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Multiple Employer Plans—Opportunities and Challenges: Multiple Employer Welfare Arrangements

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Introduction

This is the second installment in a series of articles addressing multiple employer plans ("MEPs"). The first installment addressed the uncertainties and complexities of the laws governing MEPs in the retirement plan context. This installment addresses MEPs providing health and welfare benefits, particularly multiple employer welfare arrangements ("MEWAs"). In concept, MEWAs are designed to give employers access to low cost health coverage and may represent the only available option for small employers who are unable to obtain insurance coverage due to underwriting risks.[1] However, MEWAs have a long history of abuse, which has made them the focus of many policy discussions and much regulatory scrutiny.[2]

There are two types of MEWAs, those that are "employee welfare benefit plans," as that terms is defined by the Employee Retirement Security Act of 1974, as amended ("ERISA") and those that are "any other arrangement" which are established or maintained for the purpose of offering or providing welfare plan benefits to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, subject to certain statutory exceptions for union and cooperative plans.[3]

Whether a MEWA is an "employee welfare benefit plan" or an "other arrangement" will determine which federal and state laws apply to the MEWA and its participating employers.

The History of Multiple Employer Welfare Arrangements

The evolution of laws that currently apply to MEWAs was driven largely by debates over whether ERISA

[1] United States Department of Labor ("DOL"), MEWA Enforcement Fact Sheet (April 2011) [hereinafter "DOL MEWA Fact Sheet"].

[2] *See, e.g.,* Mila Kofman et al., *MEWAs: The Threat of Plan Insolvency and Other Challenges,* The Commonwealth Fund (Mar. 2004); U.S. General Accounting Office, Employee Benefits: States Need Labor's Help Regulating Multiple Employer Welfare Arrangements, GAO/HRD-92-40 (1992).

[3] Employee Retirement Income Security Act of 1974, as amended ("ERISA") § 3(40)(A), 29 U.S.C. § 1002(40)(a) (2006).

prevented states from regulating MEWAs in the face of significant abuse and fraud. ERISA contains an expansive preemption clause that preempts any and all state laws that relate to any employee benefit plan that is subject to Title I of ERISA.[4] However, state laws that regulate insurance are "saved" from preemption through ERISA's "savings clause," while ERISA's "deemer clause" prevents states from deeming an employee benefit plan to be an insurer in order to subject it to ERISA's "savings clause" and therefore state regulation.[5] Due in part to this complexity, MEWAs have a troubled past, plagued by abuse due to those who utilized ERISA's preemption clause as a shield.[6] By claiming that their multiple employer health plans were exempt from state regulation due to preemption by ERISA, "bogus insurance trusts" often "fail[ed] to comply with the basic solvency controls which each State establishes to protect health care consumers."[7] In the early 1980s, states received complaints about MEWAs' unpaid claims.[8] Around the same time, the Attorney General of Illinois characterized MEWA abuse as having the potential to become the "most sophisticated and profitable white-collar crime in America."[9]

According to the United States Department of Labor ("DOL"), MEWAs "are sometimes marketed using attractive but actuarially unsound premium structures that generate large administrative fees for their promoters. These high fees are often paid before any claims are paid, leaving insufficient funds available to pay for the benefits promised by the promoters."[10] Historically, "promoters and others have established and operated MEWAs, also described as 'multiple employer trusts' or 'METS', as vehicles for marketing health and welfare benefits to employers for their employees," while representing that the arrangements are exempt from state insurance laws.[11]

The DOL has observed,

> By avoiding [s]tate insurance reserve, contribution and other requirements applicable to insurance companies, MEWAs are often able to market insurance coverage at rates substantially below those of regulated insurance companies, thus, in concept, making the MEWA an attractive alternative for those small businesses finding it difficult to obtain affordable health care coverage for their employees. In practice, however, a number of MEWAs have been unable to pay claims as a result of insufficient funding and inadequate reserves. Or, in the worst situations, they were operated by individuals who drained the MEWA's assets through excessive administrative fees and outright embezzlement.[12]

Consequently, in 1983, out of concern that "MEWA operators were successfully thwarting timely investigations and enforcement activities of state agencies," and in order to "remove legal obstacles which could hinder the ability of states [sic] to regulate [MEWAs] to assure the financial soundness and timely payment of benefits under these arrangements,"[13] Congress amended ERISA to provide that MEWAs are not exempt from state insurance laws.[14]

The Multiple Employer Welfare Arrangement Act of 1983 ("1983 Act") added an express exception for MEWAs to ERISA's general preemption of state law and added a new MEWA definition.[15] Under Congress's new definition, a MEWA is defined, subject to several exceptions,[16] as an "employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any [medical or welfare benefits] to the employees of two or more employers (including one or more self-employed individuals)."[17] Under current law, if a MEWA is an employee welfare benefit plan it is governed by ERISA and is required to comply with all applicable ERISA provisions and all applicable state insurance laws. If a MEWA is determined to be an arrangement that is not an employee welfare benefit plan it is not subject to all ERISA requirements directly, but the employers providing coverage through the MEWA may be considered to have established individual employee welfare benefit plans that are governed by ERISA and must separately comply. Additionally, although the MEWA is not directly governed by ERISA, those who operate or manage the MEWA may nonetheless be subject to ERISA's fiduciary requirements if they are responsible for, or exercise control over, the assets of the individual ERISA-governed plans participating in the MEWA.[18] In either case, the DOL would have concurrent jurisdiction with the state(s) over the MEWA.

Unfortunately, the 1983 Act did not fully resolve either the fraud or the confusion surrounding the status of a MEWA under ERISA. Between 1988 and 1991, MEWAs left plan participants and their beneficiaries with over $123 million in unpaid claims.[19] And some operators have continued to abuse the perceived advan-

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[4] ERISA § 514(a).

[5] ERISA § 514(b)(2)(A) (the "savings clause"); ERISA § 514(b)(2)(B) (the "deemer clause").

[6] *See, e.g.,* DOL, *Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and State Regulation* [hereinafter "DOL MEWA Guide"].

[7] 128 Cong. Rec. 30355-56 (1982) (statements of Rep. Rostenkowski and Rep. Erlenborn).

[8] Kofman, *supra* note 2, at 2-3.

[9] 128 Cong. Rec. 30356.

[10] DOL MEWA Guide.

[11] *Id.*

[12] *Id.*

[13] DOL Notice of Intent to Form a Negotiated Rulemaking Advisory Committee, 63 Fed. Reg. 18345, 18347 (April 15, 1998).

[14] Amendments to ERISA, Pub. L. No. 97-473, 96 Stat. 2613 (1983).

[15] ERISA § 514(b)(6)(A) (exception to ERISA preemption); ERISA § 3(40)(A) (defining MEWAs).

[16] ERISA's definition of a MEWA under § 3(40)(A) expressly excludes collectively bargained plans and plans established or maintained by rural electric or telephone cooperatives.

