Small Group Self-Insurance and Stop-Loss Reinsurance
Insurance Subcommittee
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Overview:

Two of the principle goals of the Patient Protection and Affordable Care Act (ACA) are to ensure health insurance consumers have adequate coverage and to end risk selection by insurance companies in the small group market.

Employers who provide self- insured health coverage to their employees bare all financial risk. In order to minimize their risk, most employers purchase stop-loss insurance which caps their losses at a prescribed dollar amount.

The issue with self–insurance is that employers who self-insure do so at a low cost as long as their employees are healthy. Conversely, there is a potential risk that- when employees become unhealthy, employers will switch into exchanges or the outside-the-exchange small group market, where all groups are charged the same rate regardless of health status- and where insurers cannot exclude on the basis of pre-existing conditions. This result would be counterproductive to the goals of the ACA.

Self-Insurance:

Self-funded health plans are governed by the Employee Retirement Income Security Act of 1974(ERISA)[1]. ERISA preempts state insurance regulations, meaning that employers with self-funded medical benefits are not required to comply with state insurance laws that apply to medical benefit plan administrators. Self-insured plans must comply with basic ERISA requirements. ERISA requires the people and entities that manage and control plan funds to: Manage plans for the exclusive benefit of participants and beneficiaries; Carry out their duties in a prudent manner and refrain from conflict-of-interest transactions expressly prohibited by law; Comply with limitations on certain plans' investments in employer securities and properties; Report and disclose information on the operations and financial condition of plans to the government and participants; and provide documents required in the conduct of investigations to ensure compliance with the law.[2] However, self-insurers can be regulated by the state where the covered employees reside.

Self-insured plans can be attractive, but also include a higher element of risk to an employer. In order to provide an extra measure of financial protection against catastrophic claims, most self-funded employers elect to purchase stop-loss insurance (also known as Excess Loss or Excess Risk insurance). The two forms of stop-loss insurance are Specific Stop Loss and Aggregate Stop Loss.

Specific Stop Loss provides the employer with protection against excessive claims incurred by individuals for the policy year. Under Specific Stop Loss, a Specific Deductible appropriate for the employer is determined. The specific Deductible is the dollar figure below which the employer is totally responsible for the payment of employee claims during the policy year. Eligible claims in excess of the Specific Deductible are the liability of the stop-loss insurance carrier.[3]

[1] http://www.dol.gov/dol/topic/health-plans/erisa.htm
[2] http://www.cga.ct.gov/2008/rpt/2008-R-0203.htm
[3] Claims up to the Specific Deductible are applicable to the Aggregate.

Aggregate Stop Loss provides the employer with protection when a high number of claims are incurred by the group as a whole for the policy year.[4] Under Aggregate Stop Loss, an Aggregate Attachment Point is determined. The Aggregate Attachment Point is an annual dollar figure. The employer is totally responsible for the payment of such claims during the policy year. If claims exceed the annual Aggregate Attachment Point, Aggregate Stop Loss will reimburse the employer for the excess amount. The Aggregate Attachment Point is calculated by estimating future expected claims and adding a risk corridor for unexpected claims.

The District is home to a numerous multi-state companies with self-insured health plans. Those companies must comply with the regulations of each state in which they have plans and covered employees. However, multi-state self-funded plans need only comply with ERISA.[5]

Various States' Approaches

Most self-insured employers use stop-loss insurance to cover claims that go beyond a certain threshold per employee. But nothing controls the attachment point for re-insurance. For instance, a self-insured employer could maintain this status under the deemer clause and attach re-insurance at an arbitrarily low point, for instance $100. Thus, the claims would effectively be paid by a traditional insurance company and the benefits could be individually chosen by the employer. With too low an attachment point for stop-loss insurance, a self-insured employer is effectively no longer self-insured.[6]

There are various ways to combat this. States could attempt to directly regulate stop-loss insurers, although the legislative history would certainly need to steer-clear of any mention of ERISA[7]. The so-called savings clause in ERISA allows states to directly regulate insurance. A state would need to cleverly draft a statute that only regulates stop-loss insurance companies (which would be "saved" from ERISA) but that does not, in any way, regulate self-insured employers (which cannot be "deemed" to be insurers by a state under ERISA). If there is any hint that a state is effectively regulating a self-insured employer, the state law could immediately be preempted by ERISA.[8]

Three states, New York[9] [10], Oregon and Delaware, prohibit the sale of stop-loss insurance to small groups altogether, while North Carolina, Delaware, Arkansas, and Maryland require stop-loss insurers to comply with their respective small group insurance laws. For instance, California, one of the more progressive states in terms of regulating self-insured plans, in April 2012, passed Bill SB 1431 which requires[11]:

- Requires stop-loss carriers to offer coverage to all employees and dependents of a small employer, and prohibits the carrier from excluding any employee or dependent on the basis of actual or expected health status-related factors;

[4] Id.
[5] http://benefitsbydesigninc.com/self-funding.html
[6] http://www.dol.gov/dol/topic/health-plans/erisa.htm
[7] http://www.dol.gov/dol/topic/health-plans/erisa.htm
[8] http://mathlawguy.wordpress.com/2008/12/09/erisa-self-insured-employers-and-re-insurance-loopholes/
[9] New York does allow municipal cooperative health benefit plans to have stop loss insurance.
[10] http://codes.lp.findlaw.com/nycode/ISC/47/4707
[11] http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1401-1450/sb_1431_cfa_20120423_102346_sen_comm.html

- Requires stop-loss carriers to renew, at the option of the small employer, all stop-loss policies; and
- Establishes minimum attachment points for the sale of stop-loss insurance based on current market average attachment points. The bill contains an individual attachment point of $95,000.

