A report of the Virginia Liaison Office

2009 Annual Report on Federal Legislation Pertaining to Association Health Plans

to the Governor and the
General Assembly of Virginia

September 2009

COMMONWEALTH OF VIRGINIA
Virginia Liaison Office

Alfonso Lopez
Director

MEMORANDUM

TO: The Honorable Timothy M. Kaine
Governor of Virginia

The Honorable Lacey Putney, Chairman
House Appropriations Committee

The Honorable Charles Colgan, Chairman
Senate Finance Committee

FROM: Alfonso Lopez

SUBJECT: Virginia Liaison Office's Annual Report on Federal Legislation Pertaining to Association Health Plans

I am pleased to submit the Virginia Liaison Office's Annual Report on Federal Legislation Pertaining to Association Health Plans as mandated by section § 2.2-302.1 of the Virginia code

If you have questions or need additional information concerning this report, please contact me.

Alfonso Lopez

AL/bwb

Preface

The Virginia Liaison Office has been tasked with writing the following report:

"[An] annual report that summarizes the status of the development, support, and federal legislation that provides for the establishment and governance of group health plans sponsored by trade, industry, professional, chamber of commerce, or similar business associations, which are referred to as association health plans [AHP], provided that such plans remain subject to the laws of the Commonwealth and activities by the Office."[1]

[1] VA S.B. 487.

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Executive Summary

Under Virginia Code § 2.2-302.1 it is the Commonwealth of Virginia's official public policy to encourage pooling of health insurance efforts by small businesses, and to support federal legislative efforts that facilitate this pooling, provided that these Association Health Plans (AHPs) remain subject to State Law.

AHPs consist of groups of small firms and businesses that have banded together as trade associations to offer health insurance plans for their members and employees. The associations can be based on professional or trade associations (generally with membership limited to a specific trade or business), or can simply be a broad association for small employers who share common personal interests.

Under current law, AHPs are regulated by the states, even when the coverage is self-funded. Recently, however, there have been efforts in Congress to usurp this regulatory power. In 2009, two bills regarding AHPs (H.R. 2607 and S. 1240) were introduced in Congress that included a clause providing for the federal preemption of state law

Because all Federal legislative proposals would serve to preempt state regulations, the Virginia Liaison Office has not advocated for any legislation introduced during the 111th Congress regarding AHPs.

VIRGINIA LIAISON OFFICE

2009 Annual Report on Federal Legislation Pertaining to

Association Health Plans

It is the Commonwealth of Virginia's official public policy to encourage pooling of health insurance efforts by small businesses, and to support federal legislative efforts that facilitate this pooling. Virginia's policy is codified at Virginia Code § 2.2-302.1, which reads:

> Support for enactment of pooled purchasing of health insurance efforts.
>
> It is the public policy of the Commonwealth to support federal efforts to encourage pooling of health insurance by small businesses, provided any such health insurance plans remain subject to state law. [2]

The Virginia Liaison office has been tasked with writing the following report:

> "[An] annual report that summarizes the status of the development, support, and federal legislation that provides for the establishment and governance of group health plans sponsored by trade, industry, professional, chamber of commerce, or similar business associations, which are referred to as association health plans [AHP], provided that such plans remain subject to the laws of the Commonwealth and activities by the Office."[3]

In accordance with the above directives, the following report details Association Health Plans (AHPs), their benefits and drawbacks, the status of state regulation and current federal legislative attempts to bring regulation under the authority of the federal government.

Association Health Plans

AHPs consist of groups of small firms and businesses that have banded together as trade associations to offer health insurance plans for their members and employees. The associations can be based on professional or trade associations (generally with membership limited to a specific trade or business), or can simply be a broad association for small employers who share common personal interests.

[2] Va. Code Ann. § 2.2-302.1 (2006).
[3] VA S.B. 487.

Proponents of AHPs claim that employers, by pooling their insurance risk together, increase their bargaining power with carriers and share administrative functions, theoretically resulting in lower premium costs. In addition, employees of these small businesses are given greater freedom by being allowed to select from a larger number of plans than if their employers provided insurance independently.