[17] ERISA § 3(40)(A).

[18] *See* discussion below regarding the definition of an "employee welfare benefit plan" under ERISA.

[19] Kofman, *supra* note 2, at 2.

tages of federal MEWA status.[20] For example, in the 1996 case *United States v. Sokolow*, defendant Sokolow created and offered to the public through a single organization several self-funded health benefit plans, which he represented to be fully insured by the insurance company that provided the plans' stop-loss coverage.[21] When the Pennsylvania Insurance Department attempted to regulate his organization's activities in response to complaints, Sokolow objected on the basis that he operated a MEWA that, as a plan subject to ERISA, was exempt from state regulation.[22] Sokolow, however, was ultimately convicted of multiple counts of mail fraud, money laundering, and criminal forfeiture for stealing approximately four million dollars in member premiums.[23]

The *Sokolow* case is just one among many. Despite this history, some MEWA operators have continued to maintain that they are exempt from state regulation.[24] As a result, MEWAs remain an enforcement priority for the DOL.[25] Many MEWA abuses persist even today.[26] As of April 2011, the DOL had initiated 800 civil and 276 criminal investigations into abusive MEWAs, and it has obtained over $225 million in monetary penalties.[27]

This continued focus on fraudulent or underfunded MEWAs has led to more recent legislative and administrative efforts to strengthen the regulatory and enforcement capabilities of the DOL. The Patient Protection and Affordable Care Act of 2010 ("PPACA"), provided the DOL with greater enforcement authority over MEWAs,[28] and the DOL issued in December 2011 proposed rules to implement these legal changes.[29] These recent changes are discussed further below.

Federal Regulation of MEWAs

Does the Plan Cover Employees of More than One Employer?

As with retirement plan MEPs, formation of a MEWA requires the participation of at least two *unrelated* employers. Once this requirement is met, the broad definition of MEWA ensures that a MEP providing health and welfare benefits will almost always constitute a MEWA, unless the plan falls under one of the few definitional exceptions. As a result of this broad definition, employers may create a MEWA accidentally in several instances, such as when two affiliated but unrelated (for purposes of the Internal Revenue Code of 1986, as amended ("Code") as set forth below) employers participate in the same health or welfare plans thinking they are related, or a professional employer organization ("PEO") covers employees of several different recipient employers under a single health or welfare plan.

At least two unrelated employers

The definition of a MEWA requires the participation of two or more employers. To meet this requirement, two employers may not be members of the same control group of trades or businesses.[30] If the only two employers maintaining a plan are part of the same control group, then the plan is not a MEWA and is considered to be a single-employer plan.[31]

Two trades or businesses are within the same control group if they are under "common control," which is determined by applying principles similar to those set forth in Code § 414(c), except that common control shall not be based on an interest of less than 25 percent.[32] Therefore, whether two employers are a part of the same control group, and thus constitute a single employer, is determined by looking to the common control tests set forth in Code § § 414(b) and 414(c). A plan maintained by employers related by common control under these rules does not fall within the definition of a MEWA.

The first report in this series contains a more in-depth discussion of the control group rules. On Dec. 6, 2011, the DOL issued proposed regulations regarding MEWA reporting requirements contain two examples that illustrate these rules and their impact on whether a plan is a MEWA.[33]

Example 1. Company B maintains a group health plan that provides medical care benefits for its employees. Company B establishes a joint venture in which it has a 25 percent stock ownership interest and transfers some of its employees to the joint venture. The transferred employees continue to be covered by the group health plan sponsored by Company B.

Example 2. Company C maintains a group health plan that provides medical care benefits for its employees. Company C decides to sell a portion of its business, Division Z, to Company D. However, Company C and Company D agree

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[20] *See, e.g., United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010); *Am. Auto. Ins. Co. v. Valentine*, 131 F. App'x 406 (4th Cir. 2005) (per curiam); *United States v. Sokolow*, 91 F.3d 396, 20 EBC 1196 (3rd Cir. 1996); *ELCO Mechanical Contractors, Inc. v. Builders Supply Ass'n of W. Va.*, 832 F. Supp. 1054 (S.D.W.Va. 1993).

[21] *United States v. Sokolow*, 91 F.3d at 400.

[22] *Id.* at 401.

[23] *Id.*

[24] *See, e.g., Fuller v. Norton*, 86 F.3d 1016, 20 EBC 1364 (10th Cir. 1996); *Valentine, supra* note 20.

[25] *See* DOL MEWA Fact Sheet.

[26] Filings Required of MEWAs and Certain Other Related Entities ("Required MEWA Filings"), 76 Fed. Reg. 76222, 76223 (proposed Dec. 6, 2011) (to be codified at 29 C.F.R. pt. 2520); *see also United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010) (MEWA's refusal to pay approximately $20 Million in claims resulted in significant harm including the denial of a transplant for a kidney dialysis patient, near cancellation of life saving treatment for a cancer patient and a year long delay in other treatment).

[27] DOL MEWA Fact Sheet.

[28] Patient Protection and Affordable Care Act of 2010 ("PPACA"), § § 6601(a), (b)(2), 6602, 6604(a), 6607 (2010), adding ERISA § § 501(b), 504, 519-521.

[29] Prop. DOL Regs. 29 C.F.R. § § 2520.101-2, 103-1, 104-20, 104-41, 76 Fed. Reg. at 76231-35; Prop. DOL Regs. 29 C.F.R. § § 2560.521-10-4, 2571.1-.13, 76 Fed. Reg. 76235, 76244-49 (Dec. 6, 2011).

[30] ERISA § 3(40)(B)(i).

[31] *See* DOL MEWA Guide.

[32] ERISA § 3(40)(B)(ii) and (iii) refers to ERISA § 4001(b), which in turn states that it is consistent and coextensive with the regulations under Code § 414(c). Although § 3(40)(B)(iii) refers to "regulations" to be used to determine common control, no such regulations have been promulgated.

[33] Prop. DOL Reg. 29 C.F.R. § 2520.101-2(c), 76 Fed. Reg. at 76232

that Company C's group health plan will continue to provide health care coverage to the employees of Division Z until Company D has established a group health plan for these employees.

The DOL concluded that Company B did not establish a MEWA because it had at least a 25 percent ownership interest in the joint venture, but Company C's plan constituted a MEWA once it no longer had an ownership interest in Division Z.[34] However, as discussed below, the consequences to Company C are limited if the MEWA is temporary during a brief post-transaction period.

Practice Tip: To avoid accidentally creating a MEWA, the common ownership interest among employers participating in a single plan must be reviewed to determine whether the companies will be considered to be a single employer under common control.

