HOUSE BILL REPORT
ESSB 6112

As Reported by House Committee On:
Financial Institutions & Insurance

Title: An act relating to self-funded multiple employer welfare arrangements.

Brief Description: Regulating self-funded multiple employer welfare arrangements.

Sponsors: Senate Committee on Financial Services, Insurance & Housing (originally sponsored by Senators Prentice, Benton, Winsley, Keiser and Kohl-Welles).

Brief History:
Committee Activity:
Financial Institutions & Insurance: 2/25/04, 2/27/04 [DPA].

Brief Summary of Engrossed Substitute Bill
(As Amended by House Committee)

- Creates a state regulatory framework for self-funded multiple employer welfare arrangements.
- Establishes solvency, operational, and reporting requirements.
- Applies regulatory fee and premium tax provisions with certain conditions.
- Authorizes sanctions for noncompliance with statutory requirements.

HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

Majority Report: Do pass as amended. Signed by 8 members: Representatives Schual-Berke, Chair; G. Simpson, Vice Chair; Benson, Ranking Minority Member; Newhouse, Assistant Ranking Minority Member; Cooper, Hatfield, Santos and D. Simpson.

Minority Report: Do not pass. Signed by 3 members: Representatives Cairnes, Carrell and Roach.

Staff: Caroleen Dineen (786-7156).

Background:

The federal Employee Retirement Income Security Act (ERISA) establishes a regulatory structure for employee welfare benefit plans and pension benefit plans. An employee welfare benefit plan is defined in ERISA to include medical, surgical, or hospital care or benefits as well as sickness, accident, disability, and death benefits. ERISA specifies reporting and disclosure, claims procedure, bonding, and other requirements for defined employee welfare benefit plans. ERISA also prescribes fiduciary conduct standards applicable to persons responsible for benefit plan administration and management.

A multiple employer welfare arrangement (MEWA) is defined in ERISA as an employee welfare benefit plan or other arrangement established or maintained to offer or provide welfare plan benefits to employees of two or more employers or their beneficiaries. Certain exceptions are specified for plans and arrangements under this definition.

ERISA preempts all state laws relating to any employee benefit plan with certain exceptions. One exception allows the application of state insurance laws to ERISA-covered welfare plans that meet the MEWA definition.

The state Insurance Commissioner (Commissioner) is responsible for the licensing and regulation of insurers in Washington. The Commissioner's authority includes regulating insurance business in Washington, certifying various types of insurers, approving rate and form contracts, licensing agents and brokers, and responding to consumer complaints. The Commissioner also collects from insurers doing business in this state:

- an annual premium tax equal to 2 percent of all premiums collected or received during the preceding calendar year for policies on risks or property resident, situated, or to be performed in this state; and
- a regulatory fee representing the insurers' pro rata share of the operating costs of the Office of the Insurance Commissioner (OIC).

Summary of Amended Bill:

The Self-Funded Multiple Employer Welfare Arrangement Regulation Act is enacted as a new chapter in the state insurance code. Statutory purposes for establishing a regulatory framework for self-funded MEWAs and relevant definitions are specified.

A "self-funded MEWA" is defined for purposes of state law as a MEWA that does not provide for payment of benefits solely through a policy or policies of insurance issued by one or more licensed insurers. "MEWA" is defined in state statute as in federal ERISA law, except the state definition does not include any arrangement, plan, program, or interlocal agreement of or between political subdivisions in the state of or between any federal agencies or federal agency contractors or subcontractors at a federal government facility in the state.

The MEWA regulatory provisions apply to MEWAs providing benefits to employers who are members of a bona fide association. "Bona fide association" is defined as an association of employers in existence for at least 10 years before sponsoring a self-funded MEWA. The bona fide association must have engaged in substantial activities relating to the member employers' common interests during the 10-year period and must continue to engage in those activities in addition to sponsoring the MEWA. An association formed and sponsoring a MEWA before October 1, 1995, is not subject to the 10-year requirement in this definition.

Certificate of Authority

No person may establish, operate, provide benefits, or maintain a self-funded MEWA in Washington without obtaining a certificate of authority from the Commissioner. A MEWA is considered to be established, operated, providing benefits or maintained in Washington if: (1) one or more of its employer members is domiciled or maintains a place of business in the state; or (2) its activities fall under the scope of the insurance code. Failure to have the required certificate of authority is a violation of the state insurance code.

