Are Brokers At Risk of Violating California's 1993 Small Group Reform Law Ab 1672?

The Unsaid Truth About Some Carrier Practices.

By Mark Reynolds, RHU

> *Health & Safety Code Section 1357.03 and Insurance Code Section 10705 require health plans and insurers to make available, to every small employer group, all of the small group plans they offer to employer groups and associations. The plans or policies must be fairly and affirmatively marketed and sold to all small employers in the health plan's or insurer's service area or geographic region.*
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> **~As seen on the official website of the California State Bar Association.**

When California's legislature adopted AB 1672 in 1992, adding Section 10705 to the California Insurance Code to regulate insurance carriers and Section 1357.03 to the California Health and Safety Code to regulate HMOs and health plans such as Blue Cross, the health insurance market was ready and in need of reform. Skyrocketing rate increases, the inability of employers to change carriers as a result of existing health problems, redlining of certain industries, and other industry abuses, led to a consensus among legislators to create a more stable and fair marketplace.

This legislation radically changed the way small group health insurance has been promoted, sold, enrolled and administered in California. Under AB 1672, agents offering a health plan from a carrier or a health plan to small employers are required to present rates and benefits on all plans available from that carrier or health plan. The intent of the Small Business Health Insurance Reform law was to guarantee access to every small employer to buy any group health insurance "product" sold by a carrier to small employers. In other terms, it stopped Insurance carriers from predatory underwriting and/or rating practices.

Yet, with this law firmly in place for almost 15 years, some carriers offering small group health plans in California have started restricting employers' access to certain health plans. Unfortunately, the plans being restricted are ones that would allow employers to reduce their healthcare cost and maintain the same level of benefits.

MERPs & HRAs Used With High Deductible Plans Under Fire

Starting in 1996, Medical Expense Reimbursement Plans known as MERPs, and more recently, Health Reimbursement Arrangements (HRAs), have become proven and popular methods for small employers to reduce healthcare costs without cutting the level of employee benefits. MERPs and HRAs utilize high deductible health plans under which employers pay ("reimburse") for a portion of their employee's healthcare expenses.

The use of these plans result in significant savings for employers. For example, the annual average savings for employers using MERPS or HRAs administered by BEN-E-LECT in 2006 was $1,775 per employee. For a small business with 10 employees, that savings of $17,750 a year is significant. Plus these plans give employers control over the depth of benefits they want to offer to their employees. That's a powerful tool for brokers interested in helping their clients save money while provide their employees rich benefits.

Carrier Restrictions and Threat of Enforcement

Kaiser, HealthNet, and Blue Cross of California are now restricting employers' access to many or all of their plans if the employer intends to use an HRA or MERP, forcing employers to pay higher premiums than they would otherwise need to spend. They legitimize these restrictions by reasoning these plans are not priced for self-funding and skew their actuarial assumptions.

Furthermore, some carriers are now requiring employers to sign a statement or "Declaration of Understanding" acknowledging awareness of these restricted plans when enrolling. Employers that don't sign it may risk having their underwriting held up while employers that do sign it may be committing fraud.

The carriers are enforcing these restrictions with threats to brokers that carriers "may" withhold commission or "may" terminate the agent's contract should their clients use one of the carrier's restricted plans in conjunction with an HRA, MERP, or Section 105 plan.

The threat of contract termination is an important one, particularly since every agent contract in California is an "at will" contract. This means an agent's contract can be terminated any time and for no reason. It's understandable why few agents are willing to risk their livelihood and challenge these carrier business practices. Instead, it's safer to look the other way and go along with the carriers' restrictions. However, in doing so, agents may be violating the Department of Insurance (DOI) Section 10705 or Health and Safety Code 1357.03.

Carrier Violation of Section 10705 and Code 1357.03

The carrier restrictions seem to be a clear example of violation of the codes, which in part state:

b) Each carrier, except a self-funded employer, shall fairly and affirmatively offer, market, and sell all of the carrier's benefit plan designs that are sold to, offered through, or sponsored by, small employers or associations that include small employers to all small employers in each geographic region in which the carrier makes coverage available or provides benefits.

Popular Responses By Carriers For Plan Restrictions

Carriers have provided a number of reasons to justify and legitimize their restrictions on certain plans, stating they price these plans based on specific utilization and actuarial assumptions.

"Our HDHP was not priced for self-funding."

"We priced the plan assuming that the member would be responsible for the entire cost of the high deductible. If someone else helps the member with part or all of that cost, it skews our actuarial assumptions."

"If someone helps the member with those costs then the member will utilize more services, which skews our actuarial assumptions."

While these are valid points for discussion and seem reasonable, there are flaws to this logic.

Flaw #1: "Claims experience" cannot be a factor to encourage an employer to refrain from applying for a plan. Therefore, using actuarial assumptions as a reason to restrict certain plans is invalid. Section 10705 specifically states:

(h) No carrier or agent or broker shall, directly or indirectly, engage in the following activities:

(1) Encourage or direct small employers to refrain from filing an application for coverage with a carrier because of the health status, claims experience, industry, occupation, or geographic location within the carrier's approved service area of the small employer or the small employer's employees.