Common Situations that Create MEWAs

Any plan that covers employees of more than one employer may constitute a MEWA under ERISA. Although MEWAs may be created intentionally to take advantage of the lower costs, the creation of a MEWA requires no affirmative expression of intent by the employers. Consequently, in some situations, a MEWA may be formed despite the employers' intentions to the contrary. Common situations in which a MEWA may be formed include the following:

Associations and Industry Groups. Group health plans are often established to provide health insurance coverage to employees of employers that are members of the same association or industry group. For example, a construction industry association might sponsor a plan that can be joined by the association's members.

Although questions have been raised as to whether a plan sponsored by a group or association acting on behalf of its employer-members, which are not part of a control group, constitutes a "single employer" for purposes of the MEWA definition, the DOL concludes that such plans are not sponsored by a single employer.[35] The question is premised on the fact that the term "employer" is defined in ERISA § 3(5) to mean "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

However, the DOL concludes that there is no indication in ERISA § 3(40), or the legislative history accompanying the MEWA provisions, that Congress intended that such groups or associations be treated as "single employers" for purposes of determining the status of such arrangements as a MEWA. Moreover, while a bona fide group or association of employers may constitute an "employer"[36] within the meaning of ERISA § 3(5), the individuals typically covered by the group or association-sponsored plan are not "employed" by the group or association and, therefore, are not "employees" of the group or association. Rather, the covered individuals are "employees" of the employer-members of the group or association. Accordingly, to the extent that a plan sponsored by a group or association of employers provides benefits to the employees of two or more employer-members (and such employer-members are not part of a control group of employers), the plan would constitute a MEWA within the meaning of ERISA § 3(40).

Professional Employer Organizations, Staffing Companies and Leasing Firms. PEOs, staffing companies and employee leasing firms come in many forms, but often provide businesses with labor, efficient options for outsourcing administrative and human resource functions, and cost effective options for providing employee benefits[37]. However, when a company enters into a contract with these types of organizations, there can be a factual question as to who is the "employer" of the workers for a variety of purposes.[38] For example, when a leasing firm sponsors a group health plan, an important factual question is whether the workers covered by the plan are employees of the leasing organization or the company receiving the services of the worker (referred to as the "recipient").

The label that the leasing organization and its client put on the workers is irrelevant. The question is answered by who is deemed to be the "common law" employer of the worker under a multiple factor test.[39] Because this test focuses on who has the factual right to control and direct the work performed, the answer is often that the recipient is the common law employer even when the staffing organization is the employer of record for purposes of income and payroll tax withholding and reporting. Thus, if the plan covers multiple recipient employers, the plan will be a MEWA.

Corporate Transactions and Reorganizations. An employer might create a MEWA following a corporate transaction if it continues to provide health and welfare coverage to employees who are transferred to an unrelated buyer. This situation can arise, as provided in the above example from the DOL proposed regulations, where a company spins-off or sells a division to an unrelated buyer, but the seller agrees to continue to provide coverage to the employees of the division that is spun-off. A MEWA might also be created when there are reorganizations within a control group such that certain related companies no longer have a sufficient common ownership to be considered in the same control group.

However, in these circumstances, some plans may be exempt from the annual report that MEWAs are re-

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[34] *Id.*
[35] DOL MEWA Guide.
[36] *Id.*

[37] *See, e.g.*, Rev. Proc. 2002-21.
[38] Rev. Proc. 2002-21 (addressing qualified retirement plans sponsored by PEOs for worksite employees).
[39] *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 14 EBC 2625 (1992) (applying 20 factor common law test to definitions of employee and employer under ERISA); Code § 3121(d) (definition for employment tax purposes incorporates common law definition); Rev. Proc. 2002-21.

quired to file with the DOL, known as a Form M-1.[40] The Form M-1 requirements are discussed in more detail below.

Independent Contractors and Non-Employee Directors. A single plan covering both employees of the sponsoring employer and individuals who are not employees, including independent contractors and members of a board of directors may constitute a MEWA because, by definition, a MEWA provides benefits ″to the employees of two or more employers (including one or more self-employed individuals).″[41]

However, proposed regulations also provide relief from the Form M-1 F filing requirements if the number of these non-employees does not exceed one percent of the total number of employees or former employees covered by the plan, determined as of the last day of the year to be reported or, determined as of the sixtieth day following the date the MEWA began operating in a manner that the filing would otherwise be required.[42]

Partners. On the other hand, a single plan that covers multiple partners in a partnership would probably not be deemed a MEWA, because the reference to ″self-employed individuals″ in the MEWA definition does not apply to partners, who should be more properly treated as ″employees″ of the partnership.[43]

Is the plan exempt from the definition?

ERISA § 3(40)(A) expressly excludes from the MEWA definition three categories of plans: plans maintained under collective bargaining agreements, and rural electric or telephone cooperatives.

Plans Maintained Pursuant to Collective Bargaining Agreements

ERISA § 3(40)(A)(i) excludes from the MEWA definition all plans maintained pursuant to one or more collective bargaining agreements. To ensure that this exception applies only to plans predominantly covering participants covered under collective bargaining agreements, a series of requirements must be met before the exception applies:[44]

1. The plan must be an employee welfare benefit plan under ERISA;

2. At least 85 percent of the plan participants must have a ″nexus″ to the bargaining unit or employers of the bargaining unit employees;

3. The plan must be incorporated or referenced in a written agreement between one or more employer and employee organizations; and

4. The agreement must be the product of a bona fide collective bargaining relationship.[45]

The determination of whether a plan is maintained under a collective bargaining agreement is complex and subject to a variety of exceptions. To provide guidance, the DOL issued a comprehensive set of regulations on the topic, which provide many examples.[46] A thorough discussion of the application of these regulations is beyond the scope of this article.

Rural Electric and Telephone Cooperatives

ERISA § § 3(40)(A)(ii) and (iii) exclude rural electric and telephone cooperatives from the MEWA definition. These are narrow exceptions for statutorily defined organizations.

Is the MEWA Covered by ERISA?

The definition of a MEWA refers to both ″employee welfare benefit plans″ and ″other arrangements″ that are not employee welfare benefit plans.[47] Thus, there are two types of MEWAs, the first is covered by ERISA and the second is not covered by ERISA. With some exceptions, ERISA applies only to those plans, funds or arrangements that are ″employee welfare benefit plans″ as defined by ERISA § 3(1), or an ″employee pension benefit plan″ as defined in ERISA § 3(2).[48] Since MEWAs are not, by definition, pension plans, only MEWAs that are ″employee welfare benefit plans″ are subject to ERISA. A MEWA that is an employee welfare benefit plan must comply with all applicable ERISA provisions and all applicable state insurance regulations.

Employee Welfare Benefit Plan

The term ″employee welfare benefit plan″ (or welfare plan) is defined as:

> any plan, fund, or program which was heretofore or is hereafter **established or maintained by** an **employer** or by an **employee organization**, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) **medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death** or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions). (**Emphasis added.**)

Thus, whether a MEWA is governed by ERISA involves determining whether the MEWA: (1) provides benefits as described in the above definition, and (2) is

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[40] DOL Regs. 29 C.F.R. § § 2520.101-2(c)(2)(ii)(A) through (C), 101-2(h), Example 7.

