

*Note to readers: The article below has been edited in content and length by The California Association of Health Underwriters. This is how it appears in the CAHU Forum. For the original version, see the article entitled “Unedited/Full Version of CAHU Article on SB 1431” on our website.*

## **Opinion Editorial**

### **SB 1431 Attacks Self-Insurance Option, Creates Unwanted “Exchange Protection Act” and Invites ERISA Preemption Challenge**

**Dorothy M. Cociu, RHU, REBC, GBA, RPA**

Some folks at CAHU have asked me why I decided to come out of my retirement status (referring to my no longer sitting on a CAHU or NAHU Board of Directors) to write an article... Well, I have serious concerns and thoughts on SB 1431, that appears to drive self insured small employers towards the California Health Benefit Exchange. CAHU is working closely with NAIFA-California and IBA West to stop SB 1431.

On April 25, the California Senate’s Health Committee passed through SB 1431, a Stop-Loss Insurance Coverage bill (De Leon), with a 5-3 vote along party lines. I was indeed there to watch the testimonies of the supporters and opposition.

SB 1431, authored by Senator DeLeon (D-Los Angeles) and sponsored by Insurance Commissioner Jones. The bill was originally introduced as a “spot” bill on February 24, 2012. Two months later the bill was gutted and amended to “establish minimum attachment points for stop-loss policies to self-insured employers in the small group market” and to “require guarantee issue for employees and dependents and guaranteed renewability of the policy for the small employer”.

*This bill, in my opinion, clearly attempts to eliminate competition for the California Exchange, by virtually eliminating the option for self-insurance in the small group market in California.*

Organizations supporting the bill in Sacramento at the hearing included Blue Shield of California, California Physician Groups, the Consumer Federation of America, Health Access California, SEIU California, and the Department of Insurance. Opposing organizations included California Association of Health Underwriters (CAHU), California Chamber of Commerce, National Federation of Independent Business (NFIB), Self-Insurance Institute of America (SIIA), and BEN-E-LECT. CAHU, NAIFA California and IBA West are working in opposition to the bill.

#### ***What SB 1431 Would Do***

SB 1431 would require a minimum specific stop-loss deductible of \$95,000 per person, and an aggregate attachment point of \$19,000 per individual for employers with 50 or fewer employees. This means that a small employer would have to incur \$95,000 in claims before seeking reimbursement from the stop-loss carrier, for each individual.

Those attachment points basically eliminate the option to self-insure, even if you have an excellent candidate for self-insurance. In addition, those employers who have been self-insured at lower specific and aggregate attachment points for many years would likely lose the option in the future, as they likely would not be able to afford the additional risks.

I personally have two clients in that position, should this bill be signed into law. One has successfully maintained a \$45,000 specific stop-loss policy (which started as low as \$20,000 over 20 years ago), and the other, a \$50,000 specific (which started out at \$25,000). The latter was, incidentally, a larger group that reduced in size due to the economy and a merger, and is now just under 50 lives. If SB 1431 becomes law, it is conceivable that they would have to terminate their self-insured plan, even after years of success, with little notice, and have to pay run-out claims (claims incurred during the plan year that are paid after the plan year ends) after the plan is forced to terminate, for a period of three to six months, plus incur the simultaneous costs of purchasing a fully insured plan for their employees; one with likely lower benefit levels and higher costs than their current self-insured plans. *In essence, they would pay double for about six months...* Why/how, please tell me, does this possibly make sense? My clients aren't the only ones that had stop-loss placed since January 1, 2012, and all of them now are at risk under the provisions of SB 1431.

### ***ERISA and Self-Insurance***

Since the passage of the Employee Retirement Income Security Act (ERISA) in 1974, qualified employers of all sizes have successfully self-funded their group health plans. According to the Self-insurance Institute of America, in 2010, 77 million workers and their dependents were covered by self-insured plans, which represents about one third of the private health care marketplace. Employers have sought the help of professional service providers, such as third party administrators (TPA's), specialized brokers, competitive networks of providers, pharmacy benefit managers, utilization review and case management firms, and others to assist them in creating and maintaining a viable and well cost-contained health plan. The most critical component of self-insurance, however, is medical stop-loss. This coverage provides a financial reimbursement mechanism for claims in excess of pre-determined risk thresholds. *SB 1431 imposes new regulatory restrictions on such stop-loss coverage that would in essence disallow this funding option for small employers.* With SB 1431, in most cases, employers would not be allowed to retain stop-loss coverage at levels and terms consistent with their financial risk transfer philosophies and needs.

