

State Regulation of Stop Loss Insurance

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Issue

Explain (1) how states regulate stop-loss insurance and (2) possible preemption issues under the federal Employee Retirement Income Security Act (ERISA).

The Office of Legislative Research is not authorized to provide legal opinions and this report should not be considered one.

Summary

Stop-loss insurance, also known as excess insurance, is a type of insurance available to employers who self-insure their employees' health care coverage, meaning they assume the financial risk associated with providing health benefits. Stop-loss insures the employer or group health plan, not the plan enrollees. Thus, the stop-loss insurer pays claims to the employer or group plan rather than individual employees.

Stop-loss insurance is intended to protect self-insured employers from catastrophic claims by covering claims above a pre-set threshold amount (i.e., the "attachment point"). An attachment point is the amount the employer or plan must incur before the stop-loss insurer begins to pay. Attachment points may be set for individual employees or for the group in the aggregate. (Insurers may set attachment points for specific employees with higher risk profiles (i.e., "lasering").)

According to a [2012 Health Affairs article](#), state regulation of stop-loss insurance typically takes one of three forms:

1. setting minimum attachment points to ensure that stop-loss policies are only used for excess coverage and not as a replacement for health insurance (e.g., as in the National Association of Insurance Commissioner's (NAIC) Stop-Loss Insurance Model Act);
2. prohibiting stop-loss insurance for small groups, thus requiring small groups to have more funding available in order to self-insure (e.g., Delaware and New York); or
3. regulating stop-loss insurance as if it were health insurance, including setting minimum coverage requirements (e.g., North Carolina).

Generally, ERISA preempts states from regulating an employer's self-insured benefit plan. According to the federal Department of Labor (DOL), states may regulate stop-loss policies that protect self-funded plans, provided that the regulation does not affect the underlying self-insured plan and the stop-loss policy does not become the primary health insurance policy. However, representatives of the self-insurance industry believe that many forms of stop-loss regulation are subject to ERISA preemption.

State Approaches to Regulating Stop-Loss Insurance

Regulating Minimum Attachment Points

The [NAIC Stop Loss Insurance Model Act](#) establishes minimum attachment points and prohibits stop-loss policies from directly covering individual health care expenses. Under the act, an insurer may not issue a stop-loss policy with an attachment point:

1. lower than \$20,000 per individual;
2. for groups of 50 or fewer, lower than the greater of (1) \$4,000 times the number of members, (2) 120% of expected claims, or (3) \$20,000; or
3. for groups of 51 or more, lower than 110% of expected claims.

At least four states have enacted a version of the model act in statute: Minnesota ([Minn. Stat. §§ 60A.235 et seq.](#)), New Hampshire ([N.H. Rev. Stat. Ann. §§ 415-H:1 et seq.](#)), Rhode Island ([R.I. Gen. Laws §§ 27-8.2-1 et seq.](#)), and Vermont ([21-040 VT. Code R. § 024](#)). While Minnesota, New Hampshire, and Rhode Island each require a minimum individual attachment point of at least \$20,000, Vermont requires it be at least \$28,700.

According to the NAIC, several other states, including Connecticut, have taken state action to regulate stop-loss insurance by enacting statutes or regulations or issuing administrative bulletins. These address a variety of requirements, including minimum attachment points and policy filing requirements, among other things.

Connecticut. Connecticut law requires that stop-loss policies be filed with and approved by the insurance commissioner ([CGS § 38a-8b](#)). Insurance Department guidance additionally provides that attachment points should be set so that payment by the stop-loss insurer is not an actuarial certainty (see [Bulletin HC-126](#)). Specifically, the department (1) requires stop-loss policies to meet the NAIC model act minimum requirements (see above), (2) imposes requirements to further distinguish stop-loss policies from health insurance, and (3) establishes restrictions on lasering.

In general, the department will not approve a stop-loss policy that directly covers individual health care expenses or has provisions relating to, among other things, medical necessity determinations, case management requirements, and usual and customary charge determinations. Also, the department indicates that stop-loss policies for retiree health plans may not be subject to the conditions described above since the risk associated with them is very different from active employee plans, but the department will review such policies on a case-by-case basis.

Prohibiting Stop-Loss Insurance for Small Groups

At least two states prohibit insurers from selling stop-loss policies to small groups.

Until 2018, Delaware prohibited small group health insurers from issuing stop-loss policies to employers with 15 or fewer employees. Currently, it prohibits small group health insurers from issuing stop-loss policies to employers with five or fewer employees, and requires employers receiving stop-loss policies to have a majority of their employees employed in the state ([Del. Code Ann. 18 § 7218](#)).

Currently under New York law, insurers may not provide stop-loss policies to employers with 50 or fewer employees, and may only renew or issue stop-loss policies to certain employers with 51 to 100 employees. Effective December 28, 2021, the law generally prohibits sale of all stop-loss policies for small employers ([N.Y. Ins. Law §§ 3231 & 4317](#)).

Regulating Stop-Loss Insurance as Health Insurance

North Carolina regulates stop-loss insurance by requiring (1) minimum attachment points and (2) for policies issued to small employers with fewer than 26 employees, the plans to meet underwriting, rating, and certain other standards typically associated with health insurance. These include guaranteed availability and renewability, required whole group coverage (i.e., no individual underwriting), and a standard rating system for all small employer group health plans ([N.C. Gen. Stat. § 58-50-130](#) and [North Carolina Department of Insurance Stop-Loss Insurance](#)).

ERISA Preemption

Generally, ERISA preempts states from regulating an employer's self-insured benefit plan. According to the National Academy for State Health Policy's [ERISA Preemption Manual for State Health Policymakers](#) (2000), attempts to regulate stop-loss insurance have been met with mixed success. While courts have ruled differently on the issue, the Academy finds that states may generally regulate some aspects of stop-loss policies as long as the regulation does not directly affect the underlying self-insured benefit plan. Stop-loss policies with very low attachment points (e.g., a few hundred dollars) may amount to "partial insurance," permitting the states to regulate the substantive terms of a stop-loss policy (see pages 61-65).

In 2014, the federal Department of Labor (DOL) issued guidance stating that "use of stop-loss insurance with such low attachment points effectively gives nearly all the risk protection of a conventional health insurance policy without the consumer protections required for such policies" ([DOL Technical Release No. 2014-01](#)). Thus, according to DOL, "a state law that prohibits insurers from issuing stop-loss contracts with attachment points below specified levels would not, in the [its] view, be preempted by ERISA." Additionally, the NAIC working group that revised the NAIC model act to, among other things, address preemption concerns believes such regulation would survive an ERISA preemption challenge (see the Proceedings Citations, page PC-92-1 of [the linked document](#)).

Further, DOL believes that "states may regulate insurance policies issued to plans or plan sponsors, including stop-loss insurance policies, if the law regulates the insurance company and the business of insurance." However, it is not clear whether ERISA preempts the North Carolina model, which regulates certain stop-loss policies to a greater extent than the NAIC model act. The North Carolina law does not appear to have been challenged in court.

Meanwhile, a 2011 white paper by the industry trade association Self-Insurance Institute of America maintains that laws establishing minimum attachment points "are clearly subject to an ERISA preemption challenge, [but] such legal action has simply not been initiated" ([Self-Insured Group Health Plans, Stop-Loss Insurance and Adverse Selection](#), page 4).

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