[41] ERISA § 3(40)(A); DOL Reg. 29 C.F.R. § 2520.101-2(h), Example 8; ABA Joint Committee on Employee Benefits, Questions for the Department of Labor Staff, Q/A 16 (May 18, 2005).

[42] Prop. DOL Reg. 29 C.F.R. § 2520.101-2(c)(2)(ii)(C), 76 Fed. Reg. at 76232.

[43] ABA Joint Committee on Employee Benefits, Q/A 16.

[44] DOL MEWA Guide.

[45] DOL Reg. 29 C.F.R. § 2510.3-40(b)(3). This regulation lays out factors to help determine whether or not bona bide collective bargaining has occurred.

[46] DOL Regs. 29 C.F.R. § § 2510.3-40(b), (c) and (e).

[47] ERISA § 3(40)(A).

[48] ERISA does not apply to governmental plans, church plans, plans maintained solely to comply with workers' compensation, unemployment or disability insurance laws, certain plans maintained outside of the United States, and payroll practices. ERISA § 4(b).

established or maintained by an ″employer″ or an ″employee organization.″[49] In virtually all cases, a MEWA providing health care coverage will provide the types of benefits described in the definition. There is little room for dispute when an employee organization is involved as that term is clearly defined as labor unions or similar groups organized to represent employees.[50] The definition of ″employer,″ however, leaves room for debate and in most cases, the critical question is whether who established and maintains the MEWA is an ″employer.″

Practice Tip: Often, determining if a MEWA is governed by ERISA depends on whether the MEWA is established and maintained by an "employer."

The definition of an ″employer″ includes a group or association of employers acting on behalf of its employer-members to provide benefits for their employees.[51] Any number of insurance-type arrangements involving employers as participants might claim to be ERISA plans if this language were broadly construed.[52] To avoid this result, the DOL has interpreted this language to encompass a requirement of bona fide organizational relationship among the members other than a mere association for the purpose of qualifying for benefits.[53] The DOL's position is that if:

> several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of ERISA § 3(5). Similarly, where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of their status as employers (i.e., the group or association members include persons who are not employers) or where control of the group or association is not vested solely in employer members, the group or association is not a bona fide group or association of employers for purposes of ERISA § 3(5).[54]

Likewise, the U.S. Court of Appeals for the Ninth Circuit has found that a trust was not an ERISA-governed MEWA because it recruited heterogeneuous, unrelated employers.[55] Because many associations that sponsor MEWAs do not satisfy the definition of ″employer," many MEWAs are not governed by ERISA, except to the extent that fiduciary rules apply as described below.

In that case, the MEWA sponsored by the group or association would not itself constitute an ERISA-covered welfare plan; however, the DOL has commented that it would ″view **each** of the employer-members that utilizes the group or association MEWA to provide welfare benefits to its employees as having established separate, single-employer welfare benefit plans subject to ERISA. In effect, the arrangement sponsored by the group or association would, under such circumstances, be viewed merely as a vehicle for funding the provision of benefits (like an insurance company) to a number of individual ERISA-covered plans.″[56] The courts have also found that employers may establish individual ERISA-governed plans notwithstanding the fact that the employer purchased insurance coverage through a MEWA.[57] This would mean that each employer would separately have to comply with ERISA and other laws applicable to the plan.

A detailed discussion of the requirements of Title I of ERISA is beyond the scope of this report. But, in general, those MEWAs that are governed by ERISA would be required to comply with reporting and disclosure requirements (*e.g.*, filing Form 5500s and providing participants with summaries of benefits and coverages and summary plan descriptions), the rules governing the conduct of plan fiduciaries, ERISA claim procedures, PPACA, the Consolidated Omnibus Budget Reconciliation Act of 1985 (″COBRA″), the Health Insurance Portability and Accountability Act (″HIPAA″), the Newborns' and Mothers' Health Protection Act, the Mental Health Parity Act, and the Women's Health and Cancer Rights Act.

MEWAs that are not covered by ERISA (because they are not ″employee welfare benefit plans″) are not subject to these requirements directly, but in the case where each employer has a separate ERISA-governed plan funded through a MEWA, the persons who operate the MEWA are subject to ERISA's fiduciary provisions to the extent they have discretionary authority or control over the assets of the individual plans.[58] The MEWA operators ″may also be subject to ERISA's fiduciary obligations if it acts as a fiduciary to plans that meet the definition of an employee welfare benefit plan.″[59]

Practice Tip: A MEWA that is not established or maintained by an employer is not governed by ERISA as a single plan, but each employer providing coverage to its employees through the MEWA will have established a separate plan that, by itself, is subject to ERISA. Thus, while the MEWA sponsor may take the position that it does not have to comply with ERISA, employers should be aware that they each have separate obligations under ERISA.

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[49] ERISA § 3(1).
[50] ERISA § 3(4).
[51] ERISA § 3(5).
[52] *Moideen v. Gillespie*, 55 F.3d 1478 19 EBC 1708 (9th Cir. 1995).
[53] *Id.* at 1481; DOL Op. Letter No. 79-41A (June 29, 1979).
[54] DOL MEWA Guide.
[55] *Moideen*, 55 F.3d at 1481, citing *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 625, 8 EBC 1470 (9th Cir. 1987).
[56] *Id.*
[57] *See Fossen v. Blue Cross and Blue Shield of Montana, Inc.*, 660 F.3d 1102, 51 EBC 2697 (9th Cir. 2011) (employer established plan by purchase of insurance through MEWA); *Arndt v. Concert Health Plan Ins. Co.*, No. 8:09-CV-1239-T-27TBM, 48 EBC 2699 (M.D. Fla. Jan. 18, 2010)(owner who purchased coverage for himself through a MEWA did not establish an ERISA plan).
[58] DOL MEWA Guide.
[59] *Chao v. Crouse*, 346 F. Supp. 2d 975, 34 EBC 1084 (S.D. Ind. 2004)(agreeing with DOL that MEWA operators were subject to ERISA fiduciary obligations because the MEWA received assets from the individual plans of its subscribing members that themselves qualified as employee welfare benefit plans).

State Regulation of MEWAs

There is nothing in ERISA § 514(b)(6)(A) that limits the applicability of state insurance laws to only those insurance laws which specifically or otherwise reference "MEWAs." Similarly, while the specific application of a particular insurance law to a particular MEWA is a matter within the jurisdiction of the state, there is nothing in ERISA § 514(b)(6) that would preclude the application of the same insurance laws that apply to any insurer to ERISA-governed plans which constitute MEWAs, subject only to the limitations set forth in ERISA § 514(b)(6)(A). Under ERISA § 514(b)(6)(A), the scope of permissible state regulation of an ERISA-governed MEWA depends upon whether the plan is fully insured.