A very important distinction that should be made is that stop-loss carriers do not pay for individual health care claims, as erroneously stated in SB 1431. Stop-loss coverage reimburses the employer/plan sponsor for claims. SB 1431, according to SIIA, has some erroneous assumptions. "It's important to be clear" stated Mike Ferguson, COO of SIIA, "that self-insured employers are financially responsible for all eligible health care claims, so it's not accurate to say [as stated in SB 1431] that an employer's financial liability is 'capped' at the stop-loss attachment levels. To put a finer point on it, stop-loss carriers do not pay individual health care claims."

### ***ERISA Preemption***

ERISA prohibits states from imposing regulations that affect the administration of self-insured group health plans. Because SB 1431 would restrict employer risk transfer arrangements, this directly affects plan administration and is therefore a likely violation of ERISA, and would invite an ERISA preemption challenge. The Self-insurance Institute of America (SIIA) has stated that it is prepared to make that legal challenge.

One of the key testimonies on April 25 was that of Mike Ferguson, COO of SIIA- When I first became aware of the bill contents and the hearing date, my first reaction was to contact Mike and ask SIIA to get involved. SIIA's role in legislative and lobbying activity across the nation on self-insurance issue is unprecedented.

In SIIA's written testimony, they stated that "It is well established that state mandated benefit laws do not apply to ERISA self-insured plans. This is because such laws are preempted – or superseded-by federal law. The mandated attachment points of SB 1431 are also preempted."

SIIA went on record with the California Senate Health Committee, informing them that they (SIIA) would consider initiating a legal battle in this state, as this is a prominent, high profile state. How serious is SIIA about this? “Very serious,” Mike replied. “There clearly is a legal argument that the regulation proposed by SB 1431 ‘relates to’ self-insured ERISA plans and is therefore preempted by federal law...”

Other opponents added further detail and testimony. The California Chamber of Commerce, combined with National Federation of Independent Business, for example, in its letter of opposition (dated April 18, 2012), stated that they opposed SB 1431 because “it will severely limit small employers opportunity to select the most appropriate, affordable health care coverage to their employees as self-insurance. The bill proposes to regulate stop-loss insurance for small employers, most notably to require the employer to bear an unreasonable level of claims cost before stop-loss coverage applies.”

### ***Why Self-Insurance?***

As a long-term self-insurance specialist, spanning over more than two decades, I have successfully administered , then later placed as a broker, a number of self- insured plans here in California. I have been involved in every aspect, from bidding stop-loss coverage, to managing TPA’s paying claims, to writing plan documents and SPD’s, to analyzing the claims experience and making recommendations for plan design to assist employers in creating and maintaining the most cost-effective, competitive health benefit plans in the market. In all these years, I have never seen such a blatant attack on a successful funding option.

While self-insurance is not for every employer, it provides a viable option for some; particularly those with strong balance sheets, stable workforces, healthy employees and dependents, those with employees in multiple states and those who wish to offer uniformity to their employees. Employers who self-insure are allowed plan design flexibility (but are subject to ERISA requirements), and a long term cost management mechanism. Self-insurance is a funding option that offers affordable coverage at a time that California employers have experienced rising health insurance costs, and many small and medium size businesses struggle to provide health coverage at all...

Personally, I would ask that CAHU members participate in the Call to Action and possible Operation Shouts on this issue. CAHU is working closely with NAIFA-California and IBA West to stop SB 1431.

**Editor’s Note: This article has been edited from its original form/content. Please contact the author or visit her website at [www.advancedbenefitconsulting.com](http://www.advancedbenefitconsulting.com) for additional information and related articles on this topic.**

**The views and opinions expressed herein are those of the author and do not necessarily reflect the views of the California Association of Health Underwriters.**

(INSERT LINK TO JOINT LETTER TO SENATE APPROPRIATIONS.)