

SB 1431 & Self-Funding for Small Employers: What's the Fuss All About?

An in-depth look at the Impact of Limits on Self-Funding that SB 1431 Imposes for Small Employers and the Consequences – Unintended or Otherwise.

It has been sometime, probably 1992, since any California insurance related legislative action has attracted the level of concern as does SB 1431. However, it is difficult to properly estimate the level of awareness employers, employees, brokers, and others in California have toward Senate bill 1431.

Because of this, it is tough to accurately state whether or not people truly understand just how dramatic the financial effect SB 1431 will have on tens of thousands of small employers and hundreds of thousands of employees.

The effort to modify or defeat this bill faces unprecedented obstacles and in the shadows of PPACA, the bill has tremendous forward momentum even though most legislators are unaware of the effects it will have on small employers. If you had been present at the July 3rd hearing of the California Assembly Health Committee, you would have witnessed the opposition efforts on behalf of the California Chamber of Commerce, California Association of Health Underwriters, Healthcare Administrators Assoc, Self Insurance Institutes of America, CIGNA, HCCA, as well as many California TPAs, independent brokers, and small employers. You would have also witnessed the efforts of SB 1431's supporters in the form of California Insurance Commissioner Dave Jones, Blue Shield of California, Kaiser, as well as Health Access.

But what is all the fuss about? What is it about this legislation that causes such concern and is that concern warranted? How will the limitations within SB 1431 affect small employer's ability to control healthcare cost and the benefits small employers provide? Who is supporting SB 1431 and why would those groups want to limit the choices small employers have when selecting a health plan?

This article will address these issues. We will point out specifically how SB 1431 will limit choices and the consequences it brings if it is implemented. Clearly, your author is opposed to SB 1431, but I will endeavor to present both sides with an equal presence

First Let's Frame The Discussion

SB 1431 is written with guidelines to place limits on stop-loss policies purchased by small employers that wish to self insure a portion of their company's health plan. The small employer is defined in SB 1431 as two to 50 eligible employees until January 2014, at which time, the bill would increase the defini-

tion of a small employer to two to 99 eligible employees. It also places requirements and limitations on the underwriting and renewal of these products.

In its current form, SB 143 states that a small employer would not be able to buy a stop-loss policy with a specific deductible of less than \$60,000. Further, the stop-loss policy would be required to calculate the aggregate protection at no less than \$15,000 times the number of covered members. Both of these limitations would make the risk to small employers too punitive to consider; therefore small employers will not be able to buy or administer their self-funded group medical plan.

Three points of reference for those not heavily involved in self funding:

1. Employers can now purchase stop-loss protection with specific deductibles as low as \$10,000. Employers may choose to purchase a policy with higher specific limits, such as \$20,000 or even \$30,000, but the point is that employers now get to make that choice for themselves.
2. Employers that are buying aggregate policies frequently see the aggregate factors and risk corridors as low as \$4,500 per member and 115% of expected claims.
3. SB 1431 would prevent an employer with 49 eligible employees from purchasing the same stop-loss policy as an employer with 51 eligible employees could purchase.

As even the casual observer will note, these limits on specific and aggregate coverage will deter small employers from self-funding their health plans. Small employers will have no choice but to purchase their group policies from fully insured plans or from the Exchange with the limits imposed by PPACA. The other alternative will be to discontinue the employer's group plan, pay the penalty, and force employees on to the state plan.

What Is So Scary About SB 1431 For Small Employers?

To address this we need to look at PPACA and what 2014 will bring as well as what benefit plans will look like in January 2014? Let's start with a few facts about the limits within PPACA. While everyone talks about the Essential Benefit Package, unlimited lifetime limits, kids to 26, etc., those are not the concerns come January 2014. There are many issues within

PPACA that can cause debate, but let me address two that are directly linked to the consequences of SB 1431 along with a third issue which becomes a multiplier to make the consequences worse.

The first is the modified community rating imposed on fully insured plans by PPACA. Every reasonable estimate projects that this guideline may cause rates to increase by as much as 40% due to the limit of three rating brackets. Therefore, small employers should anticipate a significant rate adjustment on any fully insured health plan.

The second issue is due, in part, to the plans employers provide their employees today. The most prominent, if not popular, plans sold over the past four years have been plans with deductibles of \$2,500, \$3,000, \$3,500, \$5,000, and even \$10,000. Thousands of employers have enrolled in plans like these regardless if they wrapped or not. The reason these plans are so prominent is price. Third, PPACA will limit the fully insured deductibles for plans to no greater than \$2,000. This is key; it is the multiplier that I mentioned above.

