WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 2

TO: MEMBERS OF THE SPECIAL COMMITTEE ON HEALTH CARE REFORM IMPLEMENTATION

FROM: Laura Rose, Deputy Director, and Heidi Frechette and Margit Kelley, Staff Attorneys

RE: Selected Issues Relating to Application of Federal Health Care Reform Law

DATE: October 15, 2010

At the September 21, 2010 meeting of the Special Committee on Health Care Reform Implementation, committee members requested information on the following issues:

1. Application of the federal Patient Protection and Affordable Care Act (PPACA) (P.L. 111-148, as amended by P.L. 111-152, the Health Care and Education Reconciliation Act) to self-insured health plans.

2. PPACA's treatment of "Taft-Hartley" plans.

3. PPACA's treatment of collectively bargained health care benefits.

The last section of this Memo provides a summary chart of PPACA's requirements for these plans.

Application of PPACA to Self-Insured Health Plans

A self-insured health plan is one in which the employer pays for health benefits directly on behalf of its employees. Therefore, an employer with a self-insured health plan accepts the risks for its employee's health care costs. An employer with a self-insured health plan will usually prepare a health benefit plan document. This document will outline coverage available to the employees and will also outline what costs the employee is responsible for covering. An employer who self-insures will

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generally contract with a third party to administer the plan, and will also obtain stop-loss coverage in the event of catastrophic losses.[1]

Under PPACA, employers will still have options to self-insure their health benefit plans.[2] Plans offered in the exchange, by definition, will not be self-insured plans, because the plans within the exchanges will be those that are offered by insurance carriers.[3]

Under PPACA, many new insurance reforms are created that apply to the private insurance market. In many cases, these reforms also apply to self-insured plans.

PPACA incorporates the definition in ERISA (the Employee Retirement Income Security Act of 1974) of "group health plan," which includes self-insured plans. However, PPACA also uses the term "health plan," which does not include self-insured plans. Therefore, some of the PPACA provisions apply to self-insured plans, and some do not.[4]

Furthermore, plans (including self-insured plans) that are "grandfathered" under PPACA are subject only to some of the health insurance reforms. A grandfathered plan is an existing group health plan (which, as mentioned above, includes self-insured plans) that was in existence on the date of the enactment of PPACA, March 23, 2010.[5]

PPACA's Treatment of "Taft-Hartley" Plans

A "Taft-Hartley" health plan is an employee benefit plan that is sponsored by a joint employer- and employee-board of trustees. The Labor-Management Relations Act of 1947, known informally as the Taft-Hartley Act, made it illegal for an employer to contribute to an employee benefit plan controlled by a union. For an employer contribution to such a plan to be legal, the Act required that the assets of the plan be held in trust and that the trust be administered by an equal number of employer (management) and employee (union) trustees.

By their very nature, all Taft-Hartley plans are subject to collective bargaining agreements (CBAs), and many are self-insured plans. If a Taft-Hartley plan was in place on the date of the enactment of PPACA (March 23, 2010), it is a grandfathered plan and is subject only to some of the health insurance reforms. Under PPACA, Taft-Hartley plans are included in the grandfathered group health plans.

Under the "Interim Final Rule for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Plan under the Patient Protection and Affordable Care Act" (the Rule, 45 C.F.R. Part 147 (2010)), issued on June 17, 2010, a Taft-Hartley plan will be grandfathered at least until the termination date of a CBA for that coverage, even if there is a change in issuers. Grandfathered

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[1] The Alliance; Self-Funding Overview; page 2.
[2] Sara Rosenbaum; *Health Reform and ERISA*; Health Reform GPS: http: healthreformgps.org/resources/health-reform-and-erisa/.
[3] Bernadette Fernandez, *Self-Funded Health Insurance Coverage*, Congressional Research Service, June 25, 2010, page 7.
[4] Bernadette Fernandez; *Self-Funded Health Insurance Coverage*; Congressional Research Service, June 25, 2010, page 7.
[5] Bernadette Fernandez, *Grandfathered Health Plans under PPACA*, Congressional Research Service, April 7, 2010, page 1.

status may be maintained beyond the CBA termination date if the only change during the CBA period is a change in issuers, and no other changes were made since March 23, 2010.

After expiration of its CBA, a Taft-Hartley plan would lose its grandfathered status upon any of the following changes compared to the plan's status on March 23, 2010:

- Elimination of a particular benefit.
- Increase in a percentage cost-sharing requirement by any amount.
- Increase in deductible or out-of-pocket maximum by more than medical inflation plus 15%.
- Increase in copayment by more than $5 or by more than medical inflation plus 15%.
- Decrease in employer or employee-association contributions by more than 5%.
- Certain changes in annual limits.

The allowance for a change in issuers applies only to insured plans maintained pursuant to a CBA, and not to self-insured plans.

A Taft-Hartley plan may have some plans with grandfathered status, and some without, if issuers are changed after termination of the CBA that was in effect on March 23, 2010.

All plans, including grandfathered Taft-Hartley plans, must comply with certain rules as of September 23, 2010, such as the PPACA's age 26 dependent rule. PPACA bans waiting periods of more than 90 days for enrollment of employees in a health care plan, but it is not clear if this ban applies to waiting periods longer than 90 days or that are based on a minimum number of initial hours worked for eligibility, pursuant to the requirements of a Taft-Hartley plan.

