



AMERICAN BENEFITS COUNCIL

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SHADEGG AMENDMENT WOULD INCREASE LITIGATION, HEALTH COSTS AND LEAVE EMPLOYERS VULNERABLE

A proposal from Rep. Shadegg (R-AZ) would amend the House health care reform bill to permit state law rights and remedies to apply in lawsuits involving employer-sponsored health coverage.

Under current law, all rights and remedies for participants in employer-sponsored health plans – whether insured or self-insured – are governed exclusively under federal law under provisions in the Employee Retirement Income Security Act of 1974 (ERISA). ERISA regulations also include extensive claims review provisions that are intended to encourage timely and accurate coverage decisions by a plan and provide explicit appeal rights to all plan participants after an initial coverage decision is made. Participants also have the right to seek immediate injunctive relief, so that a court may order that a claim be paid if the court determines that a plan has not made a correct determination.

ERISA's remedy provisions have two very important characteristics. First, they are intended to encourage accurate and fair decisions for all plan participants at the earliest possible stage. Second, because ERISA's standards are in federal law and interpreted by federal courts, it results in a much more uniform body of law that plans follow when making decisions that affect their enrollees. It is fundamentally fair that rights and remedies to participants in the same plan should be interpreted and applied under a uniform body of law, regardless of where an individual may live. The application of state law standards and decisions made by differing state courts would result in much more inconsistent or even conflicting interpretations of a plan's responsibilities for coverage of benefits or other duties.

Finally, although proponents of the Shadegg amendment state that their intent is to only allow for the application of state law rights and remedies in lawsuits involving health insurers, nothing in the amendment would protect employers from potentially ruinous exposure to liability. Therefore, whenever employers sponsor health benefits for employees and their families they could find themselves subject to liability for unlimited damages under state laws for a single claim of injury by a plan participant.

Employers and Insurers Would Both Be Named as Defendants in Lawsuits

Even in lawsuits directed at health insurers, employers or the employer's health plan (which is a separate legal entity) are very likely to be named as defendants in a lawsuit because of the employer's contractual relationship with the insurer. In fact, even if safe harbors were included in the amendment to attempt to shield employers from future lawsuits, these safe harbor protections would also presents difficult problems and are not likely to fully protect employers. Plaintiffs' attorneys are likely to interpret any safe harbors as narrowly as possible and argue that the actions of an employer fall outside of the specified safe harbors approved by Congress, leaving employers to defend themselves in court and still exposed to potentially unlimited damages under state laws.

In addition, employers would be required to pay for any large legal judgments against their self-insured group health plan, otherwise the plan itself could face insolvency. Further, those who act on an employer's behalf in administering the plan and who would also be exposed to state law liability will undoubtedly seek to be indemnified by employers for their increased legal risk if this proposal were enacted, increasing the cost employers pay for sponsoring benefits for their employees.

Excessive Litigation Will Result in Fewer Employers Willing to Sponsor Coverage

If employers conclude that the effect of health reform legislation is to expose their companies to excessive litigation and potentially unlimited damages -- even for a single decision -- many employers may simply decide that the legal risk of remaining as a plan sponsor is simply too great. In this case, not only would the employees then be required to obtain health coverage on their own, potentially without further employer assistance, but the health care system as a whole would suffer the loss of direct employer engagement on behalf of their employees as demanding and innovative purchasers.

As ill-advised as this proposal to expand liability would be in our current health care system, it would be completely inappropriate under the system established by the House bill in which employers are compelled to either sponsor health coverage subject to detailed federal standards or pay a penalty. Exposing employers to unlimited liability will unquestionably compel many employers to abandon coverage, pay the penalty and thereby would be highly destabilizing to employer-sponsored coverage.

Recommendation

Employers of all sizes and industries strongly urge that Congress not permit the application of state law rights and remedies to employer-sponsored health plans. Such a provision is particularly unfair and destabilizing in the context of a "pay-or-play" mandate where employers must either provide coverage or pay a penalty of 8 percent of payroll. Excessive litigation and potentially unlimited state law remedies will increase health care costs, discourage the earliest possible resolution of determinations on health care claims, and result in fewer employers being willing to sponsor health benefits for employees, resulting in higher costs to the federal government and a loss of engagement and innovation that employers bring to the health care system.