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EDUCATION
ALERT

Pennsylvania School Districts Beware – Proper Planning is Necessary for a School District to Move Away from an Insured Core Health Benefit Plan to a Self-Insured Core Health Benefit Plan

As part of the economic squeeze impacting school districts in the region, many school districts are looking to the benefits of going to self-insured core health benefit programs to save district dollars. There is quite a lot of evidence to indicate that going to a self-insured health benefit program may yield some substantive health benefit savings for the employer.

Looking at the decision on the savings issue alone, however, is not enough. There are number of additional factors that need to be addressed prior to moving to self-funding.

- Bargaining considerations – Fringe benefits, including healthcare coverage, are considered to be "wages" within the meaning of the Public Employe Relations Act and are, therefore, a mandatory subject of bargaining. The question that has been raised with respect to self-insurance is whether a change "related" to benefits but with no practical impact on bargaining unit employees triggers a bargaining obligation on the part of the district.

  In 1995, the Pennsylvania Labor Relations Board in *Palmyra Area Education Association v. Palmyra Area School District*, 26 P.P.E.R. ¶26087 (March 21, 1995), involved the school district's implementation of a self-insured plan with benefits identical to those available under the prior Blue Cross contract. The Labor Board nevertheless found that transitioning to a self-insured status, **in and of itself**, was enough to trigger a bargaining obligation. The Labor Board emphasized the fact that the district was no longer subject to regulation by the Commonwealth Insurance Department (as was Blue Cross), and the district's position inappropriately "dismissed any significance placed on the reputation and track record of an insurance carrier or plan."

  The *Palmyra* decision, however, is not necessarily consistent with federal labor law under the National Labor Relations Act, which often is followed by the Pennsylvania Labor Relations Board. In *Connecticut Light and Power Company*, 196 NLRB 967, 969 (1972), the National Labor Relations Board reasoned: "The method used in processing of employee claims under a medical/surgical policy, the practices and procedures of the insurance carrier in allowing or disallowing claims, and the dispatch and efficiency of its personnel in processing such claims are facts connected with a carrier's administration of a health insurance premium … It is difficult to accept [employer's] argument that whereas an employer must bargain as to the benefits which may be provided under a health insurance program … bargaining [may] stop short of involving the actual selection of a carrier and leave that matter to its sole discretion." In sum, the Pennsylvania Labor Relations Board has held that the bargaining was mandatory with respect to both the nature of the health benefits and the provider. The Second Circuit disagreed and refused to enforce the Labor Board's decision and found that nearly every managerial decision impacts in some way upon wages, hours, working conditions, and that the employer was free to choose whatever carrier it liked to fulfill the

terms of its bargained-for agreement with the union.

Fox Rothschild's Labor and Employment Department has been successful in working out Memoranda of Understanding with various school districts regarding the implementation of a self-insurance program. This is something that needs to be addressed and discussed as part of the process.

• Non-Discrimination Testing – The move to self-insurance would also trigger the requirements of Section 105(h) of the Internal Revenue Code. The district would then need to engage in benefits testing to make certain that highly compensated individuals under a self-insured medical plan would not be discriminated in their favor over non-highly compensated individuals, typically not covered by a collective bargaining agreement. In Pennsylvania, this often means that cabinet level employees and/or the Act 93 group who have a health benefit plan that requires a lesser employee contribution in premiums than what is provided to non-highly compensated individuals may have to report the value of the benefit as part of their taxes.

This may be an unanticipated tax consequence faced by many school entities that have recently moved to self-insurance.

These issues will become more prevalent by 2014 because under the recently passed federal health benefits legislation, these non-discrimination requirements will take effect as of then. In the meantime, districts face a risk of being audited by the Internal Revenue Service and having to undergo required benefits testing.

Fox Rothschild can assist your school district in engaging in benefits testing should this be an issue for your district.

If you have any questions about the information contained in this Alert, please contact Jeffrey T. Sultanik at 610.397.6515 or jsultanik@foxrothschild.com, or any member of Fox Rothschild's Education Law Practice.

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