



RA-0296-GA

Mike Stafford
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November 15, 2004

The Honorable Greg Abbott
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Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

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OPINION COMMITTEE

FILE # ML-44028-04

I.D. # 044028

Attention: Opinion Committee

Re: Whether the self-funded Harris County Employee Health Benefits Plan must cover dependent children younger than 25 years of age and related matters;
C.A. File No. 04GEN1533

Ladies and Gentlemen:

As of March 1, 2004, Harris County ceased to obtain medical insurance from an insurance carrier, other than vision and dental insurance, for Harris County employees, retirees, and dependents. That is, Harris County no longer contracts with an insurance company to provide medical benefits to County employees, retirees, and dependents. Rather, Harris County provides medical benefits to its employees, retirees, and dependents by self-funding the Harris County Employee Health Benefits Plan ("the County Plan"), which is now administered by a third-party administrator, Aetna Life Insurance Company.

The Texas Insurance Code generally applies to insurance companies, group hospital service corporations, health maintenance organizations, and certain organizations set out in the Insurance Code rather than to employers; and the Texas Department of Insurance's regulatory authority is generally limited to these industries. We respectfully request your opinion on whether general and specific provisions of the Texas Insurance Code apply to the self-funded County Plan.

Due to the fact that the recodified Insurance Code takes effect on April 1, 2005, one month after the start of the County's new plan year, we respectfully request your expedited consideration of our request for an opinion. Our Memorandum Brief is enclosed.

Sincerely,

MIKE STAFFORD

By: 

MARVA GAY

Assistant County Attorney

Approved:


JOHN R. BARNHILL

First Assistant County Attorney

MEMORANDUM BRIEF

Questions Presented:

1. Whether a self-funded benefits plan established by a county commissioners court pursuant to section 157.101 of the Local Government Code is subject to the provisions of the Insurance Code because it is a "health benefits plan," a "health benefits plan issuer," or otherwise.
2. Whether provisions of the Texas Insurance Code, which require an insurance company to provide medical benefits to dependents of a covered person when the dependent is younger than 25 years of age, also apply to the self-funded County Plan.
3. Whether Commissioners Court may amend the self-funded County Plan to require that children, including natural and adopted children, stepchildren, and grandchildren, who are 19 years of age or older be enrolled as full-time students at an educational institution in order to be covered under the self-funded County Plan.
4. Whether the self-funded County Plan must provide coverage for grandchildren who are not tax dependents of a covered County employee or retiree and, if so, whether the self-funded County Plan can end coverage before age 25, set a different premium for grandchildren than for children, and require that grandchildren be enrolled in an educational institution.
5. Whether the self-funded County Plan must provide coverage for stepchildren and/or grandchildren who do not live in the home of a covered County employee or retiree, and whether the self-funded County Plan may require a different premium for such stepchildren and/or grandchildren than for the natural or adopted children of a covered County employee or retiree.

The Harris County Employee Health Benefits Plan (the "County Plan") was established pursuant to section 157.101 of the Local Government Code, which reads in pertinent part as follows:

- (a) A commissioners court by rule, including through an intergovernmental risk pool organized under Chapter 172, may provide for group health and related benefits, including medical care, surgical care, hospitalization, and pharmaceutical, life, accident, disability, long-term care, vision, dental, mental health, and substance abuse benefits, for the following persons if their salaries are paid from the funds of the county or of a flood control district located entirely in the county or if they are employees of

another governmental entity for which the county is obligated to provide benefits:

- (1) deputies, assistants, and other employees of the county, or of the flood control district, who work under the commissioners court or its appointees;
 - (2) county and district officers and their deputies and assistants appointed under Subchapter A, Chapter 151;
 - (3) employees of a community supervisions and corrections department established under Chapter 76, Government Code;
 - (4) a retired person formerly holding a status listed in Subdivisions (1)-(3); and
 - (5) the dependents of a person listed in Subdivisions (1)-(4).
- (b) The commissioners court may provide the benefits under subsection (a) through insurance, self-insurance, or a contract with a county-operated hospital, a hospital operated jointly by a municipality and county, or a private hospital.

