

State of South Dakota

EIGHTY-SECOND SESSION
LEGISLATIVE ASSEMBLY, 2007

400N0261

SENATE ENGROSSED NO. **SB 47** - 02/05/2007

Introduced by: The Committee on Commerce at the request of the Department of Revenue
and Regulation

1 FOR AN ACT ENTITLED, An Act to prevent illegal multiple employer welfare arrangements
2 and other illegal health insurers.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
5 follows:

6 Terms used in this in this Act mean:

7 (1) "Admitted insurer," an insurer licensed to do an insurance business in this state
8 including an entity authorized pursuant to § 58-18-88, a health maintenance
9 organization or nonprofit hospital, or medical service corporation under the laws of
10 this state;

11 (2) "Arrangement," a fund, trust, plan, program, or other mechanism by which a person
12 provides, or attempts to provide, health care benefits;

13 (3) "Employee leasing arrangement," a labor leasing, staff leasing, employee leasing,
14 professional employer organization, contract labor, extended employee staffing or
15 supply, or other arrangement, under contract or otherwise, whereby one business or



- 1 entity represents that it leases or provides its workers to another business or entity;
- 2 (4) "Employee welfare benefit plan" or "health benefit plan," a plan, fund, or program
- 3 which is or was established or maintained by an employer or by an employee
- 4 organization, or by both, to the extent that the plan, fund, or program is or was
- 5 established or maintained for the purpose of providing for its participants or their
- 6 beneficiaries, through the purchase of insurance or otherwise, medical, surgical or
- 7 hospital care or benefits, or benefits in the event of sickness, accident, disability,
- 8 death, or unemployment;
- 9 (5) "Fully insured," for the health care benefits or coverage provided or offered by or
- 10 through a health benefit plan or arrangement:
- 11 (a) An admitted insurer is directly obligated by contract to each participant to
- 12 provide all of the coverage under the plan or arrangement; and
- 13 (b) The liability and responsibility of the admitted insurer to provide covered
- 14 services or for payment of benefits is not contingent, and is directly to the
- 15 individual employee, member, or dependent;
- 16 (6) "Licensee," a person that is, or that is required to be, licensed or registered under the
- 17 laws of this state as a producer, third party administrator, insurer, or preferred
- 18 provider organization;
- 19 (7) "MEWA," multiple employer welfare arrangement;
- 20 (8) "MEWA contact," the individual or position designated by the division to be the
- 21 MEWA contact as identified on the division web site;
- 22 (9) "Nonadmitted insurer," an insurer not licensed to do insurance business in this state;
- 23 (10) "Preferred provider organization," an entity that engages in the business of offering
- 24 a network of health care providers, whether or not on a risk basis, to employers,

1 insurers, or any other person who provides a health benefit plan including a managed
2 care contractor registered or required to be registered pursuant to chapter 58-17C;

3 (11) "Producer," a person required to be licensed pursuant to chapter 58-30 of this state
4 to sell, solicit, or negotiate insurance;

5 (12) "Professional employer organization," an arrangement, under contract or otherwise,
6 whereby one business or entity represents that it co-employs or leases workers to
7 another business or entity for an ongoing and extended, rather than a temporary or
8 project-specific, relationship;

9 (13) "Third party administrator" or "administrator," has the meaning provided in chapter
10 58-29D.

11 Section 2. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
12 follows:

13 For purposes of this Act, any of the following acts in this state effected by mail or otherwise
14 by a nonadmitted insurer or by any person acting with the actual or apparent authority of the
15 insurer, on behalf of the insurer, constitutes the transaction of an insurance business in or from
16 this state:

17 (1) The making of or proposing to make, as an insurer, an insurance contract;

18 (2) The making of or proposing to make, as guarantor or surety, any contract of guaranty
19 or suretyship as a vocation and not merely incidental to any other legitimate business
20 or activity of the guarantor or surety;

21 (3) The taking or receiving of an application for insurance;

22 (4) The receiving or collection of any premium, commission, membership fees,
23 assessments, dues, or other consideration for insurance or any part thereof;

24 (5) The issuance or delivery in this state of contracts of insurance to residents of this

1 state or to persons authorized to do business in this state;

2 (6) The solicitation, negotiation, procurement, or effectuation of insurance or renewals
3 thereof;

4 (7) The dissemination of information as to coverage or rates, or forwarding of
5 applications, or delivery of policies or contracts, or inspection of risks, the fixing of
6 rates or investigation or adjustment of claims or losses or the transaction of matters
7 subsequent to effectuation of the contract and arising out of it, or any other manner
8 of representing or assisting a person or insurer in the transaction of risks with respect
9 to properties, risks, or exposures located or to be performed in this state;

10 (8) The transaction of any kind of insurance business specifically recognized as
11 transacting an insurance business within the meaning of the statutes relating to
12 insurance;

13 (9) The offering of insurance; or

14 (10) Offering an agreement or contract which purports to alter, amend or void coverage
15 of an insurance contract.