PPACA and Collective Bargaining Agreements

Under the PPACA, fully insured plans pursuant to a CBA are exempt from some of the statutory provisions until the last expiration date of a CBA related to that coverage. This grandfathered status may be maintained beyond the CBA expiration date if no changes were made since March 23, 2010, that would have otherwise caused the plan to lose its grandfathered status, as discussed above. According to the interim final regulations cited in the prior section of this Memo, all CBA plans ratified before March 23, 2010, are grandfathered plans and are therefore subject to the same statutory and regulatory provisions as other grandfathered plans. Unlike the Health Insurance Portability and Accountability Act (HIPAA) and other federal legislation requiring changes to employee benefit plans, the PPACA does not contain a special effective date for collectively bargained health plans that is tied to a date that is after the expiration of the CBA.

Grandfathered plans are exempt from statutory provisions relating to preventative services, patient protections, out-of-pocket maximums, high deductibles, and minimum services covered. However, certain provisions of the PPACA apply to grandfathered plans for the first plan year that begin on or after September 23, 2010 including:

- Coverage for dependents to age 26[6];
- Prohibition on lifetime limits;
- Prohibition on excessive waiting periods; and
- Prohibition on rescissions.

In addition to the insurance market reforms discussed above, the PPACA could have long term implications for collective bargaining. Under the PPACA, an individual has the option to purchase subsidized coverage through a health insurance exchange if they are not offered employer-sponsored insurance or if the employee premium cost for the employer-sponsored insurance (ESI) exceeds 9.5% of income or has an actuarial value of less than 60% and they are not eligible for other minimum essential coverage including Medicare, Medicaid, and Children's Health Insurance Program (CHIP). Typical union-negotiated health plans are not likely to fall below the actuarial value threshold of 60% since the average actuarial value of employer-based plans was 80% in 2007.[7]

Small employers of up to 100 employees can participate in the newly created exchanges in 2014. States have the option of defining small employers as 50 employees or less through 2015. In 2017, states can expand access to the exchange to large employers. The PPACA allows for the continuation of a private insurance market outside of the exchange.

When state health exchanges become operational, employers with more than 50 employees will become subject to an assessment if they do not offer health insurance and any full-time employee receives a tax credit to purchase insurance in an exchange. The assessment would be $2,000 for each full-time employee. If the employer does offer coverage but it does not meet the income or actuarial values discussed above, the employer must pay the lesser of $3,000 per full-time employee receiving a subsidy or $2,000 for all full-time employees.

How the state health insurance exchange will impact or interact with the collective bargaining process is unclear at this time because it is uncertain how the exchange will function in the state, if larger employers will be allowed to participate in the health exchange, and whether a private insurance market will continue to operate. For example, the existence of a health exchange and an outside private market may result in employers and unions contemplating whether or not it would be beneficial for employees to participate in the health exchange and whether or not to bargain for increased wages instead of health benefits.[8]

The following chart, which is modeled from a chart prepared by the Congressional Research Service, provides a summary of which of PPACA's private insurance reforms apply to CBA and self-insured plans:

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[6] State law already allows some adult children to be covered up to age 27, however federal law applies to all policyholders.
[7] The Affordable Care Act: A Guide for Union Negotiators, Center for Labor Research and Education, University of California-Berkeley, July 2010.
[8] The Affordable Care Act: A Guide for Union Negotiators, Center for Labor Research and Education, University of California-Berkeley, July 2010.

Reforms Prior to 2014	***CBA & Self-Insured Grandfathered Plans***	***Self-Insured New Plans***
Prohibition on lifetime limits	Required	Required
Restriction on annual limits	Required	Required
Restriction on rescission	Required	Required
Require coverage for prevention services; no cost-sharing	Not required	Required
Dependent coverage to age 26	Required9	Required
Uniform explanation of plan benefits	Required	Required
Quality of care reporting	Not required	Required
Reporting of medical loss ratio and provision of rebates	Not required	Not required
Internal and external appeals process	Not required	Required
Patient protections	Not required	Required
Annual rate review	Not required	Not required

Reforms 2014 and After	***CBA & Self-Insured Grandfathered Plans***	***Self-Insured New Plans***
Prohibiting coverage exclusions for pre-existing conditions	Required	Required
Adjusted community rating rules	Not required	Not required
Guaranteed issue requirements	Not required	Not required
Guaranteed renewability requirements	Not required	Not required
Prohibits discrimination based on health factors	Not required	Required
Prohibits discrimination against medical providers	Not required	Required
Out-of-pocket spending limits	Not required	Required
Requires essential health benefit coverage	Not required	Not required
Cost-sharing limits	Not required	Required
Excessive waiting period prohibition	Required	Required
Clinical trial coverage for qualified individuals	Not required	Required

Source: Congressional Research Service: Self-Insured Health Insurance Coverage, by Bernadatte Fernandez; June 25, 2010, page 6.

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[9] This requirement is applicable only if the adult child is not eligible for other employer-sponsored health plan coverage (the Rule).