Fully Insured Plans

A MEWA that is also a fully insured ERISA plan is subject to state insurance regulation "to the extent such law provides . . . standards, requiring the maintenance of specified levels of reserves and specified levels of contributions" that the plan must meet in order to satisfy its benefit payment obligations when they are due, and also provides for the enforcement of those standards.[60] In its guidance booklet, the DOL describes such standards to include "licensing, registration, certification, financial reporting, examination, [and] audit" requirements.[61] Given the fully insured status of these plans, the reserve and contribution requirements are typically already met by the underlying insurance company. However, the MEWA sponsor is still responsible for compliance with all other state law requirements including, licensing, income reporting and establishing a trust for holding the insurance policy.

The statutory language indicates that a plan is considered "fully insured" only if the Secretary determines that the benefits "guaranteed under a contract, or policy of insurance, issued by an insurance company . . . qualified to conduct business in a State [sic]."[62] Confusingly, the DOL stated in its MEWA guidance booklet that a state's ability to regulate a plan does not depend on a DOL determination that the plan is fully insured, while courts have construed the plain language of the statute to require a DOL determination before it will consider a MEWA to be fully insured.[63]

For example, in *Custom Rail Employer Welfare Trust v. Geeslin*, the Custom Rail Employer Welfare Trust ("CREW Welfare Trust") argued that it was largely exempt from state regulation due to its status as a fully insured MEWA.[64] However, the plan's "fully insured" status arose only from a statement in its contract of insurance, which purported to render the plan fully insured for ERISA purposes.[65] Interpreting the plain language of ERISA § 514(b)(6)(D), the court held that a MEWA is fully insured for ERISA purposes "only when the Secretary of Labor says it is."[66] The court concluded that nothing in the guidance *requires* states to deem a MEWA to be fully insured, absent the DOL's stamp of approval.[67]

Practice Tip: A MEWA intending to be considered fully insured should request an Advisory Opinion from the DOL, which is handled by the Office of Regulations and Interpretations under the provisions of ERISA Procedure 76-1.

The CREW Welfare Trust sought such a determination without success. The DOL determined that the CREW Welfare Trust was a MEWA, but not a fully insured MEWA, in Advisory Opinion 2007-06A (August 16, 2007). The DOL recently affirmed that determination in Advisory Opinion 2011-01A (February 1, 2011). Although the CREW Welfare Trust purchased a Certificate of Insurance from an insurance company, the coverage was similar to a stop-loss policy and paid for claims only after the claims were not paid by the CREW Welfare Trust. Because the CREW Welfare Trust retained "first in line" responsibility for paying claims, the Certificate of Insurance did not unconditionally guarantee payment of all benefits due. In contrast, the DOL determined that a MEWA was fully insured in Advisory Opinion 93-11A (April 5, 1993) where an insurance company was first in line for paying all benefits directly to plan participants.

Self-Funded Plans

In the case of an ERISA-governed MEWA that is self-funded (i.e. that is not fully insured), "any law of any State which regulates insurance may apply to the extent not inconsistent" with Title I of ERISA.[68] *A self-insured plan that is also an ERISA-governed plan, would be subject to* ***any*** *state insurance laws in* ***any*** *state in which it operates, to the extent not inconsistent with Title I of ERISA.[69] In the DOL's opinion, a state law would be inconsistent with Title I "to the extent that compliance with such law would abolish or abridge an affirmative protection or safeguard" available under Title I, or where the state law affirmatively conflicted with Title I.[70] For example, any state law that exempted a plan from any of the disclosures required under Title I would be inconsistent with Title I and thus preempted by ERISA.*

Practice Tip: A self-insured plan that is governed by ERISA is subject to state insurance laws in the states in which it operates, to the extent those laws are not inconsistent with Title I of ERISA.

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[60] ERISA § 514(b)(6)(A)(i).
[61] DOL MEWA Guide.
[62] ERISA § 514(b)(6)(D).
[63] DOL MEWA Guide; *Custom Rail Employer Welfare Trust v. Geeslin ("CREW")*, 491 F.3d 233, 235, 41 EBC 1023 (5th Cir. 2007); *Virginia Beach Policemen's Benevolent Ass'n v. Reich*, 881 F. Supp. 1059 (E.D. Va. 1995), *aff'd*, 96 F.3d 1440, 20 EBC 1836 (4th Cir. 1996).
[64] *CREW*, 491 F.3d at 235.
[65] *Id.*
[66] *Id.* at 236.
[67] *Id.*
[68] ERISA § 514(b)(6)(A)(i).
[69] ERISA § 514(b)(6)(A)(ii) (emphasis added).
[70] DOL MEWA Guide.

However, federal preemption law generally applies to the question of whether a state law ″conflicts″ with Title I. Where a state law may be harmonized with Title I, the state law will survive. And state law will not be inconsistent with Title I if it imposes more stringent standards or offers greater protections to participants than those delineated in Title I.[71] *The DOL has expressed the view that a state law regulating insurance which requires a license or certificate of authority as a condition precedent or otherwise to transacting insurance business or which subjects persons who fail to comply with such requirements to taxation, fines and other civil penalties, including injunctive relief, would not in and of itself be ″inconsistent″ with the provisions of Title I for purposes of ERISA § 514(b)(6)(A)(ii).*

Practice Tip: According to the DOL, state insurance laws that require a license to conduct business, or which subject violators to taxes or other penalties, are not inconsistent with Title I of ERISA.

Courts have taken the regulatory scope of self-funded MEWAs available to states seriously. For example, in *Fuller v. Norton*, the U.S. Court of Appeals for the Tenth Circuit considered a Colorado regulation that defined and described the scope of *state* regulation of MEWAs.[72] The plaintiff, a self-funded MEWA, argued that ERISA preempted state law. To decide the issue, the court thoroughly analyzed both whether the Colorado law ″regulated insurance″ and whether it was ″inconsistent″ with ERISA.[73] The court observed that a state regulation is inconsistent with a federal law only when an ″actual conflict″ arises, which occurs ″only when compliance with both federal and state regulations is a physical impossibility″ or ″when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.″[74] Subject to such a high standard, plaintiffs were unable to demonstrate that an actual conflict arose between the Colorado regulation and ERISA. Other courts have been similarly reluctant to find state regulations to be inconsistent with ERISA.[75]

ERISA gives the DOL authority to issue regulations that would exempt self-funded MEWAs from state regulation if the MEWA is an employee welfare benefit plan.[76] However, such authority does not extend to the requirements relating to the maintenance of specified levels of reserves and specified levels of contribution under state insurance laws. It is important to note that the DOL has neither prescribed regulations for such exemptions, nor granted any such exemptions since the enactment of the MEWA provisions in 1983.[77]

An ERISA-governed MEWA is also subject to the requirements of federally mandated COBRA and HIPAA. However, because States are permitted to regulate a MEWA, state laws that expand the protection afforded by HIPAA and COBRA will not be preempted. Identifying and complying with the requirements of each state will increase the administrative and financial burden of implementing a MEWA. Examples of the state law requirements applicable to MEWAs for select states are set forth at Exhibit A.

