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## Health Insurance Exchanges Should Open Their Doors to Multiemployer Plans



By **GEORGE M. KRAW**

**A**bout 26 million people in the United States rely on multiemployer plans for their health insurance coverage. The Affordable Care Act (ACA)<sup>1</sup> does not address participation by multiemployer plans in the health insurance exchanges envisioned in the law, creating doubt and uncertainty about the future of multiemployer plans.

This policymaking by omission is both unfair and unwise. Ignoring multiemployer plans weakens them and puts at risk the plan participants, who are active employees, dependents, retirees, part-time workers, and the unemployed.

Someone needs to define the role of multiemployer plans in the health insurance exchanges that, under the ACA, must be operating by Jan. 1, 2014. If the federal government will not act, the states should.

<sup>1</sup> The ACA has adopted the same definition of “multiemployer plan” found in the Employee Retirement Income Security Act (ERISA). Under both statutes, a multiemployer plan is a plan (i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and (iii) which satisfies such other requirements as the Secretary [of Labor] may prescribe by regulation.

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The ACA and other federal statutes do not specifically bar states from including multiemployer plans in the exchanges. Restrictions in the ACA currently limiting large-employer participation do not extend to multiemployer plans, which under longstanding federal law are not “employers.” Multiemployer plans act as intermediaries and conduits through which individual workers and employers, most of which are small businesses, obtain health insurance.

Multiemployer plans would have difficulty coexisting with the exchanges if the plans were denied access to health insurance products offered through the exchanges. Allowing multiemployer plans to participate in the exchanges would be consistent with the purpose of the ACA and would prevent disruption, loss of benefits, and other harm to participants that would occur if multiemployer plans were forced out of existence.

Absent additional federal regulation or further congressional action, state-based exchanges should allow multiemployer plans to buy the same exchange insurance coverage that will be available to individuals and small employers. Multiemployer plans also should be permitted and encouraged to assist participants who lose eligibility and can no longer participate in a multiemployer plan to obtain coverage through the exchanges.

**Multiemployer Plan Features.** For more than six decades, multiemployer plans have provided a unique means of delivering superior, cost-effective health care benefits to working Americans and their families. Typically structured under Section 302(c)(5) of the Taft-Hartley Act, the plans operate through individual trusts overseen by a joint labor-management board of trustees. A multiemployer plan is sponsored by two or more employers and at least one union. The plans operate in a variety of industries and are especially suited to employment sectors that have mobile workforces, such as construction and entertainment. In those industries, employees may work for several different participating employers during a single year.

Apart from providing health insurance benefits, related multiemployer plans often provide pensions, unemployment benefits, and industry training programs.

Multiemployer health plans are attractive to employers because they provide consistent, cost-effective health benefits for their workers. According to data provided by the National Coordinating Committee for Multiemployer Plans (NCCMP), nearly 90 percent of the employers in multiemployer plans are small businesses,

most of which have fewer than 20 employees. Many of these employers could not afford to provide similar health care benefits through a single-employer plan.

A multiemployer plan pools the financial contributions of all participating employers and the service hours of all participating employees to provide health insurance coverage to all employees who meet the service requirements. The collectively bargained contributions and the specific allocations from the employees' wage package to pay for health benefits—many of these allocations are voted on by the employees themselves—make participants aware of the cost of coverage.

Participants, through their bargaining representatives, often choose to subsidize coverage for unemployed workers and retirees ineligible for Medicare coverage. Early retiree coverage is often critical for employees in physically demanding jobs in which employees typically cannot keep working until they are 65 or older. In those plans, active employees divert part of their income to pay for coverage for those not currently working.

The structure and tradition of multiemployer plans provides a level of social protection seldom found in single-employer plans.

**Group Health Plans.** Multiemployer health plans have attracted little attention apart from participating employers and employees. The plans are “group health plans” under federal law, which means they must comply with the ACA. However, unlike a single-employer group health plan, which is sponsored by an employer, the sponsor of a multiemployer plan is the plan’s board of trustees.<sup>2</sup> Employers contribute as part of the wage package pursuant to the applicable collective bargaining agreement. At this point, the employer’s direct involvement ends. The plan’s relationship to the beneficiary or consumer is closer to that of an agent who acts as an intermediary in helping individuals or businesses obtain health insurance coverage.

The ACA focuses primarily on delivering health care benefits in the group and individual context either through insurance issued by a state-licensed insurer or through self-funded plans offered by employers. Multiemployer plans are “hybrid” designs that can have fully insured and self-insured options. Plan trustees determine the plan structure and design, oversee plan administration and plan professionals, and decide whether and to what extent benefits are paid. Small plans and plans for lower-wage workforces are more likely to be fully insured.

**Federal Action.** The NCCMP has proposed that the Department of Health and Human Services use its regulatory authority to certify a multiemployer plan as a “Qualified Health Plan” (QHP).<sup>3</sup> The NCCMP has presented three theories to the department to justify the certification request, namely that a multiemployer plan:

- satisfies specific requirements of a QHP as defined under ACA Section 1301(a) and certain other requirements applicable to health insurance issuers,
- is equivalent to a multistate plan under Section 1334 of the ACA, and

<sup>2</sup> See, for example, ERISA Section 3(16)(B)(iii).