* * * * *

(f) A county providing coverage under this section may reinsure its potential liability or purchase stop-loss coverage for any amount of potential liability that is in excess of projected paid losses. . . .

TEX. LOC. GOV'T CODE ANN. § 157.101 (Vernon Supp. 2004). Pursuant to section 157.101, Harris County Commissioners Court provides group health benefits to employees and retirees through self-insurance. Harris County has purchased stop-loss coverage pursuant to section 157.101(f). Note that some counties provide benefits through risk pool arrangements entered into through interlocal agreements with other political subdivisions pursuant to section 172.005 of the Local Government Code. Section 172.014 of the Local Government Code reads:

A risk pool created under this chapter is not insurance or an insurer under the Insurance Code and other laws of this state, and the State Board of Insurance does not have jurisdiction over a pool created under this chapter.

TEX. LOC. GOV. CODE ANN. § 172.141 (Vernon 1999). While risk pools created pursuant to section 172.141 of the Local Government Code are not subject to the Insurance Code, other risk pools, such as the Texas Health Insurance Risk Pool, which provides coverage for individuals, are subject to the Insurance Code. Chapter 157 of the Local Government Code contains no language similar to that in section 172.141, which states that benefits provided through self-insurance authorized pursuant to section 157.101 of the Local Government Code are not insurance under the Insurance Code or other laws of this state and that the State Board of Insurance does not have jurisdiction over a section 157.101 self-funded county benefits plan.

The Insurance Code of 1951 was recodified in 2003 into a new Insurance Code, which takes effect April 1, 2005. Because the new Insurance Code will be in effect one month after the start of the new plan year and our questions relate to the new plan year, statutes cited herein are from the new Insurance Code. See the Insurance Code of 1951, as amended, TEX. REV. CIV. STAT. ANN. art. 1.01 *et seq.* (Vernon Supp. 2004).

In general, provisions of the Health Insurance Portability and Availability Act, codified in subchapter A, chapter 1501 of the new Insurance Code, apply to a “health benefit plan” and a “health benefit plan issuer” defined in section 1501.002 of the Insurance Code as follows:

(5) “Health benefit plan” means a group, blanket, or franchise insurance policy, a certificate issued under a group policy, a group hospital service contract, or a group subscriber contract or evidence of coverage issued by a health maintenance organization that provides benefits for health care services. . . .

* * * * *

(6) “Health benefit plan issuer” means an entity authorized under this code or another insurance law of this state that provides health insurance or health benefits in this state, including:

- (A) an insurance company;
- (B) a group hospital service corporation operating under Chapter 842;
- (C) a health maintenance organization operating under Chapter 843; and
- (D) a stipulated premium company operating under Chapter 884.

TEX. INS. CODE ANN. §§ 1501.002(5) and 1501.002(6) (Vernon Supp. 2004) [*emphasis added*]. The self-funded County Plan is not an insurance policy, not a group hospital service contract, and not a group subscriber contract or evidence of coverage. Harris County is not an insurance company, not a group hospital service corporation, not a health maintenance organization, and not a stipulated premium company. Nonetheless, if section 157.101 of the Local Government Code is “another insurance law of this state that provides health insurance or health benefits,” Harris County would fall within the definition of a “health benefits plan issuer” pursuant to section 1501.002(6). As noted above, section 157.101 of the Local Government Code authorizes a commissioners court to provide group health benefits to county employees and, therefore, could be considered to be “another insurance law of this state that provides health insurance or benefits in this state.” Furthermore, unlike section 172.141 of the Local Government Code, which authorizes a county to provide benefits through risk pool arrangements with other government entities, section 157.101 does not include language specifically excluding benefits provided under section 157.101 from the definition of “insurance” or “insurer” under the Insurance Code or stating that the Board of Insurance does not have jurisdiction. See TEX. LOC. GOV’T CODE ANN. § 157.101 (Vernon Supp. 2005) and TEX. LOC. GOV’T CODE ANN. 172.141 (Vernon 1999).