ERISA Compliance and Enforcement

The federal reporting obligations to which MEWAs are subject, as well as the expanded enforcement authority provided enacted by PPACA in 2010, emphasize the DOL's continued concern about MEWA abuse.

Reporting Obligations

Form 5500 Requirement

If a MEWA is an employee welfare benefit plan under ERISA, then the MEWA must file a single annual Form 5500 for the plan.[78] In this circumstance, employers participating in the plan generally would have no obligation to file separate Forms 5500.

If the MEWA is not an employee welfare benefit plan, however, then each employer participating in the MEWA functionally maintains its own plan and each is responsible for filing a separate Form 5500 for that plan. A regulatory exception exists, however, for ″group insurance arrangements;″ a plan meeting the definition of such an arrangement need file only a single Form 5500 for the arrangement.[79]

New proposed regulations implementing the PPACA amend the Form 5500 filing requirement for MEWAs to require that all MEWAs demonstrate in their Form 5500 that they are compliant with their M-1 filing obligations.[80] See below for more discussion of the Form M-1 filing requirements.

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[71] DOL MEWA Guide.

[72] *Fuller v. Norton*, 86 F.3d 1016, 20 EBC 1364 (10th Cir. 1996).

[73] *Id.* at 1024-27.

[74] *Id.* at 1025-26 (internal quotations omitted).

[75] *See, e.g., Atl. Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 5-6 (2nd Cir. 1993) (finding no inconsistency between Connecticut regulation and ERISA); *Fuller v. Olson*, 907 F. Supp. 257, 261 (W.D. Mich. 1995) (Michigan regulation and ERISA not inconsistent); *Int'l Ass'n of Entrepreneurs of Am. Ben. Trust v. Foster*, 883 F. Supp. 1050, 1066 (E.D. Va. 1995) (Virginia); *Atl. Health Care Benefits Trust v. Foster*, 809 F. Supp. 365, 374, 16 EBC 1503 (M.D. Pa. 1992) (Pennsylvania); *MDPhysicians & Assoc., Inc. v. Wrotenbery*, 762 F. Supp. 695, 699, 13 EBC 2154 (N.D. Tex. 1991) (Texas).

[76] ERISA § 514(b)(6)(B).

[77] DOL Op. Letter No. 90-02A (Feb. 9, 1990).

[78] ERISA § 104.

[79] DOL Regs. 29 C.F.R. § § 2520.103-2, 2520.103-3, and 2520.104-43. The DOL instructions to the Form 5500 describe a group insurance arrangement as one which ″provides benefits to the employees of two or more unaffiliated employers (not in connection with a multiemployer or a collectively bargained multiple-employer plan), fully insures one or more welfare plans of each participating employer, uses a trust or other entity as the holder of the insurance contracts, and uses a trust as the conduit for payment of premiums to the insurance company.″ Form 5500 Instructions, at 11.

[80] Proposed Revision of Annual Information Return/Reports, 76 Fed. Reg. 76252 (Dec. 6, 2011).

Form M-1 Requirement

Any plan that meets the definition of a MEWA that offers or provides medical benefits, whether or not it is an ERISA-governed group health plan, must file an annual Form M-1 with the DOL.[81] The purpose of Form M-1 is to allow the DOL to determine whether the requirements of Part 7 of ERISA are being met, thus MEWA administrators must provide information in the Form M-1 regarding state registration, insurance and compliance with ERISA. Generally, the deadline for filing the Form M-1 is March 1 (subject to a possible 60 day extension period), but under current law all MEWAs must file their first Form M-1 within 90 days of their "origination date."[82] The DOL regulations define a MEWA's "origination" as the date of the occurrence of any of the following events:

- The date the MEWA first offers coverage for medical care to employees of two or more employers;
- The date the MEWA first offers coverage for medical care to employees of two or more employers after a merger with another MEWA; or
- The number of the employees receiving medical coverage under the MEWA is at least 50 percent greater than the number of such employees on the last day of the previous calendar year.[83]

Under this definition, a MEWA conceivably could have more than one "origination date," each subject to the 90 day filing requirement. Under current law, if a MEWA's origination date is between October 1 and December 31, it is not required to file a separate initial Form M-1 but should instead file the initial Form M-1 on the March 1 annual filing deadline.[84] On Dec. 6, 2011, the DOL proposed regulations that would change the filing deadline for the initial Form M-1 to 30 days prior to the origination date or operating in any additional states, with certain exceptions and additional reporting requirements.

Practice Tip: Under DOL rules, a MEWA may have more than one origination date, each of which is subject to the 90-day Form M-1 filing requirement.

Certain MEWAs are exempt from the Form M-1 filing obligations.[85] These exemptions include, among others, MEWAs that are authorized to operate as a health insurance issuer in every state in which it offers or provides such coverage; those that provide coverage consisting entirely of excepted benefits (defined in ERISA § 733(c) and DOL Reg. 29 C.F.R. § 2590.732(b)); and those that are or provide coverage through a group health plan not subject to ERISA, such as a governmental plan, church plan, or plan maintained solely to comply with workmen's compensation laws.

The DOL's proposed regulations provide that the Form M-1 reporting requirements do not apply to the administrator of a plan that would not constitute a MEWA *but for* the following circumstances:

(A) The plan provides coverage to the employees of two or more trades or business that share a common control interest of at least twenty-five percent at any time during the plan year, applying the principles similar to the principles of Code § 414(c); and

(B) The entity provides coverage to the employees of two or more employers due to a change in control of businesses (such as a merger or acquisition) that occurs for a purpose other than avoiding Form M-1 filing and is temporary in nature. For this purpose, temporary means the MEWA does not extend beyond the end of the plan year following the plan year in which the change in control occurs.

Expanded Enforcement Authority

In PPACA, Congress enacted several provisions designed to affect MEWAs directly. The new law enhanced the reporting requirements, as discussed above, and also added new prohibitions and enforcement authority for the DOL. On Dec. 6, 2011, the DOL issued proposed rules to implement these provisions of PPACA.

Practice Tip: PPACA created new prohibitions against making false or misleading statements about MEWAs, and it enhanced the DOL's authority to enforce the MEWA rules.

Under new ERISA § 519, no person involved in marketing or selling a MEWA may make false statements about the MEWA's financial condition or solvency, the benefits to be provided, or the regulatory status of the plan under federal or state law.[86] PPACA also amended ERISA to add possible criminal penalties for violations of this law. On Dece. 6, 2011, the DOL proposed rules to implement these changes.[87]

A new ERISA § 520 enables the DOL to adopt "regulatory standards" or issue an order establishing that a person who provides insurance through a MEWA is subject to the laws of the state in which that person operates.[88] To date, the DOL has not proposed rules to implement this section.