So the multiplying affect means that the tens of thousands on fully insured plans with deductibles of \$2,500 or above will have their rates increased for two compounding reasons: one, to get the fully insured deductible at or below \$2,000 and two, the affect of modified community rating.

Supporters of SB 1431

The bill was authored and carried by Senator Kevin De Leon, but it is the support of Insurance Commissioner Jones along with Blue Shield of California that provided the language, background, and its momentum. The supporters of SB 1431 have been very honest about why they support the bill.

As presented in public hearings, the supporters state that if the limits within SB 1431 are not imposed than employers with younger members or healthier members will purchase self-funded plans. Commissioner Jones stated that this would leave the older groups and unhealthy groups to purchase coverage from the Exchange. In its presentation Blue Shield of California similarly stated that if small employers are allowed to self-fund their health plans, the younger

healthier groups would purchase self funded plans leaving Blue Shield exposed to cover the older unhealthier groups. It was also suggested that unless self-funded plans were limited by SB 1431 that employers might provide plans with lower benefits or stripped out plans.

However, the presentation during the public hearings was predominantly centered on younger, healthier employers being able to buy outside of the Exchange or fully-insured plans and therefore small employers must be limited on what they can purchase.

What does this mean to California's employers, employees, and economy?

If SB 1431 is passed then many thousands of California's small employers will be put into a predicament. If those employers are currently insured under a traditional PPO or HMO plan then those employers will see their premiums increase as stated above. The modified community rating increases rates 30-40%. If those employers are covered by an HDHP then those employers will see their premiums increased by the multiplying effect explained above and could easily be 60%. Employees cost under either scenario will increase.

So how would one expect this to affect our economy, our employers, and our covered employees? The short answer is not good. SB 1431 is the only insurance bill this session that promises to increase insurance costs. It makes one ask, "Why would our legislature pass a bill that will increase cost for thousands of small employers at a time when our economy is fragile and possibly on the verge of a second recession?"

Maybe now is a time for a good analogy. If our legislature were considering building a one-mile long road or canal across a wetland of even farmland; how many environmental impact studies, traffic studies, or density studies would be conducted and how long would this process take? Answer: It's impossible to predict.

Yet, not one study was conducted concerning how SB 1431 will affect small employers and their employees. SB 1431 was created to protect the Insurance Exchange yet no one has conducted any feasibility studies or statewide tests or estimates to its affect on our small employers and their employees.

The Employee Retirement Income Security Act and its Preemption

ERISA is probably the most often noted and most often misquoted law in the insurance and healthcare industries. It is said that anyone who portrays themselves as an expert on ERISA then is either crazy or thinks you are. ERISA, through the Dept of Labor and IRS, provides the oversight and regulations for ERISA. One of the most often quoted statements about ERISA involves the ERISA Preemption – more about that in a bit.

ERISA is the regulatory guide for self-funded and stop-loss plans, but is a tool often used by fully insured plans. Fully insured plans started inserting ERISA statements in the back of their Certificates of Insurance, in the late 1990s, in an attempt to have any legal action against the plan, including punitive damages, take place in Federal court rather than state court. Check out any cert book you have lying around and you will see it.

Now, at the risk of over simplifying the ERISA Preemption here is what it means: "No state can interfere with an employer's ability to administer its self funded plan." So, if SB 1431 is passed in its current form, or any form for that matter, it will be argued in court that the State of California is interfering with a small employer's ability to administer its self-funded plan.

The bill's supporters point out that other states have implemented similar limitations without being sued. That is relatively true, but not exactly. The two states that have passed bills with limitations are Delaware and Oregon. There are two basic reasons why those states have not been tested. First, the limits that these states implemented are very low and present no real restriction to small employers. The second reason is, with all due respect to Oregon and Delaware, these states are small in comparison to California. Carriers, industry associations, TPAs etc. see no reason to waste litigation dollars in states where the population is low and the limitation insignificant.

That is not the case here in California. The industry has stated collectively that, if passed, litigation will be pursued. Small employers should be the ones carrying the litigation since the bill affects small employers so severely but it will be the various stake holders in the insurance and stop-loss industry that pursue such

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action. It would be good to avoid litigation since California has enough budget issues and cannot really afford such a significant legal cost. Plus, litigation will be very public and the press will likely be on the side of small employers.

Finally

You have heard it said that the closer one gets to watch our political process work, the further one wants to be from it. This is the situation with SB 1431. How can any legislator see wisdom in limiting an employer's choices when it comes to a health plan? If an employer with 51 employees can purchase a \$10,000 specific stop-loss policy then why can't an employer with 49 employees do the same? There are many such questions but unfortunately we have yet to hear a reasonable answer from supporters of SB 1431.

