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DOL: ERISA Does Not Pre-empt State Regulation of MEWAs

By Allen Smith

Nearly a quarter of a century ago, Congress carved out an exception from Employee Retirement Income Security Act (ERISA) pre-emption in order to permit state insurance regulations to apply to multiple employer welfare arrangements (MEWAs).

MEWA promoters still continue to claim ERISA pre-emption despite the 1983 amendment, two recent U.S. Department of Labor (DOL) opinion letters show.

In one opinion letter, the DOL rejected a professional employer organization (PEO) argument that its MEWA was a single employer plan pre-empted by ERISA. In another, the DOL disagreed with an association's characterization of its MEWA as fully insured.

Rodger Burge, an attorney with Parr, Waddoups, Brown, Gee & Loveless in Salt Lake City, said the two opinion letters reflect a "constant struggle since 1983," as MEWA providers continue to try to find "creative ways to avoid" state regulation.

Lower Costs, Higher Risks

Prior to the 1983 amendment, MEWA promoters "typically represented to employers and state regulators that the MEWA is an employee benefit plan covered by ERISA and, therefore, exempt from state insurance regulation under ERISA's broad preemption provisions," the DOL notes in its guidance, *MEWAs Under ERISA: A Guide to Federal and State Regulation*.

MEWAs could market insurance coverage at rates lower than regulated insurance companies, which made them more attractive for small businesses that had difficulty obtaining affordable group health care coverage.

"In practice, however, a number of MEWAs have been unable to pay claims as a result of insufficient funding and inadequate reserves. Or in the worst situations, they were operated by individuals who drained the MEWA's assets through excessive administrative fees and outright embezzlement," the DOL said in its guidance.

Nevada Goes After PEO

State regulators continue to be frustrated in their efforts to enforce state insurance laws against MEWA providers, according to the DOL.

When the state of Nevada sought to order Payroll Solutions, a PEO, to stop offering unlicensed insurance through a MEWA, Payroll Solutions resisted the order. It claimed that the plan was a single employer plan, not a MEWA, and that ERISA pre-empted the application of state insurance laws.

The plan cannot be a MEWA, the PEO asserted, because Nevada state law defined an employee leasing company as the employer of its leased employees for the purposes of sponsoring and maintaining any benefit plans.

Nevada Attorney General Catherine Cortez Masto wrote the DOL asking whether Payroll Solutions was offering a MEWA that was subject to state insurance law. In an Aug. 15, 2007, [opinion letter](#), the DOL said that the plan was a MEWA.

Whether any given welfare benefit arrangement is a MEWA within the meaning of ERISA is a question of federal

law, the DOL wrote. Consequently, "a state statute addressing an employee leasing company's relationship to leased employees would not govern the determination of whether any particular benefit arrangement sponsored by the employee leasing company is a MEWA for purposes of ERISA."

Burge said the opinion was "a wake-up call for PEOs that are trying to rely on state laws" in order to avoid state insurance regulations.

Self-Funded Vs. Fully Insured MEWAs

In a separate [opinion letter](#) issued Aug. 16, 2007, the DOL rejected an association's assertion that its MEWA was fully insured, and consequently subject to fewer state insurance regulations than if it were self-insured. The Custom Rail Employer Welfare Trust Fund said that its MEWA for members' employees and dependents was fully insured for ERISA purposes because of its stop-loss insurance coverage.

With stop-loss coverage, a self-insured plan will agree to pay up to a certain amount during the year. The plan will have a stop-loss insurance policy and if claims exceed the year's cap, claims above and beyond that amount are paid through the stop-loss insurance policy. The use of stop-loss coverage is a way to avoid "blowing all the plan's assets" in one year, Burge explained

But the DOL determined that stop-loss coverage did not make the MEWA fully insured because benefits under the plan were not unconditionally guaranteed under a contract and legally enforceable against the insurance company or organization.

With a self-insured plan, claims are paid from self-funded assets rather than from a licensed insurer. For self-insured MEWAs, there "is no limit to state regulation as long as the state insurance regulations are not inconsistent with ERISA," Burge said in a Sept. 13 interview.

Fully insured MEWAs, by contrast, would be subject to fewer state regulations, such as state insurance requirements on reserves, noted Eric Keller, an attorney with Paul Hastings in Washington, D.C.

Inadvertent MEWAs

Inadvertent MEWAs also are subject to state regulation, Keller added. This is an issue that "often arises in mergers and acquisitions," he said.

If a corporation buys another company's subsidiary but is not in a position to provide health benefits yet for the employees of the purchased division, it may contract for the target company to continue providing insurance for employees in the division for a few months. That might be viewed as a MEWA, Keller noted.

However, Keller said there "has not historically been a lot of state insurance enforcement" in such circumstances.

Allen Smith, J.D., is SHRM's manager of workplace law content.

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