



# RULE-MAKING ORDER EMERGENCY RULE ONLY

## CR-103E (October 2017) (Implements RCW 34.05.350 and 34.05.360)

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER  
STATE OF WASHINGTON  
FILED

DATE: December 17, 2018

TIME: 3:06 PM

WSR 19-01-081

**Agency:** Office of the Insurance Commissioner

**Effective date of rule:**

**Emergency Rules**

- Immediately upon filing.
- Later (specify) \_\_\_\_\_

**Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?**

- Yes
  - No
- If Yes, explain:

**Purpose:** On June 19, 2018, the United States Department of Labor (DOL) issued a final rule on Association Health Plans (AHP's) <https://www.federalregister.gov/documents/2018/06/21/2018-12992/definition-of-employer-under-section-35-of-erisa-association-health-plans>. The DOL rule greatly expands the ability of small businesses and self-employed individuals to band together by geography or industry to provide health care coverage to their employees as if they were a single large employer. It establishes a set of requirements that associations and the health plans they offer must meet in order to offer coverage under the new rule.

Under the final federal rule, there are two types of associations that can offer health plans. Under the rule, both types of associations are considered a "bona fide group or association of employers":

- Pathway 1: Association health plans that are formed and offered under "pre-rule guidance" issued by DOL prior to issuance of the new rule on June 18; and
- Pathway 2: Association health plans that are formed and offered under the criteria of the new rule.

Under the federal rule, fully-insured Pathway 2 association health plans can be filed with states beginning September 1, 2018.

**Citation of rules affected by this order:**

- New: WAC 284-43-9000, WAC 284-43-9010, and WAC 284-43-9020
- Repealed:
- Amended:
- Suspended:

**Statutory authority for adoption:** RCW 48.02.060; RCW 48.43.733

**Other authority:**

**EMERGENCY RULE**

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

**Reasons for this finding:** The federal association health plan rule allows new "Pathway 2" association health plans to file forms and rates with the Office of the Insurance Commissioner beginning September 1, 2018. There are no current state rate or form rules related to Pathway 2 AHP filings. Emergency rules are needed to establish requirements for rate and form filing that are unique to this new type of association health plan. Emergency rulemaking will ensure that regulations are in place in order to respond to and review Pathway 2 association health plans filed with the Office of the Insurance Commissioner for sale in Washington state.

**Note: If any category is left blank, it will be calculated as zero.  
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.  
A section may be counted in more than one category.**

**The number of sections adopted in order to comply with:**

Federal statute:	New	___	Amended	___	Repealed	___
Federal rules or standards:	New	<u>3</u>	Amended	___	Repealed	___
Recently enacted state statutes:	New	___	Amended	___	Repealed	___

**The number of sections adopted at the request of a nongovernmental entity:**

New	___	Amended	___	Repealed	___
-----	-----	---------	-----	----------	-----

**The number of sections adopted on the agency's own initiative:**

New	<u>3</u>	Amended	___	Repealed	___
-----	----------	---------	-----	----------	-----

**The number of sections adopted in order to clarify, streamline, or reform agency procedures:**

New	___	Amended	___	Repealed	___
-----	-----	---------	-----	----------	-----

**The number of sections adopted using:**

Negotiated rule making:	New	___	Amended	___	Repealed	___
Pilot rule making:	New	___	Amended	___	Repealed	___
Other alternative rule making:	New	<u>3</u>	Amended	___	Repealed	___

**Date Adopted:** 12/17/2018

**Name:** Mike Kreidler

**Title:** Insurance Commissioner

**Signature:**



**SUBCHAPTER M  
ASSOCIATION HEALTH PLANS**

NEW SECTION

**WAC 284-43-9000 Definitions.** "Pathway 2 Association Health Plan" means a health plan offered by a bona fide employer group or association acting in the interest of an employer under section 3(5) of the Employee Retirement Income Security Act (29 U.S.C. 1002(5)) that meets the requirements set forth in paragraphs (b) through (e) of 29 C.F.R. 2510.3-5.

NEW SECTION

**WAC 284-43-9010 Requirements for Pathway 2 Association Health Plan form filings related to the bona fide status of Pathway 2 Associations.** (1) Carriers must document in their form filings compliance with the requirements of 29 C.F.R. 2510.3-5 related to the bona fide status of a group or association as an employer under 29 U.S.C. 1002(5) as provided in this section.