A new ERISA § 521 authorizes the DOL to issue *ex parte* cease and desist orders when it appears that the MEWA is engaging in fraudulent conduct, or conduct that "creates an immediate danger to the public safety or welfare, or is causing or can be reasonably expected to cause significant, imminent, or irreparable public injury."[89] This section also enables the DOL to seize the

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[81] The Form M-1 filing obligation may also apply to plans claiming exemption from the MEWA designation pursuant to the collective bargaining exception. "Entities claiming exception" from the MEWA definition under this exception must file the Form M-1 for three years after origination. DOL Reg. 29 C.F.R. § 2520.101-2(c)(1)(ii). *See also* http://www.dol.gov/ebsa/faqs/faq-FormM1.html.

[82] DOL Regs. 29 C.F.R. § 2520.101-2(e)(1)-(2).

[83] DOL Reg. 29 C.F.R. § 2520.101-2(b).

[84] DOL Reg. 29 C.F.R. § 2520.101-2(e)(2)(ii)(B).

[85] DOL Reg. 29 C.F.R. § 2520.101-2(c)(2).

[86] ERISA § 519 (2010). "Federal and state law" includes those governing collective bargaining, labor management, intern union affairs, as well as exemption from state laws. *Id.*

[87] Required MEWA Filings, 76 Fed. Reg. at 76226.

[88] ERISA § 520 (2010).

[89] ERISA § 521(a) (2010).

assets of a MEWA determined to be in a ″financially hazardous condition.″[90] The DOL recently proposed implementing regulations to deal with those circumstances in which MEWAs lack sufficient resources to pay claims or otherwise become financially unstable.[91] According to the DOL, this new authority ″will serve as an additional enforcement tool to protect plan participants, plan beneficiaries, employers or employee organizations, or other members of the public against fraudulent, or financially unstable MEWAs.″[92]

Practice Tip: MEWA operators should be prepared to demonstrate compliance with all filing, advertising and funding requirements to avoid being the subject of a cease and desist order.

The DOL intends its rules to implement PPACA's MEWA provisions ″in a way that limits the burden on legitimate MEWAs but gives the Secretary, employers, and the participants and beneficiaries of the plans those employers sponsor additional information about these entities and a stronger enforcement scheme.″[93]

Cafeteria Plans and Health Flexible Spending Accounts

If an employee pays for all or a portion of his health care coverage that is provided through a MEWA, an additional question is whether the employee can do so on a pre-tax basis. A cafeteria plan is required in order for an employee to choose, or be deemed to have chosen, to defer a portion of his or her wages to pay for health care coverage on a pre-tax basis.[94] A ″cafeteria plan″ is defined as a separate written plan that is ″maintained by an employer for the benefit of *its* employees.″[95] ″All participants in a cafeteria plan must be employees.″[96]

For this purpose, an ″employee″ is defined as any current or former employee of the employer including common law employees, leased employees, and full-time life insurance salesmen.[97] Thus, it would appear that only an individual who is the common law employee, leased employee or full-time life insurance salesman of the cafeteria plan sponsor could participate in the cafeteria plan. A cafeteria plan sponsored by someone other than the common law employer, such as a MEWA operator, association or PEO, would cover individuals who are most likely not the common law employee of the MEWA operator. In that case, the cafeteria plan would not meet the definition under Code § 125 and employee contributions would be subject to income taxes.

The Internal Revenue Service, however, does not appear opposed to the concept of a multiple employer cafeteria plan, as shown by its request for comments on such plans when it issued proposed cafeteria plan regulations in 2007.[98] Unless further guidance is issued clearly permitting multiple employer cafeteria plans, employers that provide health care coverage through a MEWA and wish to allow their employees to pay for coverage on a pretax basis must establish their own, independent cafeteria plan.

Practice Tip: Until there is further guidance, employers that provide health care coverage through a MEWA and wish to enable employees to pay for coverage on a pretax basis must establish a separate cafeteria plan.

A health flexible spending account, or health FSA, is generally a self-insured medical reimbursement plan which provides non-taxable reimbursements to employees for medical care as defined in Code § 213(d).[99] Where a health FSA is funded in whole or in part by employee contributions, the health FSA must be offered under a cafeteria plan.[100] Thus, the above rules under Code § 125 would appear to prohibit a multiple employer health FSA funded with employee contributions. Health FSAs that are funded solely by employer contributions could be within the definition of a self-insured MEWA and subject to state regulation.

Practice Tip: The rules under Code § 125 appear to prohibit a multiple employer health FSA funded with employee contributions.

Conclusion

MEWAs appear to provide an attractive option for small employers to provide lower cost health and welfare coverage to their employees. However, given the history of abuse in the MEWA market, employers should carefully evaluate the financial stability, reputation and experience of any purported MEWA operator. In addition, employers should be aware of situations that unintentionally create MEWAs due to the significant multi-state regulatory burdens and intense scrutiny to which they could be subjected.

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Exhibit A

Examples of State Laws Applicable to ERISA-Governed MEWAs

California

Under California Insurance Code, Article 4.7, a self-insured MEWA must obtain from the California De-

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[90] ERISA § 521(e).

[91] Ex Parte Cease and Desist and Summary Seizure Orders—MEWAs (″MEWA Cease and Desist Rules″), 76 Fed. Reg. 76235, 76236 (proposed Dec. 6, 2011).

[92] *Id.*

[93] Required MEWA Filings, 76 Fed. Reg. at 76223.

[94] Code § 125(d); Prop. Treas. Reg. 26 C.F.R. § 1.125-1(a)(1), 72 Fed. Reg. 43938, 43946 (Aug. 6, 2007).

[95] Prop. Treas. Reg. 26 C.F.R. § 1.125-1(a)(1), 72 Fed. Reg. at 43946.

[96] *Id.*

[97] Prop. Treas. Reg. 26 C.F.R. § 1.125-1(g), 72 Fed. Reg. at 43950.

[98] *Id.* at 43945.

[99] Code § § 105, 106(c)(2); Prop. Treas. Reg. 26 C.F.R. § 1.125-5(a), 72 Fed. Reg. at 43957.

[100] Prop. Treas. Reg. 26 C.F.R. § 1.125-1(b), 72 Fed. Reg. at 43946 (a cafeteria plan is the exclusive means by which an employer can offer employees an election between taxable and nontaxable benefits).

partment of Insurance a certificate of compliance. However, under California Insurance Code Section 742.24(h), no new self-funded MEWAs may be licensed in the state that did not file an application for a certificate of compliance by November 30, 1995.

