest "critical" problem of locating qualified employees and 30 percentage points higher than taxes (p. 9). Health insurance costs have risen, outpacing wages and inflation, and the percent of small-business owners who offer health insurance to their employees has decreased from over 45% in 2000 to 30% in 2018 (p. 6).

A study published by the Commonwealth Fund, which also found the cost of providing health coverage to be the number one problem for small business owners, found that when asked about ways to control their business' healthcare costs, business owners supported allowing small businesses to band together to have more market power to buy health insurance the most among several options (Buttle et al., 2019, p. 7).

Health insurance, like most lines of insurance, is generally regulated at the state level. In order to offer health insurance, a company would be required to obtain a license to operate as an insurer and submit to varying degrees of costly regulations, including underwriting, mandated coverages, claims handling, and capital and surplus requirements. The Employees Retirement and Income Securities Act (ERISA) is a federal law that preempts state law by allowing employers to establish health insurance for their employees and be exempt from many state regulations of insurance.

A Multiple Employer Welfare Arrangement (MEWA) is defined in ERISA as an arrangement established or maintained to provide benefits to the employees of multiple employers (29 U.S.C. § 1002). The MEWA provision of federal law allows groups or associations of small businesses to form an arrangement together and be considered a single employer for the purpose of being the employer sponsor of an employee welfare benefit plan under ERISA; the plan is offered to each small business' employees.[2]

MEWAs

Without a MEWA, Texas businesses that have between 2 and 50 employees and want to offer or provide health insurance to their employees must purchase insurance from the small-group market (Texas Insurance Code §1501.002). Businesses that employ more than 50 employees are able to purchase insurance from the large-group market, which is subject to less-strict regulations.

If a group or association of small businesses together have more than 50 member employees, it can qualify to purchase insurance from the large-group market in the same manner as one business with more than 50 employees (Definition of "Employer" Under ERISA, 2018). Purchasing insurance from the large-group market allows the group or association to access cheaper plan options compared to the small-group market because:

- It can negotiate premiums with the insurance company (Telkamp, 2020).
- It is not required to provide all 10 of the Essential Health Benefits[3] (Centers for Medicare & Medicaid Services, n.d.-a), which allows them to better customize their benefits according to the unique needs of their employees.
- Insurance companies have more flexibility in setting rates (Centers for Medicare & Medicaid Services, n.d.-b).
- Insurance companies are not required to use a single risk pool when developing premiums (Corlette et al., 2018; American Academy of Actuaries, 2017).
- A group's ability to self-fund is increased, which can lower administrative costs in addition to eliminating the expense of paying a third-party insurance company (Association Health Plans, n.d.).

ERISA defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity" (29 U.S.C. § 1002(5)). The DOL has the authority to interpret this statute and determine whether a group or association of employers is acting for an employer. Such a determination includes ensuring the group or association's MEWA does not "more closely resemble State-regulated private insurance offered to the market at large" and ensuring that "the entity that maintains the plan and the individuals who benefit from the plan are tied by a common economic or representational interest" (Definition of "Employer" Under ERISA, 2018, p. 28,913).

The DOL has adopted three general requirements for a group or association that operates a MEWA to be considered a single employer:

- the group or association must have a purpose unrelated to offering or providing health coverage;
- the employer members must have a common interest unrelated to offering or providing benefits; and
- the employer members must control the group or association and the plan (Definition of "Employer" Under ERISA, 2018).

2 Many MEWAs are operated by associations and are commonly referred to as association health plans.

3 The individual and small-group markets must cover these 10 essential health benefits under the Affordable Care Act: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventative and wellness services and chronic disease management; and pediatric services, including oral and vision care (Centers for Medicare & Medicaid Services, n.d.-a).

The requirement for the group or association to have a purpose unrelated to offering or providing benefits was historically interpreted to exclude groups or associations that joined together for the *primary purpose* of offering or providing benefits. The requirement regarding "common interest" was historically interpreted to mean that the employers must operate in the same trade, industry, line of business, or profession (29 U.S.C. § 1002(43)).

Additionally, self-employed individuals were historically excluded from participation in such a MEWA because they were not included in the historically interpreted definition of "employer."

A MEWA in Texas

The State Bar of Texas, of which all licensed attorneys in Texas are members, has offered health coverage to law firms for decades. In 2018, they launched a MEWA called the Members Health Plan (2018) with the "aims to not just lower the cost of healthcare benefits but also reduce administrative fees and grant access to a wider variety of potential health plan benefits" (para. 3). The State Bar of Texas can be considered a single employer because:

- The State Bar of Texas' primary purpose is related to supporting and improving the Texas legal system, which is unrelated to offering or providing its members health coverage.
- The State Bar of Texas' members have a common interest because they are all in the same line of business: the legal business.
- Members of the State Bar of Texas control the State Bar of Texas by electing its leaders and voting on policies, and the law firms control the Members Health Plan.

