



**School of Law / Institute for
Health Policy & Practice**
Health Law & Policy

Association Health Plans

The New ERISA Rules and What They Mean For New Hampshire – Brief Q&A

NOVEMBER 7, 2018

Lucy Hodder, JD, Director of Health Law and Policy
Allison Wyman, JD, Health Law and Policy Associate
UNH SCHOOL OF LAW AND THE INSTITUTE FOR HEALTH POLICY AND PRACTICE

Summary of Key Regulatory Issues:¹

What is an AHP?

Association Health Plans (AHPs) are group health plans offered by an association of individuals and employers.²

What Do the New Rules Allow?

The new federal rules³ amend the definition of “employer” under ERISA (the Employee Retirement Income Security Act of 1974) and give states new authority to:

- 1) Treat an AHP as a multi-employer large group plan;
- 2) Make it easier to form an association by relaxing the degree to which the AHP members must have a common business interest. The new rules allow association members to be in the same industry, trade, profession or “line of business”, **or** be linked within a state geographic area or a common metropolitan area even if it extends beyond state lines.
- 3) Permit self-employed individuals to join as owner-employers.

New Hampshire must decide whether to revise its laws to accommodate these changes.

Why is NH Hosting Stakeholder Meetings Now?

The prompt effective dates of the federal rules (September 2018 for fully-insured association coverage, January 1, 2019 for existing self-funded associations and April 1, 2019 for new self-funded associations) are causing New Hampshire and other states to consider what’s best for each state’s insurance market. This does not leave much time to develop credible evidence of impact.

Does NH Currently Regulate AHPs? If So, How?

Currently, health plans can be offered by an association of employers under New Hampshire law. If the association seeks to self-fund the health plan, the health plan is regulated as a Multiple Employer Welfare Arrangement (MEWA). See [RSA 415-E:2 II](#). At least one MEWA is actively operating in New Hampshire.⁴ In New Hampshire, members of the MEWA must be employers, and if the association provides a fully-insured health plan to members, each member employer is rated and treated as a small group or a large group depending upon its actual member size. If health insurance is provided by a fully-insured carrier, New Hampshire insurance rules apply to the carrier including [NH RSA 420-G’s Portability, Availability and Renewability of Health Coverage](#) rules consistent with federal law.⁵

¹ ***This Policy Brief was made possible by the generous support of the Endowment for Health.***

² U.S. Department of Labor, About Association Health Plans, <https://www.dol.gov/general/topic/association-health-plans>

³ <https://www.federalregister.gov/documents/2018/06/21/2018-12992/definition-of-employer-under-section-35-of-erisa-association-health-plans>.

⁴ The Automotive Wholesalers Association of New England Health and Welfare Benefit Plan. There are 4 MEWAs who have filed with NHID.

⁵ New Hampshire also passed a statute to allow employers in business associations to form Purchasing Alliances as qualified association trusts to arrange for the sale of health benefit plans. The Purchasing Alliances can not be risk bearing. See RSA 420-M. Changes to ERISA and other federal statutes through the Affordable Care Act prohibited the effectiveness of the statute.

How Does the ACA Impact AHPs?

The Affordable Care Act and its coverage requirements apply and will continue to apply to individual, small group and large group health plans available to individuals and employees in New Hampshire even if New Hampshire changes its rules around AHPs/MEWAs. The ACA, however, treats coverage differently depending upon the health plan's group size because of the different risks involved. For example, small groups (up to 50 employees or full-time equivalents) do not have to provide health coverage, but if they do, the coverage must include the essential health benefits, and premiums can only vary based on age, region, and smoking status. Large groups (over 50 FTE employees) must provide health coverage to employees and comply with the ACA requirements to provide sufficient benefits (known as "minimal essential coverage").⁶

*What's the Difference Between How Large Groups and Small Groups are Regulated?*⁷

Federal and state requirements for premium rates and benefits differ based on the size and type of the health plan. The key questions to ask are: 1) how many members are covered by the plan? and 2) is the plan fully-funded with the risk of loss transferred to a licensed health insurance company or self-funded with the risk assumed by the plan sponsor? The new AHP rules permit individual and small groups to be treated as part of a multi-employer large group plan if they join an AHP. The rules still allow an AHP to be self-funded.

Premium rates for **individual and small group plans** can only vary by family size, geography, tobacco use and age. In addition, individual and small group plans must include a core package of items and services known as essential health benefits (EHBs), such as mental health and substance use disorder services, and ensure the EHBs are accessible. HHS regulations ([45 CFR 156.100](#)) define EHB based on state-specific EHB benchmark plans.⁸ New Hampshire has chosen as its Benchmark Plan Anthem Blue Cross and Blue Shield's "Matthew Thornton Health Plan,"⁹ which provides the standard for essential health benefits. This means all non-grandfathered individual and small group plans in NH must cover, at a minimum, what the Matthew Thornton Health plan covers.

