KEEPING AT ARMS LENGTH

FRANCHISE JOINT LIABILITY AND ASSOCIATION HEALTH PLANS

ARMS LENGTH

The insurance, broker and franchise industries have been abuzz about proposed Labor Department changes that could allow more businesses to offer employer-sponsored group benefits to their workers. Count us among that number. We are excited about anything that could bring affordable health benefits to the 6 million U.S. small business employers who struggle to provide cost effective employer-sponsored benefits to their employees today.

While this opportunity is great, both the Franchisors and the roughly 800,000 franchisee small businesses need to be especially diligent that they don't expose themselves to legal repercussions in pursuit of association or group sourcing benefits strategies. To avoid missteps and reap the advantages of these expanding opportunities in collective sourcing options, franchisors, franchisee member associations, and their advisors should navigate these new waters carefully.

NEW AHP RULES

Small business and franchise owners individually are not big enough to qualify for large group plans rates nor the expanded coverage in both medical and non-medical (life, disability, accident, etc.) benefits.

Traditionally, they pay more per employee than large employers and have more stringent "participation" requirements. Group-based life insurance, disability (short and long term), and other benefits often have more narrow coverage and benefits than what a large company can obtain.

Large companies also have the advantage of HR and benefits professionals to navigate the complicated waters of benefits sourcing and delivery. Small businesses do all this while juggling…well, a small business! The net result is that many smaller companies either can't afford benefits or, do not offer them, leaving employees to fend for themselves on the individual market or through state and federal exchanges. In fact, only 55% of small businesses nationally offer medical and other benefits to their employees.

Most small employers would like to offer benefits to employees – both because it's the right thing to do, and because it gives them the ability to compete for talent with larger firms as well as retain the good talent they do have. Remove the barriers of "not enough" time and "too much" money and small business owners would leap at the chance to add benefits for themselves, as owners, and their employees. Fortunately, the Labor Department has proposed a rule change that would improve their opportunity to source group benefits.

At its most basic, this modification will use a broader definition of how businesses or franchises can band together to form an association for the purposes of collective sourcing of benefits. This newly expanded set of criteria – including industry, geographic, and professional interests – would enable many more small businesses and franchises to offer benefits through an Association Health Plan (AHP).

The proposed rules, which are expected to be finalized by the end of 2018, broaden and relax the business purpose and "common business interest" standards by allowing small business owners to join together to sponsor an association health plan if they have: (1) a common industry, trade, or profession (similar to current law), or (2) a common geographic location (opening the doors for "chamber of commerce or geography-based groups). Associations would only have to meet one of the criteria, not both. Business associations whose members operate in the same trade or industry can sponsor group health plans, regardless of geographic distribution, while members in the same geographic area may work in entirely different industries.

Ultimately, the rule change could help extend workplace benefits to millions more Americans. In just one example of a Decisely AHP client of independent small business owners of a major national brand, over 35% of its members' employees were able to secure employer-sponsored benefits for the first time. Among those who currently offer benefits, the average savings on medical insurance alone was more than 20% (bringing benefits affordability more in reach), and 36% were able to offer additional benefits such as dental, vision, life and disability (broadening benefits offered to employees).

JOINT LIABILITY CONCEPT:

The Awkward Issues Between Franchisors and Franchisees

A long-standing area of legal risk in the world of franchising is a legal concept known as Joint Liability.

Essentially, Joint Liability occurs when a franchisor is perceived to be in direct control of the employees of its franchises. If this is judged to be the case, then the franchisor is considered a single, joint employer and can be exposed to lawsuits, collective bargaining, and fines for wrongs committed by franchise employees.

In general, franchisors can reduce their exposure of being considered a “joint employer” by:

- **Making non-control clear** – ensuring that within the franchisor/franchisee agreement, documentation, process and true business substance that the franchisor is not acting like the employer, and does not have the power to hire, promote, or fire franchisee employees.
- **Staying true to franchise model** – franchisors want to ensure product and service standards are at a high level (for example: product quality control standards, requiring uniforms or customer greetings to maintain the brand), but should not micromanage franchisee business operations, particularly those operations affecting employees.
- **Leaving HR functions to franchisees** – in practice, franchisors should leave the typical human resources and employer functions like hiring and firing, pay and benefits determination, employee handbooks, HR policies, etc. to the individual franchisee.

AVOIDING JOINT LIABILITY IN AN AHP

If you’re a franchisor, how do you balance your desire and the opportunity to take advantage of Association Health Plans that reduce the cost of benefits for your Franchise ecosystem without creating Joint Liability Exposure?

An AHP or Trust can be sponsored by members of your franchisee group or association and overseen by members of this organization. The AHP or Trust’s role is to aggregate and oversee member needs and to secure coverage on behalf of its members. To avoid Joint Liability missteps in setting up and managing this Trust, we generally recommend five things to clients:

- Leverage an existing association or Trust. This should be an existing independent association or Trust to administer benefits. In many cases, though, there may not be an existing association, but you can set a dedicated AHP Trust up as long as you keep it at arms length.
- The AHP/Trust must be SPONSORED by franchisees, not the franchisor. When creating a new association or Trust, the franchisor can help initiate the exploration of collective benefits sourcing through an AHP, but should leave the decision and its establishment to the franchise members.

There should be a clear hand off from franchisor to franchisee before the start of the Trust.

- The AHP/Trust must be OVERSEEN by franchise members participating in the AHP/Trust. All ongoing management and decisions of the Trust should fall to the Trust Leadership, not the franchisor. Further, a franchisor should not sit on the Board of a Trust or association health plan. If they do, it should be in an advisory and non-voting status.
- Hire a program administrator at the Trust level. A program administrator is usually an outside firm or organization that provides a turnkey offering for creating, launching and managing an AHP. This can be a broker or consultant, law firm, or professional management firm. In cases where Decisely provides program management, brokerage, marketing, or a technology platform for benefits delivery and client administration, we make sure to report directly to the Trust Board and remain independent from the franchisor.
- Choose a multi-faceted program administrator that can offer services other than just benefits. Associations and Trusts can further erode the issue of Joint Liability by offering other independent HR functions beyond just the AHP, such as payroll, recruiting, retirement plans, HR support services such employee handbooks, and more. This combined program helps substantiate the Trust and its services as independent of the franchisor.

EMBRACE THE CHANGE

Ultimately, the potential of AHP's will be a game changer in terms of potential savings and efficiencies. Today, six million small businesses buy benefits individually, company by company; while tomorrow, six million small businesses will buy benefits collectively. Franchisors and their small business franchisees that seek to capitalize on this expanding opportunity can do so with careful planning for arm's length creations and administration of AHPs.

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About Decisely

Decisely is a Benefits brokerage and HR services firm specializing in integrated technology solutions for Small Businesses. Supported by licensed benefit brokers and industry professionals, the Decisely solution provides the right mix of healthcare benefits, recruiting, HR admin, compliance, and payroll on one easy-to-use platform. For more information visit: Decisely.com.