The Members Health Plan currently serves 245 firms and more than 1,000 people (State Bar of Texas, personal communication, March 14, 2022). The plan's premiums are reported by the State Bar of Texas to be around 10% to 15% cheaper than the market rates. While the plan is available to any Texas law firm, most of the firms served by the plan are small because large firms already have enough employees to purchase from the large-group market and pool their employees' risks sufficiently.

The Members Health Plan can only serve lawyers with at least one other FTE. However, the State Bar of Texas receives a lot of requests for coverage from self-employed individuals and would like to give them access to the Members Health Plan (State Bar of Texas, personal communication, March 14, 2022).

The Trump Administration Department of Labor's Rule

In June 2018, the Trump administration's DOL adopted a rule interpreting ERISA differently than it had previously been interpreted, with the stated objective of "expand[ing] employer and employee access to more affordable, high-quality coverage" (Definition of "Employer" Under ERISA, 2018, p. 28,916). The rule interpreted ERISA such that the definition of a single employer was expanded. Under the rule, a group or association of employers could form a MEWA and could be considered a single employer if:

- the group or association serves at least one "substantial business purpose" other than offering or providing health coverage, *although its primary purpose could be offering or providing health coverage*;
- the employer members are either in the same trade, industry, line of business, or profession, *or the same geographic region within a state or metropolitan area*; and
- the employer members must control—"*both in form and in substance*"—the group or association and the group health plan.

The rule also allowed such MEWAs to *cover self-employed individuals*. The Congressional Budget Office predicted that, under the new rule, about 3.7 million additional people would get coverage from a MEWA that operates according to the rule (Congressional Budget Office, 2019, p. 8).

MEWAs Under the DOL's Rule

Founded in 2018, Decent is a company headquartered in Austin, Texas, that aims to provide people with affordable health insurance by crafting health plans for small businesses throughout the state (Decent, n.d.). To provide these plans, Decent partnered with the Texas Freelance Association to enable them to group small businesses and self-employed individuals together to "access the benefits previously only available to companies with the scale to self-insure" (Poynter, 2020b, para. 4). Decent was founded following the issuance of the DOL's rule, which created an opportunity to serve small businesses, their employees, and particularly self-employed individuals with more affordable healthcare.

According to Decent, their plans were "priced at up to 40% less than the market rate" (Poynter, 2020b, para. 4). Decent reported that it was offering the "most affordable ACA [Affordable Care Act]-compliant health insurance in Texas to self-employed people without employees" and had a "Net Promoter Score (NPS) of 79 in an industry where the average score is 14 and the top 5 carriers average -20"[4] (Soman, 2020).

Chambers of commerce are groups of businesses in a variety of industries in the same geographic area. Thus, the DOL's rule enabled chambers of commerce to be considered single employers to offer health plans through MEWAs. Several chambers of commerce in Texas formed MEWAs in response to the DOL's rule.

Among these were the Lubbock Chamber of Commerce (2018) and a group of 15 chambers of commerce in north east Texas. A representative from the Longview Chamber of Commerce, a member of this north east Texas MEWA, reported that small businesses that would not have been able to afford coverage obtained it through the plan (K. Hall, personal communication, April 25, 2022).

Twenty-six chambers in north Texas formed a MEWA; the President and CEO of one of those chambers of commerce—the East Parker County Chamber of Commerce—said in an announcement of the plan: "I have been looking forward to a program like this since 2008 ... The chamber has carefully evaluated this option and I am excited to see that the right program is finally here. We are thrilled to provide this benefit to our small business members" (Owens, 2018, para. 2). Unfortunately, the DOL rule was quickly challenged, preventing a nascent market from developing fully and competitors to Decent to emerge.

The Ongoing Court Case

Eleven states[5] and Washington, D.C., sued to block this rule in July 2018 in *State of New York v. United States Department of Labor* (Complaint for Declaratory and Injunctive Relief, 2018). The lawsuit argued that the DOL's rule was unlawful because:

- It did not satisfy ERISA's definition of employer because employers in a geographic area do not share a true commonality of interest.
- It conflicted with ERISA (and the ACA and case law) by enabling one person to be both an employer and an employee, thus enabling self-employed individuals to be served by a MEWA.
- The factors motivating the DOL were not factors Congress intended the DOL to consider when making policy adjustments.
- The DOL's policy adjustments were not implementing ERISA but rather evading the ACA.

Chambers of commerce are groups of businesses in a variety of industries in the same geographic area. Thus, the DOL's rule enabled chambers of commerce to be considered single employers to offer health plans through MEWAs.

The Texas attorney general ("Brief for the States of Texas, Nebraska," 2018) submitted an amicus brief in support of the DOL's rule, explaining that, under the rule, "states will have more covered individuals at a lower cost to the states" (p. 7). The brief argued that federal agencies can change policies without being subject to a higher standard of review, and the DOL's rule was one such case.