The code continues with detailed regulation further clarifying that:

(h) No carrier or agent or broker shall, directly or indirectly, engage in the following activities:

(1) Encourage or direct small employers to refrain from filing an application for coverage with a carrier because of the health status, claims experience, industry, occupation, or geographic location within the carrier's approved service area of the small employer or the small employer's employees.

Therefore, if any carrier or health plan restricts any of the health plans it offers to small employers from any small employer it would seem to be in conflict with the law. If that is the case then what about the broker who represents that carrier or health plan?

Agent Violation of Section 10705 and Section 1357.03

These carrier restrictions are essentially placing agents and brokers in direct violation of Sections 10705 and 1357.03, which require agents to provide fair information about all carrier products to small employers:

(e) Every agent or broker representing one or more carriers for the purpose of selling health benefit plans to small employers shall do all of the following:

(A) Advise the small employer of the carrier's obligation to sell to any small employer any of the benefit plan designs it offers to small employers and provide them, upon request, with the actual rates that would be charged to that employer for a given benefit plan design.

(B) Notify the small employer that the agent or broker will procure rate and benefit information for the small employer on any benefit plan design offered by a carrier for whom the agent or broker sells health benefit plans.

Flaw #2: The actuarial assumption or utilization statement may be more credible if members were moving from a deductible of $250 to $500. However, these restricted plans typically have deductibles of $1,500 and $2,000.

In Spring 2007, a Kaiser representative presenting to the Orange County Health Underwriters stated that 85% of members will spend less than $1,000 per year. WellPoint's Chairman and CEO Leonard Schaffer, while addressing the Los Angeles Health Underwriters in 2003, stated that 68% of Californians will use less than $150 in medical services per year. The databases and actuaries of these companies are among the best in the world. Assuming these statements are true, how would a $2,400 or $2,700 deductible plan be affected by an employer-funded HRA to the degree that would force carriers to threaten the brokers who bring them their business?

Flaw #3: All HRAs and MERPs are federally sanctioned and regulated benefits under Section 105 of the Internal Revenue Code. Employers can install an HRA even without a health plan in place. If carriers restrict their plans from a federally qualified plan like an HRA, what will stop them from restricting a plan being used in conjunction with a Section 125 FSA? Leadership from California Association Health Underwriters (CAHU) always mention the camel's head under the tent when discussing state reform efforts. Wouldn't these HRA restrictions be the same camel's head under the tent?

It is important to note that not all carriers are restricting plans from employers. Aetna, United Healthcare and the plans from Allied National do not restrict plans nor do they threaten commission and contracts.

A Call to Action

Individually, brokers probably feel there is little they can do. If brokers tell their clients they can not show a plan because the carrier may not pay their commission the broker looks bad. If clients learn about a plan through another source then the broker stills looks bad to their client. So what can brokers do?

Brokers and agents can take steps to avoid being in violation of the law and ensure their employer groups continue to be treated fairly:

- Contact the local assembly member or state senator through a personal visit, phone call, email, or letter. Explain the situation to them. Healthcare reform is at the top of agenda in Sacramento, so this matter should resonate with them.

- Contact the Department of Insurance (DOI), Department of Managed Healthcare (DMHC), Attorney General, or Governor's office. Most likely they are unaware these carriers are restricting access to health plans for small employers.

- Ask small group clients to do the same. Everyone responds when a voter files a complaint.

- Stand up at the next CAHU meeting and ask members to get involved. While members of many local chapters and CAHU leadership are predominately on the carrier side of the industry, CAHU must take up this issue.

Carrier's Can Sustain Profitability While Provide Solutions To California's Healthcare Crisis

With the high cost of healthcare, employers and employees need our help. Everyone is struggling with benefits being reduced as premiums increase.

HRAs and MERPs have been and should continue to be a viable solution for small employers. Giving members an opportunity to share healthcare costs with their employers within the transparency of an HRA or MERP will yield better healthcare consumers.

HRAs are a great first step for many toward eventually being enrolled on an HSA. Most employers and employees are not ready mentally or financially for an HSA, and the HRA or MERP are excellent training experiences so members can better see how to navigate through the choices of healthcare.

At the same time, I honestly believe carriers offering small group medical plans in California want to deliver the best products and the best price possible. I believe these carriers want their plans to be competitive, profitable and sustainable so that fewer rate increases are required.

I am convinced that small employers are willing to take on more financial responsibility through HRAs and MERPs, which makes that employer a partner with the carrier in financing healthcare. You cannot have a better partner than one willing to put itself at financial risk for the benefit of all involved.

By creating a partnership where the brokers, employers, employees and carriers are on the same side of the table, we will create a solution to the healthcare crisis in which everyone wins.

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