To obtain a certificate of authority, a MEWA must have been in existence and actively operated continuously for at least 10 years as of December 31, 2003. An exception is provided for any MEWA in existence and actively operated since December 31, 2000, that is sponsored by an association in existence more than 25 years. MEWAs operating before December 31, 2003, have until April 1, 2005, to file an application for a certificate of authority and may continue to operate until the Commissioner makes a decision regarding the application.

A MEWA must satisfy other requirements to obtain a certificate of authority. Participating employers must exercise control over the MEWA according to specified provisions. In addition, a MEWA must provide benefits to employers who are members of a bona fide association as defined in these provisions. Further, a MEWA must:

- provide only health care services in this state;
- provide those health care services to no fewer than 20 employers and no fewer than 75 employees;
- provide or arrange benefits for health care services in compliance with insurance code provisions mandating particular benefits or offerings and requiring access to particular types or categories of health care providers and facilities;
- not solicit participation from the general public (but may employ or contract for employer enrollment and renewal of employer enrollments); and
- not be organized or maintained solely as a conduit for collection of premiums forwarded to an insurer.

Certain documentation must be submitted with the certificate of authority application.

Required documentation includes the MEWA's governing documents, summary plan description, evidence of required employer coverage, financial statements, and excess of loss insurance coverage policies. Biographical reports for officers, directors, employees, and fiduciaries also must be submitted. In addition, a MEWA must submit fingerprint cards and fees for state and national criminal history background information for certain employees. This information may be submitted to the Federal Bureau of Investigation, and the Commissioner may share the results of any criminal history background check with any government agency or entity authorized to receive them.

In addition to these documents, a MEWA must submit with the certificate of authority application an actuarial opinion stating the MEWA's unpaid claim liability satisfies state law standards. The MEWA also must submit proof that fidelity bonds required under federal law will be maintained. Finally, the MEWA must submit a statement certifying its compliance with certain state law and federal law requirements.

The Commissioner must either grant or deny the application within 180 days of receiving a complete application and required documentation. A denial is subject to appeal according to the Administrative Procedure Act. A certificate of authority is effective unless revoked by the Commissioner.

Solvency and Operational Requirements

Self-funded MEWAs must meet certain solvency requirements. These MEWAs must either deposit $200,000 with the Commissioner for payment of claims if insolvency occurs and submit a written plan to ensure financial integrity or demonstrate to the Commissioner their ability to remain financially solvent.

Operational requirements also are specified. MEWAs must maintain a calendar year for operations and reporting purposes. The Commissioner may require MEWAS to include information on pro rata assessments of MEWA members in their articles, bylaws, agreements, trusts, or other documents. In addition, MEWAs with fewer than 1,000 covered persons must have aggregate stop loss coverage meeting certain requirements. MEWAs must demonstrate continued compliance to receive and maintain a certificate of authority, unless this requirement is waived by the Commissioner.

Surplus and Contribution Rates

Requirements for surplus amounts and contribution rates are specified. Self-funded MEWAs must establish and maintain a surplus equal to the greater of 10 percent of the next 12 months of projected incurred claims or $2 million. Contribution rates for participation must equal or exceed:

- the sum of projected incurred claims for the year and all projected operational costs plus any surplus deficiency amount minus any excess surplus amount; or

- a funding level established by a qualified actuary's report.

Reporting and Notice Requirements

MEWAs must file certain reports and documents with the Commissioner. Before March 1 of each year, a MEWA must file a verified statement of its financial condition, transactions, and affairs for the preceding year. A MEWA also must file a copy of its Internal Revenue Service Form 5500. In addition, a MEWA must file its annual, financial, and other statements required of other insurers and comply with state insurance code assets and liabilities and investment provisions.

Each MEWA policy must contain a specific notice stating the policy is issued by a self-funded MEWA. The notice must state that the MEWA may not be subject to all state insurance law requirements. The notice also must specify that state insurance insolvency guaranty funds are not available for the MEWA.

Fees and Taxes

Premium tax payments are required from MEWAs if the state statutory requirements are not preempted by federal law (ERISA). The Commissioner and MEWAs must request an initial advisory opinion from the United States Department of Labor or obtain a declaratory ruling from a federal court regarding the legality of imposing state premium taxes on MEWAs. The premium tax requirement becomes effective on March 1 following the issuance of a certificate of authority if not preempted by federal law. The premium tax provisions may not be retroactively applied to any period before a MEWA receives a certificate of authority.

