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August 11, 2005

MEMORANDUM 2005-1H

TO: MEWAs, Producers and Health Plan Third-Party Administrators

FROM: J. P. Schmidt
Insurance Commissioner

RE: State Regulation of Multiple Employer Welfare Arrangements

This Memorandum is to remind all producers, health plan third party administrators and other individuals or entities that self-funded or partially self-funded Multiple Employer Welfare Arrangements (MEWA) that operate in Hawai'i are subject to regulation by the Insurance Commissioner of the State of Hawai'i.

No MEWA has received a license to provide insurance in Hawai'i. Therefore, any person, producer, third party administrator or other entity involved in the operation of a self-funded or partially self-funded MEWA that provides insurance benefits in this State is transacting the business of insurance without authorization in violation of Hawaii Revised Statutes (HRS) §431:1-101 and §431:3-201. Anyone involved in such activity may be subject to the penalty provisions of HRS §431:2-203. This statute provides that violation of any provision of the Insurance Code is punishable by a fine of not less than $100 nor more than $10,000 per violation, or by imprisonment for not more than one year, or both, in addition to any other penalty or forfeiture otherwise provided by law. This memorandum does not prohibit MEWAs from buying insurance from an authorized insurer. Producers or others involved in providing such insurance to a MEWA are not subject to penalty. This Memorandum only addresses self-funded or partially self-funded MEWAs.

MEWAs provide health and welfare benefits to employees of two or more unrelated employers who are not parties to bona fide collective bargaining agreements. In concept, MEWAs are designed to give small employers access to low cost health coverage on terms similar to those available to large employers. In 1983, Title I of Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1001 et seq., (ERISA) was amended by adding a definition of a multiple employer welfare arrangement. This definition provides that a MEWA is any plan which: (a) covers the employees of more than one employer; (b) is not collectively bargained; (c) is not a rural electric cooperative; and (d) is not under common control as defined by ERISA.

ERISA currently provides for both state and the federal government regulation of MEWAs. This dual jurisdiction gives states primary responsibility for overseeing the financial soundness of MEWAs and the licensing of MEWA operators. The U.S. Department of Labor enforces the fiduciary provisions of ERISA against MEWA operators to the extent a MEWA is an ERISA plan or is holding ERISA plan assets.

The 1983 amendment to ERISA also removed the federal preemption of state law with respect to MEWAs. Consequently, all MEWAs as defined by ERISA are subject to state regulation. ERISA preemption does not apply to MEWAs even if they otherwise qualify as an employee welfare benefit plan under ERISA. If a MEWA is fully insured, the MEWA is not a risk-bearing entity and the Insurance Division does not regulate it directly but imposes all applicable requirements upon the insurer. An insurance policy issued to a MEWA must comply with all applicable requirements of Hawai'i insurance law.

Some promoters of MEWAs attempt to circumvent state regulation by claiming that qualification as a tax exempt organization under section 501(c) of the Internal Revenue Code results in exclusive federal jurisdiction. This is not true. Others claim that MEWA's qualify under the ERISA preemption. This was true prior to 1983 but is not true now. Under current federal law, a MEWA is never eligible for ERISA pre-emption from state insurance regulation.

The Insurance Division notes that some promoters may style a program of health benefits as "collectively-bargained" plans or "employee-leasing" plans. The determination as to whether these particular programs are subject to state regulation usually may only be made on a case by case basis. Only an official written determination or opinion by the United States Department of Labor on the plan in its current form can establish exemption from state insurance regulation. With regard to employee leasing plans, the United States Department of Labor has taken the position that where the employees participating in the plan of an employee leasing organization include employees of two or more client (or "recipient") employers, or employees of the leasing organization and at least one client employer, the plan of the leasing organization would, by definition, constitute a MEWA because the plan would be providing benefits to the employees of two or more employers. Regardless of the contractual provisions between the leasing company and the client employer, the Department of Labor applies common law principals to determine whether both the leasing company and a client employer are employers and, if so, the plan is a MEWA.

Anyone suspecting that a MEWA or any other entity is operating as an unauthorized insurer should alert the Hawai'i Insurance Division immediately so appropriate action can be taken. All licensed producers are reminded that solicitation or sale of unauthorized insurance not only jeopardizes the security of Hawai'i insurance consumers, but also subjects producers who sell such insurance to suspension or revocation of their license, potential personal liability for unpaid claims and the civil fines and criminal penalties set forth in HRS §431:2-203.

If you have any questions or comments regarding the information contained herein, please direct them to the Health Insurance Branch of this Division at 586-2804. Otherwise, please acknowledge your receipt and understanding of this Memorandum.