Most of us are not politically active by nature. Plus, most of us are busy just trying to do our job to the best of our ability and don't have time to be an activist. So, what can we do? If the bill is still in play as you read this article then the answer is that you can do more than you think. A simple phone call to your local state senator or assembly member is a start. Place a call to the Governor's office. Call your employer clients and ask them to do the same.

As I stated in the introduction, SB 1431 presents the most significant restriction on small employer health plans since the early 1990s. As an industry we can lead small employers and their employees in understanding SB 1431 and the affects it will have on our economy, on employers, and most importantly on the hundreds of thousands of employees covered or who will be covered by self-funded plans. □

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Major Health Insurers to Lower Rate Increases for Small Employers

Three of California's major health insurers have agreed to lower their July rate increases. After review by the Department of Insurance, Anthem Blue Cross, Blue Shield, and Aetna agreed to modify their most recent small group rate increases for this quarter. Small group policies are available to small employers with two to 50 employees.

Anthem Blue Cross is withdrawing its 2.5% July 1st premium increase for small-group PPO products. The withdrawal will save about \$25 million for 45,000 of Anthem Blue Cross' small group policyholders, covering approximately 280,000 individuals. Anthem has raised rates 4.7% on its small group policyholders in the previous 12 months.

Blue Shield Life and Health Company will provide a credit to 58,000 small employers (covering approximately 265,00 individuals) equivalent to reducing its July 1st third quarter rate increase by 1.5%. As a result of the credit, the effective Blue Shield rate increase will be 1.6%, which is Blue Shield's only small group rate increase for its small employer policyholders in the past 12 months. This modified rate increase will save policyholders approximately \$15 million.

Aetna will lower its proposed small group rate from 2.6% down to 1.3% for its 9,200 policyholders (covering approximately 69,000 individuals), which saves about \$8 million for small employers. Small employers have already been billed for July and August for the July 1st rate increases, but will see credits on their August or September bills.

Jones said, "While this is a positive outcome, it again underscores the need for authority to reject excessive health insurance rate increases. Although I have the authority to reject excessive rates for auto, home, property and casualty insurance, I lack that authority when it comes to health insurance. Year after year, Californians and businesses are faced with rate hikes because the health insurers get to decide how high to raise our rates. I urge the State Senate to pass Assembly Bill 52 in its current form."

CDI Disapproves Blue Shield's Proposal to Close Health Individual Health Products

The California Dept. of Insurance (CDI) has disapproved Blue Shield's notice of intention

to close most of its individual market block of business, which is regulated by the Department of Insurance. Jones notes that insurers are allowed to close products. But, they have to pool a closed a block of individual policies with enough open policies to keep the average claim level down and maintain reasonably low rates for all policies in the pool.

The CDI says that Blue Shield's remaining open block is not adequate for pooling. The CDI says that Blue Shield has not made adequate provision for more than 20,000 consumers in the Vital Shield 2900 Plan who have no transfer right without underwriting.

Insurance Commissioner Dave Jones said, "When consumers purchase health insurance, they should not have to worry that their health insurer will open new products and close others in ways that put the policyholder at risk of being pooled with unhealthy lives whose claims costs are likely to cause premiums to increase."

The Fallout from the Autism Bill

On July 1, the Autism Bill goes into effect in California. Under SB 946, state regulated health care plans (also known as fully funded or fully insured plans) that provide hospital, medical, or surgical coverage must also provide coverage for "medically necessary" behavioral health treatment for pervasive developmental disorder or autism. The law compliments California's Mental Health Parity Act, which passed in 2000. SB 946 was passed with the hope that thousands of California families would save on out-of-pocket costs for the treatment of autism and other behavioral health conditions. However, SB 946 does not apply to self-funded medical plans. Self-funded plans may include the coverage outlined under SB 946, but it is not required. The mandate is due to expire on July 1, 2014 and an automatic repeal will take place on January 1, 2015. "The new coverage requirement will certainly alleviate some of the financial strain families affected by autism experience. However, Burnham Benefits projects the mandate to impact overall annual costs up to 0.8%. Although the impact may not seem significant, every increase adds up in today's environment of medical insurance costs," said, Burnham Benefits underwriter, Ryan Meissner. In addition to the projected cost increase, utilization of behavioral health services is likely to rise. Burnham expects behavioral health care providers to modify contractual agreements with carriers, which could increase consumer costs yet again. For more information, visit www.burnhambenefits.com.