Employer Liability under Health Care Sharing Ministries Plans

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Under the Affordable Care Act (ACA), members belonging to a certain number of organizations known as Health Care Sharing Ministries – sometimes called Christian Health Plans or Christian Ministries Plan – were granted an exemption from the personal tax penalty (up to 2.5% of one's household income in 2016 and beyond) for not having a qualified plan under the under the Act. The basic concept behind these plans is to have those who meet certain membership qualifications (attend church regularly, do not smoke or drink, etc.), co-op and share in the costs of the other participants medical expenses. Sometimes this is accomplished by a level monthly contribution to the sponsoring organization, other times you are asked to write a check directly to another member to cover their medical expenses.

While originally targeting individuals, these plans have gained some momentum as a substitute to an employer sponsored group medical plan. This paper primarily focuses on the dangers and potential legal pitfalls an employer should considering before using a Christian Ministries Plan as a replacement for their group health insurance.

The legal term in Latin, ***caveat emptor***, or ***Let the buyer beware***, applies here. In order to qualify for membership, you must be screened for medical conditions and can be rejected if you are in poor health. Often times pre-existing conditions are not covered until a person has been on the plan for twelve months. However, both of these are prohibited practices for employer sponsored fully insured and self-funded medical plans. Thus, employers may be subjecting themselves to potential legal liability and participants may inadvertently be assuming personal financial risk when using these programs.

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It is a well-known insurance underwriting fact that when a program does not cover pre-existing conditions, the plan will run very profitably as long as there is constant flow of new members whose claims can be denied because of conditions that existed before joining the plan. Profitability also occurs through the use of medical questions where only the healthiest people are accepted into the plan. If new membership declines and the "pool of members" becomes stagnant, claims and costs can begin to soar as these two "underwriting effects" wear off. As costs rise, the healthiest participants, being rational consumers, have every incentive to drop the coverage all together or find other less expensive alternatives. Decades of experience have proven that a pattern of healthy people abandoning a plan, leaving only those with medical conditions to face rapidly increasing contributions, creates an almost irreparable death spiral.

At that conjuncture, new healthy participants that have no coverage for pre-existing conditions must be added at an aggressive rate in order to stave off unavoidable plan insolvency. This can be problematic, as many would contend that there are a finite number of people either eligible or interested in a Christian Health Plan. The number of healthy participants willing to subject themselves to pre-existing conditions and willing to attest to adherence to the required Christian values is a relatively small number. Even smaller still, is the segment of this group that is aware these plans even exist. Furthermore, considering a Christian Health Plan may not be a viable option if the individual is already receiving a subsidy under their employer's plan or the Affordable Care Act. Thus, it plausible that it is only a matter of time before the pool of applicants is exhausted and a death spiral occurs.

Recently, these plans were of such great concern, that a bill was introduced in the Utah Legislature. ***HB 113 Health Care Sharing Ministry Amendments*** passed 69 to 3 in the Utah House of Representatives. Included in the proposed law, there is the warning *(shown on next page)* that would have been required in 14-point bold font above the signature line of the application. The warning is as follows:

A health care sharing ministry exempt from regulation under Subsection (3)(l) shall provide the disclosure in Subsection (8)(b) to an individual, in writing, in at least 14-point bold font prominently displayed on the health care sharing ministry application form, directly above the signature line. The written disclosure required under Subsection (8)(a) shall:

(i) be signed by the individual prior to enrollment in the health care sharing ministry;

(ii) include the following statement:

"___________ is not an insurance company and____________ does not guarantee payment of health care expenses. Our role is to enable self-pay patients to help fellow members through voluntary financial gifts. This program is not health insurance nor is it offered through an insurance company. This program does not guarantee or promise that your health care bills will be paid or assigned to others for payment. Whether anyone chooses to pay your health care bills will be totally voluntary. As such, this program should never be considered as a substitute for a health insurance policy. Whether you receive any payments for health care expenses and whether or not this program continues to operate, you are always liable for any unpaid bills."; and include:

(A) disclosure of any application fees, membership dues or fees, or other administrative expenses for which the member may be required to pay, or for which the member's benefits may be reduced;

(B) notification to the individual that if the individual leaves the health care sharing ministry, the individual may not enroll in other health

insurance coverage in the individual market until the next federal open enrollment period;

(C) a description of circumstances that may result in cancellation of the individual's membership in the health care sharing ministry, or reasons for which the health care sharing ministry may refuse to provide reimbursement to the individual for health care expenses incurred by the individual; and

(D) a declaration that the health care sharing ministry meets the requirements of 26 U.S.C. Sec. 5000A(d)(2)(B)(ii).

