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February 5, 2003



The Honorable Mark E. Recktenwald
Director of Commerce and Consumer Affairs
P.O. Box 541
Honolulu, HI 96809

Dear Mr. Recktenwald:

Re: Prepaid Health Care Act and High Deductible Health Insurance Policies with Medical Savings Accounts

By memorandum dated January 30, 2003, you made the following inquiry:

> Assuming that both of these pieces of legislation [TAX-01(03)[1] and CCA-08(03)[2]] become law, would the Hawaii Prepaid Health Care Act be a bar to allowing insurers, mutual benefit societies, and health maintenance organizations to offer high-deductible health insurance accounts when used in conjunction with federally approved MSAs [medical savings accounts]?

The answer to your precise question is no, the Hawaii Prepaid Health Care Act ("Act") would not be a bar to allowing insurers, mutual benefit societies, and health maintenance organizations from offering high-deductible health insurance accounts when used in conjunction with federally approved MSAs. Although the Act imposes certain obligations on employers, it does not regulate the kinds or types of plans that insurers, mutual benefit societies, and health maintenance organizations can offer.

The Act, however, does require employers to provide health care coverage to their eligible employees by either "(1) A plan which obligates the prepaid health care plan contractor

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[1] H.B. No. 1223 and S.B. No. 1394, relating to the Conformity of the Hawaii Income Tax Law to the Internal Revenue Code.

[2] H.B. No. 1167 and S.B. No. 1320, relating to Medical Savings Accounts.

to furnish the required health care benefits; or (2) A plan which obligates the prepaid health care plan contractor to defray or reimburse the expenses of health care." Hawaii Revised Statutes ("HRS") § 393-12(a).[3] A prepaid health care plan meets the requirements of the Act by satisfying either subsection (a) or (b) of section 393-7, HRS, as follows:

> (a) A prepaid health care plan shall qualify as a plan providing the mandatory health care benefits required under this chapter if it provides for health care benefits equal to, or medically reasonably substitutable for, the benefits provided by prepaid health plans of the same type, as specified in section 393-12(a)(1) or (2), which have the largest numbers of subscribers in the State. This applies to the types and quantity of benefits as well as to limitations on reimbursability, including deductibles, and to required amounts of co-insurance.
>
> The director, after advice by the prepaid health care advisory council, shall determine whether benefits provided in a plan, other than the plan of the respective type having the largest numbers of subscribers in the State, comply with the standards specified in this subsection.
>
> (b) A prepaid group health care plan shall also qualify for the mandatory health care benefits required under this chapter if it is demonstrated by the health care plan contractor offering such coverage to the satisfaction of the director after advice by the prepaid health care advisory council that the plan provides for sound basic hospital, surgical, medical, and other health care benefits at a premium commensurate with the benefits included taking proper account of the limitations, co-insurance features, and deductibles specified in such plan. Coverage under a plan which provides aggregate benefits that are more limited than those provided by plans qualifying under subsection (a) shall be in compliance with section 393-11 only if the employer contributes at least half of the cost of the coverage of dependents under such plan.

Thus, a plan can qualify and meet the requirements of the Act by either: (a) being a plan which has the largest numbers of subscribers in the state (known as the prevalent or (a) plans)[4] or; (b) a plan which the director deems to provide for sound basic hospital, surgical, medical, and other

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[3] This is generally accomplished through plans offered by insurers, mutual benefit societies, and health maintenance organizations, but employers can also satisfy their obligation through self-insurance.

[4] Because section 393-7(a) requires that plans (a section 393-12(a)(1) plan and a 393-12(a)(2) plan) qualifying under this section have the "largest number of subscribers in the state" it is not possible to create a category for prevalent high-deductible health insurance plans.

health care benefits, taking into account the limitations, co-insurance, and deductibles (referred to as (b) plans). The minimum benefits required by the Act are specified in section 393-7(c), HRS.

CCA-08(03) would permit insurers, mutual benefit societies, and health maintenance organizations to offer high-deductible health insurance contracts to employers or self-employed individuals that establish medical savings accounts. You raised the concern whether small employers[5] will be able to take advantage of these high-deductible health insurance contracts and medical savings accounts and, at the same time, comply with the Act.

The Director of Labor and Industrial Relations ("Director"), with input from the Prepaid Health Care Advisory Council ("Council"), has some flexibility[6] in the kinds of (b) plans that are approved. Thus, it is possible that small employers could offer high-deductible health insurance coverage along with a medical savings account to their employees and at the same time comply with the Act. This assumes that the qualifying high-deductible health insurance plan has the requisite benefits that provide for sound basic hospital, surgical, medical, and other health benefits pursuant to section 393-7(b)[7] and would not conflict with the requirements of the Act. This also assumes that the Director will be satisfied with the limitations, co-insurance, and deductibles of the plan. See HRS § 393-7(b).

