



WISCONSIN LEGISLATIVE COUNCIL

Jessica Karls-Ruplinger, Acting Director

TO: SENATOR JENNIFER SHILLING

FROM: Margit S. Kelley, Senior Staff Attorney

RE: Requirements for Coverage of a Preexisting Condition Under a Self-Insured Plan

DATE: October 18, 2018

This memorandum compares federal and state provisions relating to preexisting conditions and describes how those provisions apply to a self-insured health plan. Very generally, current federal provisions relating to preexisting conditions apply to a self-insured health plan, while current state law and a proposal from the 2017 legislative session do not.

The memorandum first provides a brief description of the current Affordable Care Act (ACA) provisions that address preexisting conditions in a group health plan. The memorandum then describes current Wisconsin law regarding preexisting conditions, and a proposed revision under 2017 Assembly Bill 365. Lastly, the memorandum describes certain federal preemption provisions relating to the ACA and to self-insured health plans.

AFFORDABLE CARE ACT

Under the ACA, as amended, a group health plan or individual health insurance policy cannot refuse coverage, limit coverage, or charge a higher premium based on a preexisting condition. These provisions, relating to eligibility, benefits, and premiums, are sometimes referred to collectively as the coverage provisions for a preexisting condition. [42 U.S.C. ss. 300gg-3 and 300gg-4.]

Although not true of all aspects of the ACA, the coverage provisions for a preexisting condition apply to both an insured and a self-insured group health plan. The coverage provisions are also among the ACA requirements that apply to a grandfathered plan. [42 U.S.C. ss. 300gg-91 (a) (1) and 18011 (a) (4) (B) (i), and 29 U.S.C. s. 1002 (1).]

STATE LAW

Current state law provides that a group health insurance policy may impose a preexisting condition exclusion, with certain exceptions, if the person received the diagnosis or any recommendations for care or treatment within the last six months before enrollment. A “preexisting condition exclusion” means a limitation or exclusion of benefits relating to a condition that existed before the date of enrollment for coverage. [ss. 632.745 (23) and 632.746 (1), Stats.]

However, under current state law, an exclusion of benefits relating to a preexisting condition cannot extend for more than 12 months after enrollment (or 18 months, for a late enrollment). Also, under current state law, a group health insurance policy cannot limit eligibility or charge a higher premium based on an individual’s medical condition. [ss. 632.746 (1) (b) and 632.748, Stats.]

In the 2017 legislative session, a proposal to revise the preexisting condition exclusion passed the Assembly, but did not receive concurrence in the Senate. Under that bill, as amended by the Assembly, state law would have been revised to specify that a health insurance policy or governmental self-insured plan cannot impose a preexisting condition exclusion, but, if a person did not have continuous coverage, a preexisting condition could be considered for the purpose of setting a premium or setting any deductibles, copayments, or coinsurance. [2017 Assembly Bill 365.]

The provisions under current law apply to a group health insurance policy, and do not apply to a self-insured plan. The provisions under 2017 Assembly Bill 365, as amended, would have applied to both a group and individual health insurance policy, and to a governmental self-insured plan, but not to a private self-insured plan.

PREEMPTION OF STATE LAW

State law regarding insurance regulation is currently preempted by two separate provisions of federal law.

Generally, the ACA supersedes state law for requirements relating to health insurance coverage, unless there is no conflict in enforcing both. Accordingly, the ACA coverage provisions for a preexisting condition currently preempt state law in this area. The ACA requires both an insured and self-insured group health plan to provide coverage without discrimination for a preexisting condition. [42 U.S.C. s. 18041.]

Additionally, the Employee Retirement Income Security Act of 1974 (ERISA) supersedes “any and all” state laws relating to a self-insured plan. As a general principle, a self-insured health care plan is not considered to be “insurance,” and is not subject to insurance regulations. In a self-insured plan, rather than paying premiums for an insurance policy, an employer pays for all health care services on its own, though it may choose to contract with a third-party administrator to administer claims. A self-insured plan may also be referred to as a self-funded plan, or an uninsured plan. [29 U.S.C. ss. 1003 (a) and 1144 (a).]

However, ERISA does not apply to a “governmental plan” that is established or maintained by a state government, or by a political subdivision of the state, for its employees. Accordingly, state insurance regulations do apply to a governmental self-insured plan when explicitly made applicable. [29 U.S.C. ss. 1002 (1), (3), and (32) and 1003 (b) (1).]

SUMMARY

As noted above, the current state law provision that allows a preexisting condition exclusion is preempted by the ACA. As a result, a group health plan, whether insured or self-insured, cannot limit coverage for benefits as provided under current state law and is required to comply with the ACA coverage provisions for a preexisting condition.

If the ACA coverage provisions for a preexisting condition are repealed or overturned, the state law provision would not be superseded and would apply. As specified in current law, a group health insurance plan could impose a preexisting condition exclusion for up to 12 months after enrollment, but could not limit eligibility or charge a higher premium for a preexisting condition. The state provisions do not apply to a private self-insured plan, and could not, under ERISA, but could apply to a governmental self-insured plan if that were to be specified in state law.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

MSK:ksm