This ***"Red Herring Disclosure"*** shows the intent the Utah Legislature had in wanting to assure that its residents were cognizant of the product they were buying - that this was not insurance and that there were associated risks with such a purchase. However, the associated tradeoff for the Health Care Sharing Ministries was that they would not be regulated by the Utah Insurance Department. Because of this, a squabble, among themselves ensued. This disagreement was centered around the risk of losing enrolles by having been made aware of these disclosures versus the freedom of not being regulated by the Utah Insurance Department. Essentially, the lack of agreement among the Health Care Sharing Ministries stalled the bill in the Senate and it was not heard before the legislature adjourned. For companies domociled in Utah, word from the Utah Association of Health Underwriters lobbyist is that the Utah Insurance Commissioner, Todd E. Kaiser and his staff will be considering an Administrative Rule within the confines of State and Federal Regulation regarding the sale of Health Care Sharing Ministries offerings.

Below is a list of reasons why our agency, and its licensed and credentialed professionals, cannot represent this product in any manner:

1 > Because the Health Care Sharing Ministries offering is not a fully insured product there is no protection or oversite from the Utah Insurance Department. Complaints to the Insurance Department on your state will not be addressed because they have absolutely nor jurisdiction over these organizations.

2 > Because this is not an insured product, it is not covered under the any state guarantee funds, which promises to pay policyholders in the case of bankruptcy or insolvency of an insurance company. In Utah, this is the Utah Life and Health Insurance Guaranty Association.

3 > The normal fallback Federal regulatory agency for complaints is the Department of Labor. They regularly deal with complaints on self funded plans. They have no oversight or regulatory authority over Heath Care Sharing Ministries offerings. Complaints lodged here will go unheard and unresolved.

4 > Employers that replace their group health plan with a Health Care Sharing Ministries offering may be at risk of a lawsuit from their employees should the payments fall short of their expectation/promise or the organization files for bankruptcy.

5 > Because the Health Care Sharing Misistries offerings are not insurance, they are not covered by an agents Errors and Omississions policy for lack of performance leaving the consumer and an agency exposed to undue liability exposure.

6 > If an employer dismantles their group health plan and substitutes a Christian Ministries plan, there is a potential that it may be determined that the Christian Ministries plan is a group plan. Case law has shown that individual plans, which are sponsored by and paid for directly or indirectly by an employer (i.e. via direct contributions or through a pay raise), are considered group plans. Employer sponsored plans need to provide coverage under laws that are required of group plans. For example, the Pregnancy Act of 1978 (which amended the Civil Rights Act of 1964) requires that all employers with 15 or more total employees (full or part time) treat pregnancy the same as any other medical condition. If an employee or their eligible spouse is denied coverage because they are currently pregnant (pre-existing condition) or limitations are placed on the plan coverage (hospital day limits, dollar amount limits or claim denial) because of their pregnancy, they may run afoul of the Pregnancy Act and risk a civil rights investigation/lawsuit.

7 > A large employer (50 or more Full Time Equivalent Employees) could not report a Christian Ministries plan as an offer of health coverage so they would be subject to play or pay penalty ($3,000.00 *per employee per year*) because this offering is not considered insurance or minimal essential coverage under the Affordable Care Act;

8 > Finally, any employer could risk a civil lawsuit or investigation from the Department of Labor/Office of Civil rights under the auspices of discrimination for employees failing to qualify for coverage. Furthermore, employees who fail to qualify for the plan for tobacco and alcohol use, which is considered a health factor, could bring scrutiny and prosecution from the Department of Health and Human Services because discrimination based on a health factor is also prohibited.

The bottom line is that these programs are not insurance and that they rely totally on the trust and goodwill of the other members in the co-op. Should there be an economic downturn or any number of other reasons where a substantial number of members leave the plan, there is a tremendous potential that claims may be unpaid as promised. Furthermore, without regulatory oversite for these offerings, no liability protection for an agent or agency and the potential of a Federal discrimination investigation/lawsuit for employers who offer a Health Care Sharing Ministries plan as a substitute for a group health plan, ***we cannot in good conscience recommend or place these offerings for our valued clients or prospects.***