Similar to California, other states have grappled with whether to institute minimum individual and aggregate attachment points, including Oklahoma and Florida which have both instituted them. Oklahoma has a $25,000 individual attachment point and a minimum aggregate attachment point of 120% of expected claims. Florida has instituted a minimum individual attachment point of $20,000. Further, Florida has promulgated minimum aggregate attachment requirements for businesses with up to 50 employees. Those requirements include: 1) $4,000 times the number of employees; 2) 120% of expected claims, or 3) $20,000, whichever is greater. Washington has no minimum attachment point, but there is a minimum specific deductible of at least 5% of expected claims or $100,000, whichever is less. Further, Texas, Indiana, Iowa, Kansas, Minnesota, Missouri, and Wisconsin have levied a premium tax that applies to normal health insurance on the basis that stop-loss insurers are insurers and are thereby subject to state regulation.

Moreover, there is disagreement as to whether state regulation of stop-loss insurance attachment points is effective and desirable. There is an argument that, on the one hand, requiring a high attachment point for re-insurance might be a great disincentive for an employer to self-insure or even offer any health benefits at all. On the other hand, under the guise of the ACA, others argue that it might be better to have a "lesser" package of benefits offered, as opposed to having no package of benefits offered at all. Another consideration is that self-insured employers would also face other financial difficulties if attachment points were set too high–they would risk insolvency. Forcing a self-insured employer to maintain a large cash reserve to pay employee benefit claims could also disincentive an employer from being self-insured. States have been cautioned to make stop-loss attachment points reasonable.[12] [13] Given the spread in the attachment points states have implemented, reasonableness depends on what a specific state, and or its stakeholders, determines it to be.

NAIC Guidance

The National Association of Insurance Commissioners (NAIC) has recently proposed revisions, and or guideline amendments to its Stop-Loss Insurance Model Act (#92) (2002). [14] [15] NAIC's primary proposal is to institute a minimum aggregate attachment point which would: (1) nearly quadruple to $15,000 times the number of group members; (2) increase 10 percentage points to 130 percent of expected claims; or (3) triple to $60,000 (whichever is higher). The NAIC Stop-Loss Insurance Model Act seeks to establish uniform national standards in regulating stop-loss insurance.[16] Opponents of the act argue that the act

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[12] http://www.starmarkinc.com/email/starmark/S669-329.pdf

[13] A chart prepared by Starmark describing Group Size, Minimum Specific Deductible and Aggregate Attachment Point Requirements for Stop-Loss Insurance available in various states.

[14] This model establishes criteria for the issuance of stop-loss insurance policies. This model does not impose any requirement or duty on any person other than an insurer or as treating any stop-loss policy as a direct policy of health insurance.

[15] http://www.naic.org/documents/committees_b_erisa_1208_response_letters.pdf

[16] http://smarthr.blogs.thompson.com/2012/08/13/naic-delays-vote-on-model-law-raising-stop-loss-attachment-points/

is intended to restrict the ability of smaller employers to obtain stop-loss insurance. Alaska, Arkansas, Colorado Minnesota, Nevada, New Hampshire, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont and Washington have adopted the NAIC Stop-Loss Insurance Model Act either in part or in full. Other states have codified related legislation and or bulletins.[17] The NAIC retained Milliman to research and present findings on the issue of stop-loss insurance. Among the findings offered by the Milliman NAIC Report (May 24, 2012) are the aggregate attachment points at which the ceding company's and reinsurer's expected claims amount will be equal, and the aggregate attachment points at which the standard deviation of the ceding company's expected claims will equal that of the reinsurer's. This approach is similar to previous studies that produced the aggregate attachment points currently used in the NAIC Stop-Loss Insurance Model Act. Further, the report includes other commonly recognized measures of risk by aggregate attachment point, specific stop-loss deductible, and employer size which may provide additional analysis to the NAIC for deciding how to update the Model Act.[18] The NAIC is currently studying the proposal further, but no consensus is expected to be reached in the near future. The District can use this guide as a resource in deciding its approach in addressing the factors that should be considered in its regulation of stop-loss insurance.

Conclusion

Very few states have instituted stop-loss Insurance regulations. In the advent of the ACA it is likely that the subject of stop-loss insurance is one states will confront soon because there are valid concerns that some employers will try to circumvent the ACA requirement that affordable, comprehensive healthcare be offered to employees. Conversely, there are considerations that should be considered to ensure fairness in regulating self-insured plans. Insofar that it does not conflict with ERISA, the District can be creative in its regulation of stop-loss insurance. The District can confront this issue, as the states previously mentioned did, by either adopting the NAIC's Stop Loss Model Act in full, or by using it as a guide in creating stop-loss legislation.

[17] http://www.siia.org/i4a/pages/index.cfm?pageID=6204

[18] http://www.naic.org/documents/committees_b_hcra_wg_120606_milliman_stop_loss_report.pdf