State vs. Federal Regulation of Association Health Plans

Under current law, AHPs are regulated by the states, even when the coverage is self-funded.[4] The authority for state regulation is clarified in the Multiple Employer Welfare Arrangement (MEWA), a provision of the Employee Retirement and Income Security Act (ERISA). ERISA defines MEWAs as arrangements through which two or more employers and self-employed individuals obtain health insurance coverage. AHPs are considered MEWAs and thus, are subject to state regulation.

Recently, however, there have been efforts in Congress to usurp this regulatory power. In 2009, two bills regarding AHP were introduced in Congress, H.R. 2607 and S. 1240. Both bills include a clause providing for the federal preemption of state law. While each bill has a different variation of this clause they all effectively preempt state authority through a federal certification process. Each bill would declare the grant of authority to the States made in ERISA § 514(b)(6) inapplicable in regards to AHPs. ERISA § 514(b)(6) currently grants to the States the power to regulate MEWAs. Each bill introduced establishing AHPs would reverse ERISA's grant and would reserve the power to regulate AHPs to the federal government. This switch of authority is accomplished by creating a system for the federal certification of AHPs. Once an AHP is federally certified, federal regulation begins and state regulation, as articulated by ERISA §514(b)(6), is thereby preempted.

AHPs have been generally considered for inclusion as part of a potential Federal Health Care Reform Bill. While no detailed plans have been laid out the proposals appear to be similar to the legislative proposals referenced above that seek to preempt state authority.

Proponents of the Congressional measures claim that creating federal standards would "harmonize" the many regulatory controls to which AHPs are now subject. Multi-state AHPs currently must comply with the regulations of each state in which enrollees reside. By releasing them from these multiple burdens, a single regulatory mechanism would allow multi-state AHPs to offer more affordable, slimmed down benefit packages that may be desirable to workers who are now uninsured. Thus, proponents of federal regulation argue that a unified regulatory system

[4] A health care benefit offered by an association is "self-insured" or "self-funded" when that association sets aside funds to cover the cost of health benefits for their employees instead of buying an insurance plan from a traditional insurance company or health maintenance organization (HMO). Many self-funded associations will purchase stop-loss insurance that covers pay outs above a certain aggregate claim level when a claim reaches a certain dollar threshold.

would result in less administrative burden, increased variation in benefits packages being offered by AHPs and, in turn, a decrease in uninsured employees.

In contrast, groups advocating for continued state regulation claim that the new legislation would result in insurance rate hikes, a greater number of uninsured workers and increased fraud. These groups argue that subjecting AHP insurers to a minimal set of federal rules while exempting them from comprehensive state-based regulations will allow insurers to boost rates and premiums for older and sicker groups, effectively excluding them from coverage. Ultimately, rate increases would mean that fewer people could afford insurance, leading to an increase in the number of uninsured workers.

Further, the lack of state oversight in favor of a more general, and minimal, federal scheme could create a regulatory vacuum. Since Congress originally passed ERISA in 1974 thus exempting multiple employer arrangements from state oversight, health insurance scams were rampant. It was for this reason, in part, that Congress added the MEWA provision in 1983, allowing state regulation of AHPs. Opponents of the federal legislation argue that its adoption would restore an environment that health insurers could manipulate. A return to federal oversight would in fact mean a lack of oversight. In such a regulatory vacuum, many small businesses and self-employed people could be subject to increased fraud and insurance scams.

Future Outlook for Association Health Plans

It is the public policy of this Commonwealth to support federal efforts to encourage pooling of health insurance by small businesses, as long as such health insurance plans remain subject to state law. The pending federal legislative efforts discussed above all seek to effect a transfer of regulatory authority over AHPs from the state level to the federal government. Because these legislative proposals, if adopted, would serve to preempt state regulations, the Virginia Liaison Office has not advocated for any legislation introduced during the 111th Congress regarding AHPs.

AHPs could be included as part of a Federal Health Care Reform Bill. If an AHP provision is included it is highly likely it will preempt state authority.

The Virginia Liaison Office remains available to discuss federal efforts to encourage the creation and development of pooled insurance plans. It does not appear that Federal efforts to encourage pooling of health insurance by small businesses will take place in a manner that retains state authority of AHPs.