Should you determine that the self-funded County Plan is not generally subject to the provisions of the Insurance Code, then it appears that the self-funded County Plan would, nonetheless, be subject to certain provisions of the Insurance Code. In Attorney General Opinion DM-276, the Attorney General addressed similar questions related to whether certain provisions of the Insurance Code apply to a self-funded employee benefits plan and held, in pertinent part, as follows:

. . . . As will be seen below, the legislature on a number of occasions has expressly made provisions of the Insurance Code applicable to self-funded plans. . . .

Op. Tex. Att’y Gen. No. DM-276 (1993). As indicated by the Attorney General and as discussed below, some provisions of the Insurance Code are expressly applicable to self-funded plans.

If the County Plan is a “health benefits plan” under the Insurance Code, then the County Plan would also be a “large employer health benefit plan” and, therefore, would be subject to Insurance Code provisions applicable to large employer health benefits plans. See TEX. INS. CODE ANN. §§ 1501.002(5), 1501.002(6), 1501.002(8), 1501.002(9), and 1501.002(10) (Vernon Supp. 2004). If the County Plan is a “large employer health benefit plan,” then the County plan would be subject to section 1501.609 of the Insurance Code as follows:

- (a) This section applies only if children are eligible for coverage under a large employer health benefit plan.
- (b) Any limiting age applicable under a large employer health benefit plan to an unmarried child of an enrollee is 25 years of age.

TEX. INS. CODE ANN. § 1501.609 (Vernon Supp. 2004) [*emphasis added*]. Therefore, if the self-funded County Plan is a “large employer health benefit plan” under section 1501.002 of the Insurance Code, it appears that any limiting age applicable to an unmarried child of an enrollee in the County Plan must be 25 years of age. Furthermore, if the County Plan is a “health benefit plan,” section 1503.003 of the Insurance Code would prohibit the County Plan from conditioning coverage for a child younger than 25 on the child’s being enrolled at an educational institution as follows:

- (a) A health benefit plan may not condition coverage for a child younger than 25 years of age on the child’s being enrolled at an educational institution.

TEX. INS. CODE ANN. § 1503.003 (Vernon Supp. 2004) [*emphasis added*]. Conversely, if the self-funded County Plan is not a “health benefit plan,” then it appears that 1591.609 and 1503.003 of the Insurance Code would not apply to the County Plan and, therefore, the County Plan would not be required to provide medical benefits to children up to the age of 25. Furthermore, the self-funded County Plan would not be prohibited from conditioning coverage of children younger than 25 on the child’s being enrolled at an educational institution.

Note that section 1501.002(2) of the Insurance Code defines “dependent” as follows:

“Dependent” means:

- (A) a spouse;
- (B) a child younger than 25 years of age, including a newborn child;
- (C) a child of any age who is:
 - (i) medically certified as disabled; and
 - (ii) dependent on the parent;
- (D) any individual who must be covered under:
 - (i) Section 1251.154; or
 - (ii) Section 1201.062; and
- (E) any other child eligible under an employer’s benefit plan, including a child described by Section 1503.003.

TEX. INS. CODE ANN. § 1501.002(2) (Vernon Supp. 2004) [*emphasis added*]. (Section 1251.154 of the Insurance Code, relates to health insurance coverage for adopted children; section 1201.062 relates to health insurance coverage for certain grandchildren and other children under a court order; and section 1503.003 relates to health benefit plan coverage for certain students younger than 25 years of age.)

If the self-funded County Plan is not subject to the Insurance Code, then it appears that Commissioners Court may use an alternative definition of “dependent” and set the age of a dependent child at less than 25 years. We find nothing in the Insurance Code that requires a self-funded benefit plan that is not generally subject to the Insurance Code to cover an employee’s children up to the age of 25. However, section 1201.062 expressly applies to a self-funded benefit plan and requires coverage of certain **grandchildren** up to the age of 25 as follows:

- (a) An individual or group accident and health insurance policy that is delivered, issued for delivery, or renewed in this state, including a policy issued by a corporation operating under Chapter 842, or a self-funded or self-insured welfare or benefit plan or program, to the extent that regulation of the plan or program is not preempted by federal law, that provides coverage for a child of an insured or group member, on payment of a premium, must provide coverage for:
 - (1) each grandchild of the insured or group member if the grandchild is:
 - (A) unmarried;
 - (B) younger than 25 years of age; and
 - (C) a dependent of the insured or group member for federal income tax purposes at the time application for coverage of the grandchild is made; and

(2) each child for whom the insured group must provide medical support under an order issued under Chapter 154, Family Code, or enforceable by a court in this state.

