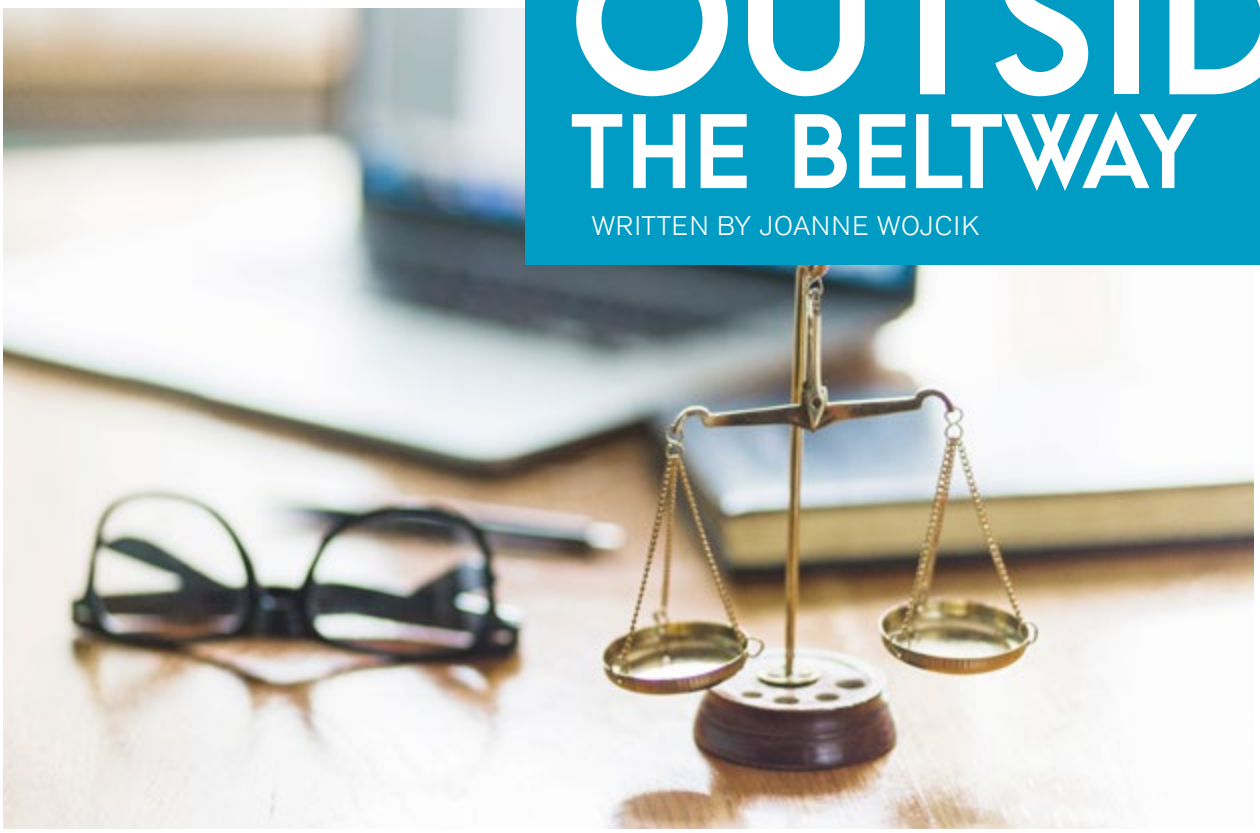
OUTSIDE THE BELTWAY

WRITTEN BY JOANNE WOJCIK



To support federal law and to shore up their eroding small group markets, numerous state legislatures have begun cracking down on the sale of medical stop-loss insurance to prevent many small employers from self-funding their health benefits.

State lawmakers also are seeking enhanced reporting by medical stop-loss carriers as a means to gauge just how many small employers have begun self-insuring health benefits since the enactment of the Affordable Care Act. Although the ACA requires the Department of Labor to prepare annual reports on the self-funded group market, including plan type, number of participants, benefits offered, and funding arrangements, it only applies to employers with 100 or more employees.

Because the federal Employee Retirement Income Security Act (ERISA) prohibits states from regulating self-funded benefit plans, some states have started taking a back-door approach to regulating self-insurance options for small employers by restricting the sale of medical stop-loss coverage, which most small employers purchase to protect against "shock" claims—high-dollar, but low-frequency claims such as a premature baby or organ transplant.