We understand that the Director currently approves (b) plans that have deductibles of up to $250.00 with a maximum out-of-pocket expense of $2,000.00. We further understand that a high-deductible health plan, as defined by section 220 of the Internal Revenue Code, 26 U.S.C.A. § 220, has a deductible amount and out-of-pocket expense ceiling much higher than the deductible and out-of-pocket expense ceiling currently approved by the Director for (b) plans. Nevertheless, if the employer, by utilizing the medical savings account or otherwise, can satisfy the Director that the benefits, including the limitations, co-insurance, and deductibles satisfy the requirements of section 393-7(b), then small employers will be able to comply with the Act and also take advantage of section 220 of the Internal Revenue Code. Thus, whether high-deductible

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[5] We only address small employers here because only small employers (and its employees), as defined by section 220 of the Internal Revenue Code, can presently take advantage of the tax benefits of medical savings accounts. In addition, self-employed individuals are not required to comply with the Act. See HRS § 393-3(3).

[6] It should be noted that rule section 12-12-7 provides, "The council shall have discretion in determining which plans qualify under section 393-7, HRS."

[7] We are not aware that federal law specifies the types of benefits that a high deductible health plan must have.

health plans and medical savings accounts can satisfy the Act will depend upon the package an employer presents to the Director.

Although no opinion was requested on the question of the interplay between the Employee Retirement Income Security Act ("ERISA") and the Prepaid Health Care Act, your memorandum brought to mind a common misconception about amendments to the Prepaid Health Care Act that should be clarified. Some have the mistaken notion that substantive amendments to the Prepaid Health Care Act would jeopardize Hawaii's exemption from ERISA.[8] Although substantive amendments to the Act would indeed be subject to preemption pursuant to 29 U.S.C.A. § 1144(b)(5)(B)(ii), passing them would not jeopardize the exemption for the original pre-amendment Prepaid Health Care Act provisions.

We trust that this fully answers your question.

Very truly yours,

Frances E. H. Lum
Deputy Attorney General

Approved:

Mark J. Bennett
Attorney General

cc: Nelson Befitel
Director of Labor and Industrial Relations

[8] 29 U.S.C.A. § 1144(b)(5)(A).

**U.S. Department of Labor**

Employee Benefits Security Administration
Washington, D.C. 20210

MAR 17 2003

The Honorable Mark E. Recktenwald
Director of Commerce and Consumer Affairs
State of Hawaii
P.O. Box 541
Honolulu, Hawaii 96809

Dear Director Recktenwald:

This is in response to your request concerning the application of the preemption provisions of the Employee Retirement Income Security Act of 1974, as amended ( ERISA), to a bill (S.B. No. 1320, S.D. 1) introduced in the Hawaii state legislature that would amend Hawaii's Insurance Code to allow insurers, mutual benefit societies and health maintenance organizations to offer high-deductible health insurance contracts to employers or self-employed individuals that establish medical savings accounts, as defined in section 220 of the Internal Revenue Code. You indicated that some concerns have been raised regarding whether the bill, if enacted, would jeopardize the status of the Hawaii Prepaid Health Care Act (Hawaii Act) under the provisions in section 514(b)(5) of ERISA which save the Hawaii Act from ERISA preemption except for any amendment "enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date." ERISA § 514(b)(5)(B)(ii).

It is important to determine whether the changes of concern are the result of changes to the Hawaii Act or changes to other Hawaii law. With regard to the Hawaii Act, we believe that the statute is clear that Congress intended ERISA to preempt any substantive amendments to the Hawaii Act enacted after September 2, 1974. Accordingly, amendments to the Hawaii Act enacted after September 2, 1974, that relate to more than administration of the Act would be preempted by ERISA. If the changes at issue are changes to Hawaii's insurance laws, rather than the Hawaii Act, those changes may be saved from ERISA preemption pursuant to a different exception in ERISA, and section 514(b)(5) of ERISA would not be implicated.

Specifically, with regard to the application of state insurance laws to ERISA-covered plans, section 514(b)(2) of ERISA provides, in relevant part, that:

> (A) Except as provided in subparagraph (B), nothing in this title [Title I] shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . .
>
> (B) Neither an employee benefit plan . . . , nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, . . . .

Section 514(b)(2) essentially reserves to the states the authority to regulate the business of insurance and the persons engaged in that business, while preventing ERISA-covered employee

benefit plans from being deemed insurance companies for such purposes. ERISA-covered plans purchasing insurance are, however, as a practical matter, indirectly affected by state insurance laws inasmuch as insurance contracts purchased by plans are subject to state insurance law requirements.

You provided us with a letter, dated February 5, 2003, from the Deputy Attorney General of the State of Hawaii regarding S.B. No. 1320, S.D.1, which confirmed that the Hawaii Act imposes certain obligations on employers to provide health care coverage to their eligible employees but does not regulate the kinds or types of plans that insurers, mutual benefit societies and health maintenance organizations can offer. The Deputy Attorney General further advised you that "whether high-deductible health plans and medical savings accounts can satisfy the [Hawaii Prepaid Health Care Act] will depend upon the package an employer presents to the [Director of Labor and Industrial Relations]."

It appears that the bill, S.B. No. 1320, S.D. 1, would not amend the Hawaii Prepaid Health Care Act. Accordingly, it is the view of the Department that the bill, if enacted, would not jeopardize the status of the Hawaii Prepaid Health Care Act under section 514(b)(5) of ERISA.

If you have any questions regarding this letter, or if we otherwise can be of further assistance to you on this matter, please do not hesitate to contact me.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations