



Association Plans: Salve or Salt for Group Health Wounds?

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Paul E. Oglethorpe (known as PEO to his clients and friends), the new president of ACME PEO,¹ sits at his desk reviewing ACME's group health insurance renewal proposals. His blood pressure rises as he considers how the astronomical increase in the group health plan costs will cripple his ability to sell ACME's PEO services without a competitive group health plan. Just as he is picking up his Big Gulp Cappuccino Latte (with extra whipped cream) to heave it across the room in a fit of rage, his telephone rings. On the line is Joe Agent, an insurance agent that Oglethorpe does not know. Oglethorpe quickly learns that Agent is offering an incredibly competitive group health insurance product through what he describes as a self-insured "association plan" that is exempt from state insurance laws and regulation. Oglethorpe schedules a meeting with Agent for that very afternoon, eager to sign up right away for the cheap group health insurance coverage. His prayers have been answered — or have they?

The Health Insurance Dilemma

The current health insurance crisis places an exceedingly difficult burden on all employers, but it is particularly complicated and problematic for PEOs. On one hand, PEOs have continued to experience

an increase in business in recent years, and one reason is that contracting with PEOs is an especially attractive option for small business employers who simply did not have access to meaningful group health insurance programs for their employees. Among the services these small businesses expect PEOs to provide is access to "Fortune 500" type benefit programs. On the other hand, health insurance costs are skyrocketing for everyone. PEOs are no exception and find themselves in the same boat as all employers, struggling to find affordable group health insurance. Many employers, including PEOs, are seeing their group health plans priced out of existence, if renewal is available at all. In their desperation to maintain group health benefits, PEOs are no less susceptible than traditional employers to falling victim to a growing trend in what many describe as health insurance "scams" cropping up across the country.

Too Good to Be True?

Whether the vehicle through which the self-funded group health insurance is offered is known as an "association plan," a "friendly union," or a "VEBA trust," the lower cost is typically explained as a combination of being self-insured and the fact that as an "ERISA plan," it is regulated under federal law and not subject to state insurance law requirements. While the intricacies of these "plans" and their status with respect to ERISA, tax law, and state

insurance regulation is beyond the scope of this article, it is important for PEOs to be alert to potentially fraudulent insurance programs and avoid the penalties that can accompany participation in such plans as well as the potential that employee participants can find themselves without promised coverage when the plans are found to be insolvent.

One such scheme for securing health insurance coverage for employees that appears to be growing in popularity is to obtain coverage through "industry associations." Although there are many legitimate associations that offer group health insurance to their members, in the wake of ever-increasing health insurance costs, many "associations" have been formed solely for the purpose of offering insurance products. Generally, these plans require the PEO and/or its co-employees to join the association and, once they become members, they are then able to participate in the association's group health plan. PEOs may assist with the administration of the plan by distributing information regarding the plan or making settlement check debits and/or deductions and forwarding payments on to the association or the association's third-party administrator. Other entities such as insurance brokers, agencies, and benefit administrators may be involved with association-type plans in that they may be recruited by the association to actively market the plan just as Joe Agent did to ACME PEO.

Regulatory Scrutiny

Again, these association plans are often marketed as self-funded ERISA plans that are purportedly exempt from state insurance law and regulation. Given the prolifer-

eration of “industry associations,” many state regulatory agencies, including state departments of insurance and attorney general offices, have become somewhat skeptical of association groups and have begun to closely scrutinize the legitimacy of these groups. In fact, the issues of ERISA preemption for association plans may arise in the context of the efforts of a state insurance department to shut down the association arrangement, claiming that the association and related entities are engaged in the unauthorized sale of insurance or in violation of other state insurance laws and/or regulations. Attendees of the 2002 NAPEO Legal & Legislative Conference learned from Robert Neumann of the Florida Department of Insurance Fraud Division that Florida has been one of the states “leading the charge” in investigating and closing down fraudulent associations formed essentially to market health insurance programs. The Florida Department of Insurance has issued cease and desist orders with respect to several such associations, ordering the immediate cessation of the issuing “policies” and turning over claims handling to third-party administrators. Unfortunately, these efforts are warranted because, under a worst case scenario, the scam involves collecting a large amount of premium as rapidly as possible and diverting the funds to the principals of the association. Even if funds are not being diverted, some associations have experienced financial difficulty and have been unable to pay legitimate claims and otherwise fulfill their obligations to their “members.” As a result, many unsuspecting employees who thought they had health insurance are left responsible for catastrophic medical bills.

As a general rule, and again focusing on association plans, to be considered a “legitimate association” for purposes of offering group health insurance, the association must have been formed for purposes other than selling insurance. For example, educational and training activities are generally regarded by state regulatory agencies as legitimate reasons for forming an association. Moreover, regulators look to whether the association

serves a homogenous group of trade or business entities. If the association’s apparent purpose is only to sell insurance, then the association’s insurance program could run the risk of being shut down by a state agency or it may face allegations that it is nothing more than a front for the illegal sale of insurance at group rates.

Potential Risks

If an association is found to have engaged in the unauthorized sale of insurance, the downside can be significant not only for the association, but also for entities that may assist with the marketing and administration of the program, including PEOs such as ACME PEO. Some states have laws that specifically provide that if an unauthorized insurer does not pay a claim under an “insurance contract,” then any person or entity (such as a participating PEO) that assisted or in any way aided the procurement of such insurance is liable to the insured (in this case the participating co-employees) for the full amount of the claim. Some state laws also impose penalties on individuals and entities that assist with the unauthorized sale of insurance, including Florida, which imposes a \$100,000 penalty for any willful violation of Florida’s statutes that prohibit the unauthorized sale of insurance, and a \$10,000 penalty for each willful occurrence of assisting with the unauthorized sale of insurance.

Questions to Ask

In this difficult health insurance market, PEOs must be extremely vigilant in examining any group health plan arrangement that may sound “too good to be true.” In fact, the U.S. Department of Labor recently released a list of suggestions to assist employers in purchasing legitimate health insurance. Labor Secretary Elaine Chao’s tips include the following:

- Compare insurance coverage and prices. If one insurance policy appears to offer similar benefits at a significantly lower cost, investigate further.
- Make sure the person attempting to sell the insurance product is a licensed insurance agent. Call the state insurance

department to determine if any complaints have been filed involving the person or the company he represents.

- Examine the policy (or have an attorney examine the policy) to determine the actual coverage and whether the benefits are fully insured by a licensed insurance company.
- Obtain references of other employers enrolled with the insurance provider, and contact the references about the provider’s service and payment history.
- Inquire about the allocation of premiums charged for commissions, fees, and administrative expenses. If a high percentage of the premiums go toward these items, this could be a “red flag” regarding the policy or the insurer.

In short, ask hard questions and do your homework. Read all materials and scrutinize Web sites carefully. Above all, follow the maxim of “let the buyer beware.” While it may seem trivial to repeat the catch phrase “if it sounds too good to be true, it probably is,” in this current health insurance crises facing many PEOs, that is exactly the lens through which any non-traditional group health plan should be viewed. ■

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