North Carolina

Under North Carolina state law, a self-insured MEWA must:

- File with the North Carolina Commissioner of Insurance:

(a) Evidence of the benefits and coverages provided to covered employees, including a table of the rates charged or proposed to be charged for each form of such contract, certified by an actuary;
(b) A copy of a fidelity bond covering any individuals managing or handling the funds or assets of the MEWA. In no case may the bond be less than fifty thousand dollars ($50,000) or more than five hundred thousand dollars ($500,000);
(c) A feasibility study, made by an independent qualified actuary and an independent certified public accountant, addressing market potential, market penetration, market competition, operating expenses, gross revenues, net income, total assets and liabilities, cash flow, and other items as the Commissioner requires. The study shall be for the greater of three years or until the MEWA has been projected to be profitable for twelve consecutive months. The study must show that the MEWA would not, at any month end of the projection period, have less than the reserves as required by law;
(d) Audited financial statements of the MEWA; and
(e) Evidence satisfactory to the Commissioner showing that the MEWA will be operated in accordance with sound actuarial principles.

- Operate pursuant to a trust agreement by a board of trustees that has complete fiscal control over and is responsible for all operations of the MEWA;
- Provide each covered employee a contract or other evidence of the benefits provided;
- Maintain excess insurance with a retention level determined in accordance with sound actuarial principles; and
- Establish and maintain appropriate loss reserves determined in accordance with sound actuarial principles.

State Regulation. MEWAs are governed primarily by state insurance laws. Under North Carolina law, a fully-insured[101] MEWA is not subject to the complex regulatory scheme that applies to self-insured MEWAs. Self-insured MEWAs must be licensed. To be licensed, a MEWA must be established by a trade association, industry association, or professional association of employers or professionals[102] organized and maintained in good faith for a continuous period of five years.

Texas

Pursuant to Article 3.95-2 of the Texas Insurance Code a MEWA, which is not fully insured, must obtain and maintain a certificate of authority. To establish a MEWA and obtain a certificate of authority in Texas, the applicant must submit the following to the commissioner of insurance:

- copies of all documents related to the MEWA;
- a current financial statement of the MEWA;
- proof of a fidelity bond equal to the greater of 10 percent of the premiums or 10 percent of benefits paid;
- the business plan of the MEWA;
- an actuarial opinion demonstrating that the MEWA has met with the cash reserve and actuarial requirements of the Texas Insurance Code; and
- certification by the applicant that the MEWA is in compliance with ERISA.

Once initial approval is granted by the commissioner, in order to maintain the certificate of authority the applicant must meet certain continuing conditions. Some of these conditions include:

- employers in the MEWA are members of a group of five or more businesses which are in the same trade or business;
- the MEWA must provide benefits to at least 200 separate participating employees; and
- annual gross premiums or contributions to the plan will not be less than $200,000.

As noted previously, a MEWA, which is not fully insured, must maintain the required level of cash reserves. Pursuant to the Texas Insurance Code, these reserves must be the greater of twenty percent of the contributions in the previous plan year or twenty percent of the total estimated contributions for the current plan year.

In addition to any required ERISA filings and disclosures, a MEWA must also file the following with the commissioner:

- an audited financial statement prepared by a certified public accountant;
- an actuarial opinion and a description of the actuarial soundness of the MEWA including a recommended level of specific and aggregate stop-loss insurance and

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[101] A fully-insured arrangement is guaranteed under a contract or insurance policy issued by an insurance company, service, or organization, qualified to conduct business in a state.

[102] The North Carolina Administrative Code provides the following definitions:

(1) ″Industry association″ means member employers who are in the same major group code, as defined by the Standard Industrial Classification Manual issued by the Executive Office of the President, Office of Management and Budget; unless restricted by Subparagraph (c)(2) or (3) of this Rule.

(2) ″Professional association″ means member employers who are of the same type of profession, such as physicians, dentists, accountants, lawyers, or architects; but is not limited to those professions. However, the profession must be one that is recognized by the required licensing agency.

(3) ″Trade association″ means member employers who are in the same type of trade, such as plumbers or electricians; and any others that are trade designations as recognized by the required licensing agency.

cash reserves that should be maintained by the MEWA; and

- any modified terms of the plan document for the MEWA.

The commissioner also has the power to order an actuarial review or examine the affairs of a MEWA, which is not fully insured. Expenses of an actuarial review or examination by the commissioner shall be paid by the MEWA.

A fully insured MEWA is regulated by Article 3.51-6 of the Texas Insurance Code. This Article governs group accident and health insurance including policies or contracts established by two or more employers in the same or related industry. Pursuant to the statute, this would require establishing a trust and appointing trustees to manage the trust. In accordance with the Texas Insurance Code, the trust would then be the policyholder. The MEWA and associated trust would continue to be subject to the applicable administration, enforcement, reporting, disclosure and fiduciary provisions of ERISA. The trust would also be required to file annual income tax returns. The Texas Insurance Code prohibits offering group health insurance coverage in Texas under a policy issued in another state unless the other state has requirements similar to those contained in the Texas Insurance Code. These requirements include a finding by the commissioner of insurance that: the policy is in the best interest of the public; the policy is economical in its administration and acquisition; and the benefits are reasonable in relation to the premiums charged.

Washington

Under the Revised Code of Washington, Section 48.125.020, a self-insured MEWA must obtain a certificate of authority from the insurance commissioner. In order for the commissioner to grant such a certificate, the MEWA must satisfy the following requirements:

- The participating employers are members of a bona fide association.

- The participating employers exercise control over the arrangement, which means that the board of directors of the association or the participating employers have the right to elect at least 75 percent of the individuals who control the operations of the MEWA.

- The MEWA provides only health care services in Washington State.

- The MEWA provides or arranges for the benefits that are otherwise required to be offered by Washington law.

- The MEWA provides health care services to no fewer than 20 employers and no fewer than 75 employees.

- The MEWA may not solicit for participation from the general public, though it may employ others to enroll and renew the enrollments of participating employers.

- Generally, the MEWA must have existed and operated actively and continuously for no less than 10 years.

- The MEWA is not organized or maintained solely as a conduit for the collection of premiums and the forwarding of premiums to an insurance company.

Once the commissioner issues the certificate of authority, the MEWA must meet the following continuing conditions in order to maintain its compliance:

- MEWAs must maintain a calendar year for operations and reporting purposes.

- MEWAs must satisfy one of the following:
- The MEWA must deposit $200,000 with the commissioner to pay for claims if the MEWA becomes insolvent; and the MEWA must submit to the commissioner a written plan of operation that the commissioner deems to ensure the financial integrity of the MEWA; or
- The MEWA demonstrates to the reasonable satisfaction of the commissioner its ability to remain solvent, for which purpose the commissioner may consider, among other reasonable factors, the MEWA's financial statements, stop-loss coverage, whether employee deposits are required, and the experience of those managing the MEWA.