(b) Coverage for a grandchild of the insured or group member may not be terminated solely because the grandchild is no longer a dependent of the insured or group member for federal income tax purposes.

TEX. INS. CODE ANN. § 1201.062 (Vernon Supp. 2004) [*emphasis added*]. Therefore, if the County Plan provides coverage for the children of employees, then upon payment of a premium, the County Plan must also provide coverage for a **grandchild** of an employee if the **grandchild** is younger than 25 years of age and is a dependent of the employee for federal income tax purposes at the time the employee applies for coverage of the **grandchild**. Similarly, the self-funded County Plan must provide coverage for each child of a group member under a medical support order enforceable by a Texas court. Furthermore, coverage for a **grandchild** of the insured or group member may not be terminated solely because the covered **grandchild** is no longer a dependent of the County employee or retiree for federal income tax purposes. See Op. Tex. Att’y Gen. No. DM-276 (1993), holding that a governmental employee benefit plan is not preempted by the federal Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 – 1461 (“ERISA”).

In the absence of any statute mandating a self-funded benefit plan to cover **children** up to 25 years of age, a requirement to cover certain **grandchildren** up to 25 appears absurd. Similarly, it seems absurd that a self-funded benefits plan must cover children to age 25 when there is a court order but, conversely, can elect to provide no coverage for other children of the same age. Generally, a statute should not be construed so as to lead to a foolish or an absurd result and interpretations of statutes that would produce absurd results are to be avoided. See *McKinney v. Blankenship*, 282 S.W.2d 691 (Tex. 1955); *State ex rel. Childress v. School Trustees of Shelby County*, 239 S.W.2d 777 (Tex. 1951); and Op. Tex. Att’y Gen. No. JM-528 (1986). See also *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 249 (Tex. 1991); and Tex. Att’y Gen. ORD-668 (2000). If a self-funded plan conditions coverage of children over 19 on enrollment as a student and if, as a consequence, the plan is challenged for failure to cover non-student children while covering similarly-situated grandchildren, a court might attempt to harmonize the statutes and, to avoid an absurd result, a court might require a self-funded plan to cover children up to 25 in the same manner as grandchildren even though the self-funded plan is not generally subject to the Insurance Code.

We also seek your opinion concerning coverage for **stepchildren** who do not reside with a Harris County employee or are not dependents of the employee for federal income tax purposes. Insurance coverage for the child of a spouse is governed, in pertinent part, by sections 1201.063 and 1201.064 of the Insurance Code as follows:

Regarding a natural or adopted child of an insured or group member or a child for whom the insured or group member must provide medical support under an order issued under Chapter 154,

Family Code, or enforceable by a court in this state, an individual or group accident and health insurance policy that provides coverage for a child of an insured or group member may not set a different premium for the child, exclude the child from coverage, or discontinue coverage of the child because:

- (1) the child does not reside with the insured or group member;
or
- (2) the insured or group member does not claim the child as an exemption for federal income tax purposes under Section 151(c)(1)(B), Internal Revenue Code of 1986.

TEX. INS. CODE ANN. § 1201.063 (Vernon Supp. 2004) [*emphasis added*]. Section 1201.064 of the Insurance Code reads as follows:

An individual or group accident and health insurance policy that provides coverage for a child of an insured or group member may not:

- (1) set a premium for a child that is different from the premium for other children because the child is the natural or adopted child of the spouse of the insured or group member;
- (2) exclude a child described by Subdivision (1) from coverage; or
- (3) discontinue coverage of a child described by Subdivision (1).

TEX. INS. CODE ANN. § 1201.064 (Vernon Supp. 2004) [*emphasis added*]. Therefore, it appears that if the self-funded County Plan is not a group health insurance policy, the County Plan may exclude or set a different premium for children, whether stepchildren, natural, or adopted, who do not reside in the home of a Harris County employee or retiree.