

# HEALTH INSURANCE EXCHANGES

Timely News and Strategic Insights on the Development and Operation of State Exchanges

## Group Wants Taft-Hartley Plans Deemed QHPs, Workers to Get Exchange Subsidies

The National Coordinating Committee for Multiemployer Plans (NCCMP) is lobbying HHS and the Dept. of Treasury to recognize the “unique status” of multiemployer plans (i.e., Taft-Hartley plans) and deem them qualified health plans (QHPs). Such an arrangement would mean their low-income members could qualify for federal tax credits.

But two health policy experts interviewed by *HEX* agree that workers covered by a multiemployer plan have access to employer-sponsored coverage, which makes them ineligible for the credit. NCCMP Executive Director Randy DeFrehn doesn't see it that way.

Among other things, the Taft-Hartley Act, enacted in 1947, allowed employers and unions to jointly create trusts to cover benefits for workers of certain industries that relied on a mobile work force (e.g., restaurants, hotels, entertainment, transit and construction). Those workers typically wouldn't qualify for benefits coverage under more traditional employer-sponsored plans. The law requires that such trusts be jointly held by contributing employer and union representatives and that the assets of the trusts be used for the “sole and exclusive benefit” of beneficiaries of the trusts, DeFrehn explains.

The group is concerned that once insurance exchanges become operational, many employers will stop contributing to the trusts — which also fund pensions — and abandon coverage for their low-income workers. They will then have to buy commercial insurance offered on an exchange where they can receive federal tax credits.

Under the reform law, the credits will be available only through state insurance exchanges and only to low-income people (i.e., less than 400% of the Federal Poverty Level) who don't have access to employer-based coverage.

### Does HHS Have Authority to Exempt Plans?

“I don't see any way, under the statutory wording of the reform law, that this [exemption] would be allowed. I see where this puts them in a difficult situation, but they don't really have a very clear case for an exemp-

tion,” says Mark Hall, Ph.D., a professor of health care law and policy at Wake Forest University.

Timothy Stoltzfus Jost, a health law professor at the Washington and Lee University School of Law in Virginia, agrees and says HHS most likely lacks the authority to exempt the plans. Moreover, a qualified health plan (QHP) has to be operated by a state-licensed health insurance issuer. Taft-Hartley plans are categorized as multiemployer ERISA plans. And the guaranteed-issue provision of the reform law requires that QHPs sell to any qualified consumer who wants to enroll as long as it has capacity. It's unlikely that trusts would want to — or be legally allowed to — set up an insurance company and sell coverage to people outside of the trust's core membership.

“It's a fascinating idea, but it's just really hard for me to see how it would work,” Jost tells *HEX*. “Ideally, it would be nice if the premium tax credits were available to everyone whose income is below a certain level and could subsidize employer payments as well.” Jost is also a consumer representative for the National Association of Insurance Commissioners.

DeFrehn argues that multiemployer plans have “historically been recognized as distinct entities” that are regulated under both labor and trust laws as well as ERISA. He says his organization has had “productive” meetings with HHS and Treasury, though no decisions have been made.

NCCMP also would like HHS to give their small-employer members the option of purchasing coverage through a Small Business Health Options Program if the SHOP exchange winds up offering cost-effective plans, according to a consultant who is working with NCCMP but asked not to be identified.

Proponents of an exemption contend the reform law is unclear when it comes to multiemployer plans and argue that HHS does have the authority to deem multiemployer plans as QHPs. And even though its beneficiaries have access to health insurance, that coverage actually is sponsored by a trust fund, not an employer. Moreover, they say, multiemployer-based coverage is unique and, as under current law, shouldn't be subject

to rules developed for more traditional employer-based health coverage.

### Are Plans Employer-Sponsored?

DeFrehn tells *HPW* that three Washington, D.C., tax law firms have analyzed the statute and concluded that the exclusion for “employer sponsored” plans from receiving the subsidy does not apply to multiemployer plans. The law, he says, “is replete with subtle distinctions” that would result in such an interpretation. The reason this is not “employer-sponsored” coverage is that the eligibility is not contingent on employment with any single identifiable employer.

A pair of documents written by former Rep. Earl Pomeroy (D-N.D.), now an attorney at the law firm Alston & Bird, outlined the group’s argument in memos sent to HHS.

While Hall agrees that the coverage is offered by a trust rather than an employer, he notes that the trusts meet the definition of “employer-based coverage” under ERISA, a status the trusts probably won’t want to give up. “They’re trying to walk too fine of a regulatory line in saying ‘we’re employer based’ for some things but not for others,” he says.

Moreover, as Congress searches for ways to slash the federal deficit, it could be difficult to get an exception that will translate to more spending — in the form of more federal tax credits.

### Coverage Could Be Interrupted

Employers and unions that operate trusts are concerned that continuation of coverage could be interrupted if their members have to buy insurance coverage on an exchange. Because of their often sporadic employment, some workers would find it difficult to make monthly premium payments, and there likely would be no employer contribution.

A construction worker, for example, might work a job for three months and be off the next six weeks. But employees who now receive coverage through a trust often have an “hour bank” that builds continuation of coverage into the system that employees can tap when they don’t have many hours.

Under a collective bargaining agreement, a worker’s employer might pay \$5 per hour worked toward the health plan and another \$5 into the pension fund. Once the employee works 300 hours over three months, he or she would be eligible for benefits. Eligibility rules tend to vary by industry.

### A Shot in the Arm for Unions?

Allowing multiemployer plan members to receive federal tax credits would indirectly mean taxpayer

support for unions, says an attorney who asked not to be identified because he has represented unions. “Without this relief, many Taft-Hartley plans representing low-wage workers will splinter and disintegrate. Small contributing employers will figure out their workers get a better deal on the exchange because of the federal tax credits...and companies with fewer than 50 workers won’t be subject to penalties” for not offering health coverage, he says.

Hall agrees that unions are probably worried about the impact the exchanges will have on multiemployer plans. “I don’t know how likely it is [that they will be affected], but they definitely have reason to be concerned.”

But DeFrehn says the treatment being requested is not new. “Multiemployer trusts have long been recognized as standing in the shoes of and fulfilling the role of non-profit insurers that were granted special status — including exemption from state insurance laws — under federal law decades ago,” he asserts.

Unlike low-cost mini-med plans, which typically offer thin benefits, coverage offered through trusts tends to be very comprehensive. The average benefit has an actuarial value of 87%, and many are even richer. The lowest cost Bronze-level plans offered through the exchange, by contrast, must have an actuarial value of at least 60%.

And because eligibility for trust benefits is determined by the aggregation of service with one or more employers who contribute to the trusts, employers often have no way of knowing which workers are covered. That could make it impossible for them to determine eligibility for tax credits offered through the exchanges. Moreover, even if employers meet their payment obligations under the collective bargaining agreement, they could be at risk for penalties under the reform law.

Although Hall doesn’t seem to think HHS will create a special status for multiemployer plans, he says the agency will need to figure out how to determine tax credits for employers who participate in Taft-Hartley plans. “The whole system is premised upon being able to attribute each worker to an employer,” he notes. “This is an issue HHS has to work through.”

*Editor’s Note:* Pomeroy’s memorandums, and an Oct. 31 letter to CMS, outline NCCMP’s arguments. Visit [www.nccmp.org](http://www.nccmp.org).

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