The premium tax requirement does not apply to participant contributions that are not taxable in the state. Participant contributions used to determine taxable amounts for purposes of the premium tax are to be determined according to the premium tax determination statute.

MEWAs are included within the definition of organizations required to pay fees to the OIC regulatory account for their pro rata share of the OIC's operating costs. The participant contribution amount is to be determined according to the premium tax determination method for purposes of the regulatory fee.

Market Conduct Examinations

The Commissioner is authorized to conduct market examinations of MEWAs as often as deemed necessary according to statutory market conduct examination requirements. The Commissioner may accept an examination by the regulatory official in a foreign MEWA's state of domicile. In conducting these examinations, the Commissioner may rely on an independent certificated public accountant's audit reports and incorporate those reports into the examination report.

MEWAs are required to cooperate and provide information for the examination. The Commissioner may issue subpoenas, administer oaths, and examine the MEWA's officers and principals when conducting the examination. The Commissioner also may examine a MEWA affiliate's activities or operations that may affect the MEWA's financial position. MEWAs are not required to pay a specific examination fee for market conduct examinations.

<u>Exemptions</u>

The MEWA regulatory provisions do not apply to single employer entities, Taft-Hartley plans, or self-funded MEWAs that do not provide coverage for health care services.

<u>Enforcement</u>

The Commissioner may impose sanctions against a MEWA that does not comply with the statutory requirements. A maximum fine of $10,000 per violation is authorized. In addition, the Commissioner may issue a notice of intent to revoke the MEWA's certificate of authority. The certificate of authority may be revoked if the MEWA fails to file a compliance plan within 60 days of receiving the Commissioner's notice of intent to revoke. The Commissioner may impose other sanctions for failure to maintain the required surplus.

<u>Application of Other Requirements</u>

MEWAs are subject to state risk-based capital requirements as well as insurer rehabilitation provisions. A self-funded MEWA is deemed an insurer for purposes of statutory merger, rehabilitation, and liquidation provisions.

For one year after the effective date of the MEWA provisions, the Commissioner may not take any action with respect to a MEWA, other than rule adoption, that is not expressly authorized by these statutory provisions.

<u>Severability</u>

A severability clause is included to specify that the judicial invalidation of any provision(s) does not affect the validity of the remaining provisions.

Amended Bill Compared to Engrossed Substitute Bill:

The amendment prohibits the Commissioner, for one year after the MEWA provisions' effective date, from taking any action with respect to a MEWA (other than rule adoption) that is not specifically authorized by the MEWA statutory provisions.

Appropriation: None.

Fiscal Note: Requested on February 20, 2004.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect immediately.

Testimony For: (In support) Failure of some thinly capitalized MEWAs in the 1980s created serious consequences for hospitals, doctors, and consumers. A regulatory framework for MEWAs is needed. At least two MEWAs have faced enforcement action by the OIC for failing to fit within the current statutory framework.

More than 40 states have MEWA laws. This bill has the strongest financial requirements for MEWAs in the United States and provides good consumer protection. The bill also requires MEWAs to pay the premium taxes other insurers must pay. The bill's proponents worked with the OIC on this bill. The OIC supports the Senate version.

MEWAs in this state have been providing thousands of state residents with health care coverage for many years. MEWAs do not issue individual policies and therefore do not create the risk situations addressed by the high-insurance risk pool. Federal law includes grievance procedures for MEWAs.

(Concerns) The bill's proponents initially identified one MEWA to which these provisions would apply. At least three other MEWAs have been identified during the legislative process; we do not know the full scope of this bill. A one-year moratorium on enforcement by the OIC should be considered so issues related to this legislation can be fully considered. Oregon's MEWA law has a different capitalization standard.

Testimony Against: MEWAs should have to comply with the same requirements as other health carriers, including prompt payment provisions in the patient bill of rights and high-risk pool participation requirements. Constituents deserve protection from MEWA failures. The definition of "bona fide association" is confusing.

Persons Testifying: (In support) Senator Benton; Charles M. Fox, Timber Products Manufacturers Association; Craig D. Nelson, Washington Employees Association; and Bill Daley, Office of the Insurance Commissioner.

(Concerns) Ken Bertrand, Group Health Cooperative.

(Opposed) Nancee Wildermuth, Regence Blue Shield and PacifiCare.

Persons Signed In To Testify But Not Testifying: None.