In March 2019, a federal judge ruled much of the DOL's rule invalid in *State of New York v. United States Department of Labor* (2019). The judge ruled that the DOL's new interpretations of the three requirements a group or association must satisfy to be considered a single employer did not meaningfully constrain groups or associations to only "those acting 'in the interest of' their employers" (p. 32). The opinion, broken down by each requirement, can be summarized as follows:

Purpose: The DOL's new interpretation that includes groups or associations formed with the primary purpose of providing health coverage does not "set

4 An NPS is calculated by asking customers to rate on a scale of ten how likely they would be to recommend the product or service to a friend and subtracting the percentage of the ratings that were lower than or equal to six—a.k.a. the "detractors"—from the percentage of the ratings that were nine or ten—a.k.a. the "promoters" (Reichheld, 2003).

5 New York, Massachusetts, California, Delaware, Kentucky, Maryland, New Jersey, Oregon, Pennsylvania, Virginia, and Washington.

meaningful limits on the character and activities of an association," which the judge claims to be a necessary function of the purpose requirement (p. 25).

Common interest: The DOL's new interpretation that includes employers in the same state or metropolitan area is not sufficient because "common geography does not necessarily correlate with any common interest" (p. 28).

Control: Because the DOL's new interpretations do not meet the purpose and common interest tests, they do not "establish an interest-based bond between associations and employer members, which in turn undermines the effectiveness of the control test" (p. 32).

Additionally, the judge ruled that the DOL's inclusion of self-employed individuals—by defining them as both employers and employees—violates ERISA because ERISA is designed to regulate benefits from employment relationships and "one does not have an employment relationship with oneself" (*State of New York v. United States Department of Labor*, 2019, p. 35).

The Trump administration appealed the ruling in April 2019 (U.S. Department of Labor, 2019). While the appeal was pending, MEWAs operating according to the DOL's rule were able to continue providing coverage based on the rule until the end of the plan year or contract term. In February 2021, the D.C. Circuit said they would not yet issue a decision on the DOL rule to give the Biden administration time to learn the case (McAfee, 2021). The Biden administration has not indicated any intentions to take any actions regarding the DOL's rule, the case, or the appeal (Stein, 2022), which means the district court ruling remains intact.

The Impact of the Federal Judge's Ruling on Texas MEWAs

Founder and CEO of Decent Nick Soman shared the experience of his organization and how it was affected by the federal court case on MEWAs. According to Soman, in November 2020—two weeks into the Open Enrollment period—the Texas Department of Insurance (TDI) notified Decent and the Texas Freelance Association (TFA) that TDI's interpretation of the ongoing federal court case meant Decent and TFA were not allowed to continue serving self-employed individuals and businesses across industries in the same geographic area with their MEWA (Soman, 2020). Decent and TFA were forced to comply with the ruling. While they are still operating, they serve small businesses in the same industry but can no longer serve self-employed individuals and businesses across industries.

The chambers of commerce, too, discontinued their MEWAs, since the plans were serving businesses across industries (but within the same geographic area; S. Mayer, personal communication, April 21, 2022; K. Hall, personal communication, April 25, 2022).

Texas Legislation

In the 87th Texas Legislature, a bill was introduced that would have enacted some parts of the DOL's rule. HB 3923 (2021) would have allowed:

- groups or associations to form a MEWA and be considered a single employer if they are in the same trade or industry *or within a metropolitan statistical area and the state of Texas*; and
- self-employed individuals to be a part of a new MEWA formed by a group or association considered a single employer.

Currently, under Texas state law, groups or associations must have existed for at least two years before they can form a MEWA. HB 3923 would have repealed that two-year requirement.

Because there was no state law enabling MEWAs to serve businesses across trades or industries and the self-employed when these parts of the DOL rule were struck down in federal court, plans like those offered by Decent and the chambers of commerce were no longer allowed to operate. However, an option available for Texas is to adopt a law enabling these types of MEWAs at the state level (Texas House Insurance Committee, 2021, 4:43:49).

HB 3923 was passed by the Texas House of Representatives but did not receive a vote in the Texas Senate (HB 3923 Actions, n.d.).

Recommendation

The 88th Texas Legislature should expand the ability of MEWAs operating in Texas to provide affordable coverage to more people, especially small businesses and the self-employed. Texas can do this by removing the requirement for MEWAs to only include members of the same industry, by allowing self-employed individuals to be included in MEWAs, and by removing the requirement for the association to have been operating for two years before entering into a MEWA.

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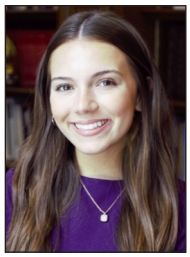

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