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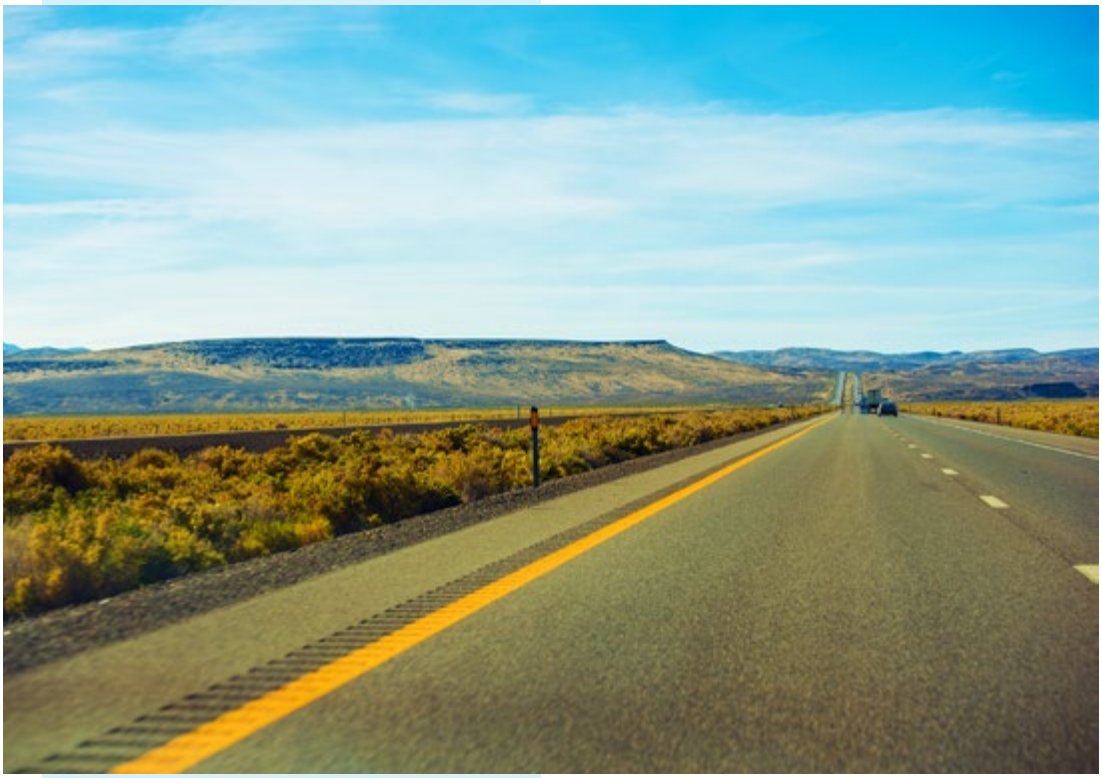

Other states blame the increasing prevalence of self-insured health benefits for their shrinking fully insured small group markets. In New Jersey, for instance, a bill was introduced to ban the sale of stop-loss insurance to groups with fewer than 50 eligible employees. Driving this legislation is the fact that the fully insured small group market has lost approximately 600,000 enrolled individuals over the last 18 years. It has the support of two of the state's largest insurers, which stand to gain if small employers elect to buy coverage from them.

However, the Self-Insurance Institute of America, Inc., has been warning state lawmakers that many of these smaller employers might simply drop healthcare coverage for their employees if they cannot self-insure. As SIIA members are aware, self-insured plans tend to cost employers less than fully insured plans because they are not subject to state-mandated benefits, which often drive up the cost of health insurance.

"Many smaller employers are looking for lower-cost alternatives or are dropping coverage entirely since they are not subject to the employer mandate in the ACA," said Dan Ziebel, Director of Product Management at National General Insurance, a Milwaukee-based stop-loss carrier that operates nationwide. In 2016, ACA laws and regulations changed the definition of "small group" from 50 or fewer employees to 100 or fewer employees.