Large group plans are treated differently under federal and state laws and are not subject to the same rating restrictions or coverage requirements as individual or small groups. Large groups do not need to meet minimum actuarial value requirements. Large group employers are, however, required to provide minimum essential health insurance coverage or risk a penalty.

Whether New Hampshire permits AHPs to change the rating restrictions or benefit requirements when individual or small groups form an AHP is being considered.

⁶ "Minimal essential coverage" for large group health insurance plans mean they must be affordable and provide minimum value (typically an actuarial value of at least 60%).

⁷ *Federal Requirements on Private Health Insurance Plans*, Congressional Research Service, August 28, 2018, <https://fas.org/spp/crs/misc/R45146.pdf>.

⁸ Information on Essential Health Benefits (EHB) Benchmark Plans, The Center for Consumer Information & Insurance Oversight, <https://www.cms.gov/cciio/resources/data-resources/ehb.html>.

⁹ *Id.*

Do AHP Rules Impact Essential Health Benefits?

Maybe: The new federal rules permit an association to include individual owner/employers and small group members in a large group AHP which could mean the health plan no longer has to meet protections required for individuals and small groups in the Affordable Care Act, such as including coverage for essential health benefits. However, New Hampshire would have to change its current insurance statutes governing MEWAs for that to happen.

What Are the Risks for NH If the MEWA Laws are Changed?

There has not been sufficient time to assess the impact of permitting AHPs in New Hampshire consistent with the new federal rules. The US Congressional Budget Office predicts that 4 million additional people will enroll in AHPs, including some individuals who are otherwise uninsured and many more migrating from existing individual or small group coverage. Other reports predict that AHPs can be too loosely affiliated under the rules and will be able to segment the markets resulting in migration of the healthier populations to AHPs. Such a migration could result in higher premiums in the individual and small group markets. Many are concerned with the consumer protection issues that have impacted MEWAs in the past, such as fraud, insolvency, lack of transparency and limited coverage benefits.¹⁰ Both the federal rules amending ERISA for AHPs and employment laws covering employers include certain non-discrimination provisions that may offer some protection to employees against disparate treatment.

What Are the Reasons to Change the MEWA Laws in New Hampshire?

New Hampshire has always tried to encourage accessible and affordable health insurance coverage that includes appropriate consumer protections for New Hampshire businesses and residents. Expanding AHPs may allow for cheaper health insurance coverage for certain small employers or self-employed individuals. Opportunities to enhance options for employers and maintain stability in our insurance markets is important. New Hampshire must continue to focus on finding solutions that bring value and sustainability to our health care system by looking at our population's overall health and the costs that drive up our premiums.

¹⁰ *Comments on Proposed Rule: Definition of "Employer" Under Section 3(5) of ERISA – Association Health Plans*, 83 Fed. Reg. 614 (Jan. 5, 2018), RIN 1210- AB85; *Request for a Public Hearing*, Attorneys General of New York, Massachusetts, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, New Jersey, New Mexico, Oregon, Pennsylvania, Vermont, Virginia, March 6, 2018, https://ag.ny.gov/sites/default/files/multi_state_ag_comment_letter.pdf.

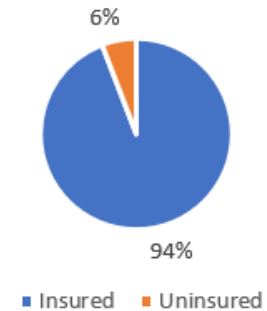
NH Insurance Statistics

According to the *New Hampshire Insurance Department's Preliminary Report of the 2017 Health Care Premium and Claim Cost Drivers*, by Gorman Actuarial, Inc., dated October 25, 2018.¹¹

In 2017:

- There are 1,325,000 residents in New Hampshire
- 1,248,000/94% have health insurance
- 742,000/56% have employer sponsored insurance (ESI) coverage

Insurance Status,
New Hampshire, 2017

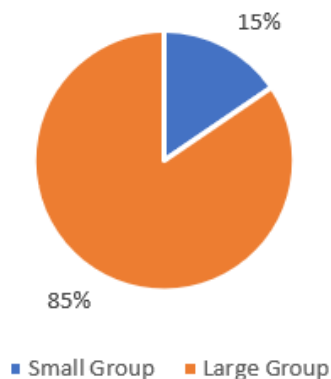


Group Employer Sponsored Insurance Coverage in NH

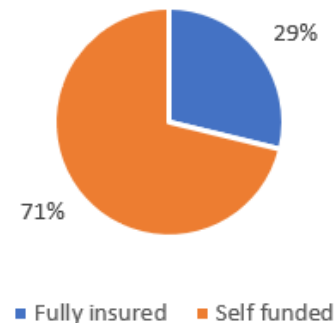
Of NH's total population the following have group employer sponsored coverage in 2017:

- 68,500 in the **small** group market (fewer than 350 self-insured)
- 373,800 in the **large** group market. Of those in the large group market,
 - (29%) 107,700 fully insured plans
 - (71%) 266,100 self-funded plans

Group Type, Employer Sponsored
Insurance, New Hampshire, 2017



Fully Insured and Self-Funded Large
Group Insurance, New Hampshire,
2017

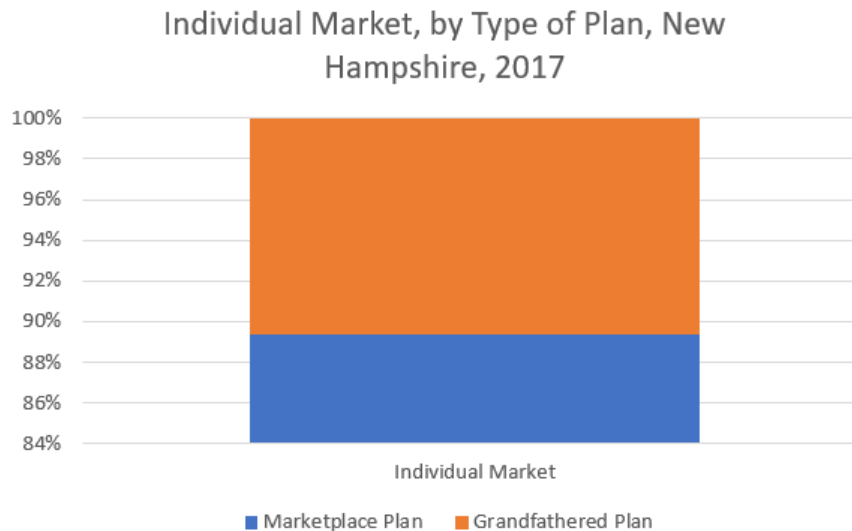


¹¹<https://www.nh.gov/insurance/reports/documents/nhid-annual-hearing-preliminary-report-2017-health-care-premium-102618.pdf>

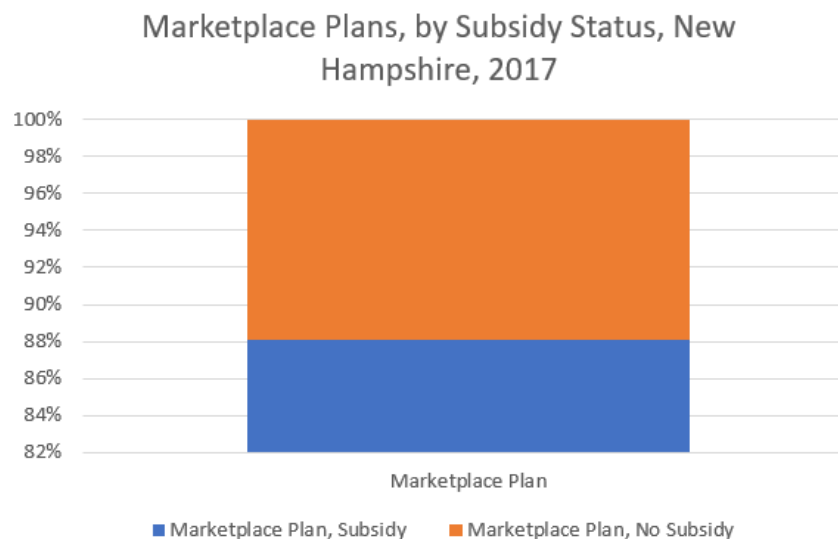
Individual Coverage In NH

In 2018, 94,000 NH residents had individual health insurance coverage:

- 84,000 through NH's Marketplace Exchange (QHPs)
- 10,000 non-exchange ('grandfathered' plans)



Only 20,000 people purchased individual coverage without any direct federal subsidies (including 10,000 through the Marketplace Exchange and 10,000 in non-exchange grandfathered plans).



Beginning January 1, 2019, approximately 41,000 individuals currently enrolled in individual commercial coverage through the Premium Assistance Program (PAP) of the New Hampshire Health Protection Program will be transitioned to Medicaid MCO plans.