(2) Carriers must file a group health plan, other than a small group health plan, form filing as provided in RCW 48.43.733. The form filing for an association health plan submitted by a carrier must include documents related to "Evidence as an Employer." The documents must include, at a minimum:

(a) The employer group or association's bylaws;

(b) A trust agreement or other organizational document that shows the purpose of the employer group or association and who governs the employer group or association;

(c) A statement of the employer group or association's history;

(d) An advisory opinion from the United States Department of Labor (DOL) demonstrating the employer group or association is qualified to purchase association health plan coverage. If such an advisory opinion is not available, a signed opinion from an attorney attesting to the fact that the employer group or association qualifies as an employer under 29 U.S.C. 1002(5). The attestation must explain how and why the employer group or association meets each of the requirements below, with explicit references to relevant language drawn from the employer group or association's bylaws, trust agreement or other organizational document, the statement of the employer group or association's history or other documentation submitted with the filing that is necessary to complete the attestation under this subsection:

(i) The employer group or association members have sufficient commonality of interest, due to either:

(A) The members of the employer group or association are in the same trade, industry, line of business or profession. A list of the occupational categories/industrial classifications of the employers

eligible to participate in the employer group or association must be submitted with the attestation; or

(B) Each employer member of the employer group or association has a principal place of business in the same region that does not exceed the boundaries of a single state or metropolitan area (even if multi-state).

(ii) If the employer group or association offers health coverage as its primary purpose, the employer group or association has at least one substantial business purpose unrelated to offering health coverage or other employee benefits. A substantial business purpose exists if the employer group or association would be a viable entity in the absence of offering health insurance coverage;

(iii) The employer group or association does not discriminate on the basis of an individual's health status with respect to employer membership in the employer group or association;

(iv) Each employer member of the employer group or association participating in the group health plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan. If the employer group or association offers coverage to working owners under 29 C.F.R. 2510.3-5, the employer group or association has in place mechanisms to ensure that working owners meet the minimum requirements for such status under 29 C.F.R. 2510.3-5(e) upon initial enrollment and on an ongoing basis;

(v) The employer group or association has a formal organizational structure with a governing body and has bylaws or other similar indications of formality;

(vi) The functions and activities of the employer group or association are controlled by its employer members, and the employer group's or association's employer members that participate in the group health plan control the plan. Control must be present both in form and in substance;

(vii) As provided in 29 C.F.R. 2510.3-5(d)(1), the employer group or association does not condition employer membership in the employer group or association on any health factor, as defined in 29 C.F.R. 2590.702(a) of any individual who is or may become eligible to participate in the group health plan sponsored by the employer group or association; and

(viii) As provided in 29 C.F.R. 2510.3-5(d)(2), the group health plan sponsored by the employer group or association must comply with 29 C.F.R. 2590.702(b) with respect to nondiscrimination in rules for eligibility for benefits.

(3) The carrier's form filing also must include its most recently submitted Form M-1, as published by and filed with the United States Department of Labor.

#### NEW SECTION

**WAC 284-43-9020 Requirements for Pathway 2 Association Health Plan rate filings.** (1) The carrier's rate filing must document compliance with the requirements of RCW 48.43.733(3) and 29 C.F.R. 2510.3-5 as provided in this section.

(2) Under 29 C.F.R. 2510.3-5, a health plan issued to a Pathway 2 Association must comply with the nondiscrimination provisions of 29 C.F.R. 2510.3-5(d). In applying the nondiscrimination provisions, car-

riers must not rate the employees of different employer members of the association based on a health factor of one or more individuals, as defined in 29 C.F.R. 2590.702(a).

(3) Filings for Pathway 2 Association must include a public rate schedule. The public rate schedule must include a complete list of the premium rates for the employees and dependents covered under the plan that accounts for all variations in premiums charged. For example, if the rates vary by the covered person's age and his or her geographic area of residency, the public rate schedule must include the rates charged for all age and geographic area categories for each plan.

(4) The rate filing for a Pathway 2 Association Health Plan must include the following information and documents:

(a) A rate filing that includes rates and rate filing information only for the group or association that is the subject of the filing;

(b) A filing summary under WAC 284-43-6540 with the experience exclusively for the employer group or association that is the subject of the filing;

(c) For renewal plans, a monthly enrollment report from the most recent twelve-month experience which must be a public portion of the rate filing;

(d) A brief description of the development of rates and rating factors;

(e) If rate factors such as age, geographic area, or family size are used, provide justification and an explanation of the development of these factors; and

(f) A certification by a member of the American Academy of Actuaries, or other person approved by the commissioner, that the development of the rating factors are based on applicable actuarial standard of practices for rating a single employer, and the rating criteria in connection with this association health plan meet the requirements of nondiscrimination provisions under 29 C.F.R. 2510.3-5 (d) and 2590.702(a).