Similar regulation pending in Maine has been put on hold while the Bureau of Insurance develops regulations that are likely to set higher specific and aggregate stop-loss attachment points and bar lasering—the practice of setting higher attachment points for individuals with high-cost medical conditions. Under current Maine law, the minimum specific attachment point for employers with fewer than 50 employees is $20,000, while the aggregate attachment point is 120% of expected claims.

In Nevada, three iterations of small group stop-loss regulations have been proposed over the past two years. One proposed regulation would prohibit medical stop-loss carriers from issuing contracts to employer groups of 15 and under. Another would discontinue the current minimum attachment points for aggregate stop-loss of $4,000 per enrollee. SIIA sees the latter as a positive change because it increases small employers' contract options, allowing them to purchase aggregate coverage at lower attachment points.

The Nevada regulations also would require medical stop-loss insurers to report certain information such as the number of contracts in force in the state, specific and aggregate attachment points, and the number of employees each employer has—something that stop-loss carriers can't do since they only know the number of individuals enrolled in coverage, not the total number of full- and part-time employees a company has. For example, they wouldn't know whether some individuals have coverage via other sources, such as their spouse's employer.

SIIA has submitted comments to Nevada regulators and participated in a stakeholder work group, and additional updates are expected along with a new draft of the regulations.

In New York, Gov. Andrew M. Cuomo's proposed 2019-20 budget would have eliminated the grandfathering of stop-loss contracts in the 51-100 market. In 2015, the governor signed a five-year grandfathering extension through Jan. 1, 2024, with the understanding that the Legislature would pass a new law reducing the extension to two years. The bill changing five years to two years passed the Legislature earlier this year and is awaiting the governor's signature. This new law would permit renewal of stop-loss contracts through Jan. 1, 2021, a reduction of three years compared to the current law.

In some cases, state legislatures are operating under the assumption that self-insured benefits are bare-bones health plans that leave many covered individuals underinsured, or that employers offering such benefits can deny coverage to employees or their dependents who they perceive to be poor risks.

"Some states think self-insured plans are simply stripped-down, minimum coverage plans, but that's not true," observed Steve Suter, chairman of SIIA's Government Relations Committee and President & CEO of Healthcare Management Administrators, Inc., a third-party administrator based in Seattle.

Meanwhile, proponents of the ban in New Jersey are telling lawmakers that self-insured plans are "junk coverage," according to Adam Brackemyre, Vice President, State Government Relations, SIIA's Washington-based state legislative lobbyist.

While self-insured plans have a great deal of flexibility in plan design, most offer a comprehensive suite of benefits including preventive care, Brackemyre noted. He said the ACA also prohibits self-funded employers from setting annual and lifetime dollar limits on coverage, and all plans must cover pre-existing conditions, although they can set a 90-day waiting period before coverage commences.

Because of these and other misperceptions, state lawmakers need to be educated about self-insurance, said Suter, who has been recruiting SIIA members to help shape the feedback that Brackemyre provides to lawmakers on behalf of SIIA. He said that SIIA members should be concerned about these legislative and regulatory developments affecting the availability

of self-insurance in New Jersey, Maine, Nevada and New York even if it is outside of their markets because "states watch the actions being taken by other states and they frequently try to introduce similar legislation."

Armed with input from members of SIIA's Government Relations Committee, Brackemyre has been educating members of the various state legislative committees considering these bills on how the availability of medical stop-loss insurance provides financial support for self-insured health benefits sponsored by small employers, many of which might not be able to afford to offer health benefits to their employers without this option.

However, state legislatures also are receiving negative feedback from their insurance regulators since it has been the longstanding position of the National Association of Insurance Commissioners (NAIC) that small employers should not be permitted to self-insure because it would hurt the fully insured market, which is required to take all comers regardless of medical history since enactment of the ACA. In a 2015 White Paper titled "Stop Loss Insurance, Self-Funding and the ACA," the NAIC asserts "if employers—particularly small employers, with younger, healthier employees—self-fund…it will leave the older, sicker population to the fully insured, smaller group market."

"The truth is, after decades of self-insurance being made available to small employers, there's never been any evidence of self-funding undermining the small group market in any state," Brackemyre said.

SIIA will continue to update members on this issue through the various digital platforms. Questions or comments are invited by Adam Brackemyre at (202) 595-0641 or by email at abrackemyre@siia.org. ■