<sup>3</sup> See [http://www.nccmp.org/pdfs/NCCMP\\_Paper\\_\(Final\)\\_1\(2\).pdf](http://www.nccmp.org/pdfs/NCCMP_Paper_(Final)_1(2).pdf).

- is the equivalent of a Consumer Operated and Oriented Plan (CO-OP) described under ACA Section 1322.

The CO-OP grant program is designed to foster the adoption of CO-OPs. Multiemployer plans already conform to the CO-OP model.

If a multiemployer plan were certified as a QHP under any one of those theories, the plan could participate fully in all state and federally assisted exchanges. The plans could receive tax benefits or act as pass-throughs for tax benefits. Absent such action or further legislative changes, multiemployer plans will remain in federal regulatory limbo.

**Competitive Disadvantage.** According to NCCMP data, the vast majority of employers in multiemployer plans are small businesses that would otherwise qualify for small-business programs. It is unfair and bad policy to exclude those employers from the exchanges because they participate in multiemployer plans. Participating employers have union contracts. Excluding the employers from the exchanges will put them at a competitive disadvantage relative to similarly sized, nonunion competitors that do not provide the same level of benefits.

This disadvantage will encourage employers to leave multiemployer plans, weaken the plans’ contribution base, and force the affected plans to reduce benefits and drop subsidies for retirees and the unemployed. This unintended result will lead to inferior coverage and diminished social protections for the remaining plan participants.<sup>4</sup>

**State Action.** The ACA gives states freedom to develop their own regulatory rules and does not preempt state legislation permitting multiemployer plan participation in the state exchanges.<sup>5</sup> States can, without further federal action, allow multiemployer plans to purchase insurance from the exchanges and otherwise participate in the exchanges. States also can make a determination that multiemployer plans are intermediaries or agents for small employers and individual participants in obtaining health insurance coverage on their behalf.

**California AB 710.** Legislation introduced as AB 710 in the California Assembly this year states that multiemployer plans can participate fully in the exchanges “to the extent permitted by federal law.” The caveat language protects the legislation from preemption challenges. The ACA does not preempt state regulatory functions, under which a state could decide to admit a multiemployer plan into its exchange. ERISA also does not preempt state regulatory functions.<sup>6</sup> The law would not go into effect until July 1, 2014, which would allow six months for the California Exchange to be up and

<sup>4</sup> The structure of most multiemployer plans is such that small employers cannot be separated from large employers for purposes of eligibility and benefits. Although allowing multiemployer plans to participate in the exchanges may indirectly benefit some large employers, this consequence by itself does not justify excluding the entire multiemployer plan population from the exchanges.

<sup>5</sup> Section 1321(d) of the ACA. Preemption is a legal doctrine by which federal law overrides state law. Therefore, state laws that conflict with federal law are “without effect.” *Maryland v. Louisiana*, 451 U. S. 725, 746.

<sup>6</sup> See, for example, *Golden Gate Restaurant Association v. City and County of San Francisco*, 546 F.3d 639, 44 EBC 2761 (9th Cir. 2008).

running. The bill is sponsored by several construction industry unions, including Sheet Metal, Plumber and Pipe Fitter, and IBEW locals.

Without AB 710, California exchange programs will likely be restricted in 2014 to individuals and employers with 50 or fewer full-time employees. Multiemployer plans represent a collection of health care consumers joining together to obtain health care coverage for themselves and their families. The plans are employment-based but are not employer-sponsored. There is no basis for treating multiemployer plans as equivalent to employers for applying the ACA rules for participating in the exchanges.

**Participation in Exchanges.** Allowing multiemployer plans to participate in the state exchanges will focus attention on the gaps in the ACA regarding these plans and on the failure of regulators to fix these omissions. California's AB 710 can serve as a model for other state exchanges and encourage states to open the exchanges to multiemployer plans.

## Closing Arguments

For the reasons given, health insurance exchanges created under the ACA should permit multiemployer plans to obtain insurance products from the exchanges

for participants in multiemployer plans. The exchanges also should permit multiemployer plans to use plan assets to assist individual participants in obtaining insurance coverage through the exchanges.

**Summary of Reasons.** The following is a summary of the reasons for permitting multiemployer plans to participate in the ACA exchanges:

- The ACA gives states the freedom to develop their own regulatory rules and does not preempt state legislation that would allow multiemployer plan participation in the exchanges (Section 1321(d) of the Affordable Care Act).
- ERISA does not preempt state regulatory action.
- Multiemployer plans act as conduits for employers and individuals to receive health care benefits. The overwhelming majority of the plans' contributing employers are small businesses that should not be excluded from the exchanges.
- Businesses with union contracts should not be put at a disadvantage with nonunion competitors.
- The unique nature of multiemployer plans justifies allowing them to obtain health insurance coverage for multiemployer plan participants directly through the exchanges.