

PUBLICATION

DOL Gives States More Control Over Self-Insured Health Plans

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On November 6, 2014, the U.S. Department of Labor, Employee Benefits Security Administration (DOL) published Technical Release 2014-01, which provides technical guidance to States concerning stop-loss insurance. Stop-loss coverage has long been a concern for state insurance regulators, and this DOL release gives regulators more control over how policies are delivered to self-insured employer groups.

In the employee health insurance context, stop-loss insurance is a product available to employers and other sponsors of self-insured group health plans. With self-funded plans, the employer provides health benefits to employees and pays health care claims with the employer's own funds. Stop-loss insurance limits claim expenses the employer is responsible for within a plan year. Stop-loss insurance protects self-funding employers against catastrophic or unpredictable losses by indemnifying the employer or paying directly claims that reach a pre-determined monetary threshold – an attachment point – for either a single participant or for aggregate claims over a determined period (e.g. a participant's health care costs exceed \$10,000 in a coverage year).

State regulation of stop-loss insurance varies by jurisdiction. States have generally been timid in regulating stop-loss insurance because of concerns about the federal preemption mandates of the Employee Retirement Income Security Act of 1974, as amended (ERISA). These mandates preempt any State law that relates to an ERISA-covered employee benefit plan, with the exception of the States' rights to regulate insurance. Until this DOL Technical Release, States have not been clear on where the preemption line was drawn for stop-loss policies. The DOL issued its Technical Release to acknowledge that stop-loss insurance policies with low attachment points can effectively undermine the viability of state health insurance markets. Therefore, the Technical Release provides States with a practical solution to the stop-loss insurance problem.

The DOL concluded that States may regulate stop-loss insurance, "if the law regulates the insurance company and the business of insurance." This gives the States additional authority to protect claimants while strengthening their health insurance markets. If, however, a State attempts to regulate stop-loss insurance by treating stop-loss insurance as health insurance, such regulation would run afoul of ERISA's preemption provisions. The DOL gives the clear pronouncement that States now have authority to pass laws that prohibit insurers from issuing stop-loss contract with attachment points below specified levels. The net effect of such regulation will be that self-funding employers will be responsible for a larger portion of group health plan claims.

Employers and other sponsors of self-insured group health plans should brace for new State laws and regulations that, consistent with the Technical Release, regulate stop-loss insurance in a manner that will likely increase the attachment point and increase the risks of loss for employers. This may result in reducing the attractiveness of self-funded plans for more risk averse and smaller employers.

If you have questions about self-insured insurance plans, or need guidance on other insurance regulatory issues, please contact the authors of this alert or any of the members of our Insurance Regulatory Group.