16 No provision of this section prohibits employees, officers, directors, or partners of a
17 commercial insured from acting in the capacity of an insurance manager or buyer in placing
18 insurance on behalf of the employer, if the person's compensation is not based on buying
19 insurance. The venue of an act committed by mail is at the point where the matter transmitted
20 by mail is delivered or issued for delivery or takes effect.

21 Section 3. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
22 follows:

23 For the purposes of this Act, the term, transacting of insurance, includes:

24 (1) Issuing a stop loss policy covering an employer located in this state. Stop loss policy

1 coverage of an employer for claims incurred under the employer's self-funded health
2 benefit plan is insurance, not reinsurance, regardless of whether the contract is
3 described by the insurer as reinsurance;

4 (2) Issuing a stop loss policy to a trust or trustee, whether the trust or trustee is located
5 in this state or otherwise, with an employer located in this state directly or indirectly
6 the beneficiary of the trust;

7 (3) Agreeing to loan or advance funds to pay claims incurred under an employer's self-
8 funded health benefit plan if the availability of funds to advance is significantly
9 dependent on payment of contributions and the claims experience of two or more
10 employers who have entered into similar loan or advance agreements; or

11 (4) Engaging in a risk distribution arrangement providing for compensation of loss
12 through the provision of services, including an arrangement established through
13 marketing or representations to consumers, without specification in a contract.

14 Section 4. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
15 follows:

16 For the purposes of this Act, the term, unauthorized health insurance, means health
17 insurance offered by a nonadmitted insurer except to the extent the laws of this state allow the
18 coverage to be offered by a nonadmitted insurer licensed in another state through an employer
19 or group located out of state; and includes health care benefits or coverage offered by a
20 professional employer organization or an employee leasing arrangement that is not:

21 (1) Fully insured by an admitted insurer; or

22 (2) Licensed or otherwise authorized under the laws of this state to offer a self-funded
23 health benefit plan.

24 Section 5. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as

1 follows:

2 Unauthorized health insurance does not include:

- 3 (1) Health care benefits or coverage under an employee welfare benefit plan of the
4 employees of two or more employers (including one or more self-employed
5 individuals), that is established or maintained under or pursuant to a collective
6 bargaining agreement under the criteria provided under 29 CFR 2510.3-40 as of
7 January 1, 2007;
- 8 (2) Health care benefits or coverage under an employee welfare benefit plan established
9 or maintained by a rural electric cooperative or a rural telephone cooperative as
10 defined under 29 U.S.C. § 1002(40)(B) as of January 1, 2007;
- 11 (3) Health care benefits or coverage under an employee welfare benefit plan of the
12 employees of two or more employers but only if the employers are within the same
13 control group so the plan is deemed to be a single employer plan under 29 U.S.C.
14 § 1002(40)(B) as of January 1, 2007; or
- 15 (4) Health care benefits or coverage under a church plan as defined under 29 U.S.C
16 § 1002(33) as of January 1, 2007.

17 Section 6. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
18 follows:

19 A licensee shall notify the division MEWA contact if the licensee knows a product is, or is
20 about to be, offered to the public in this state, and the licensee, based on the information known
21 to the licensee, reasonably should know the product is unauthorized health insurance. A licensee
22 meets the requirements of this section if that licensee reviews the division's website of admitted
23 health insurers and either does not notify the division's MEWA contact if that insurer is listed
24 as an admitted insurer or notifies the division's MEWA contact if that insurer is not listed as an

admitted insurer. For the purposes of this section an insurer does not include a stop loss insurer but a stop loss insurer is a licensee under this section. Knowledge of a producer regarding an unrelated unauthorized health insurance arrangement is not imputed to licensed insurers represented by that producer. Circumstances where a licensee knows that a product is, or is about to be, offered to the public in this state, include if the licensee knows that any person is:

- (1) Recruiting producers to solicit or offer, or is soliciting or offering, a health benefit plan generally to the public in this state; or
- (2) Seeking an administrator for, or is administering a health benefit plan that is intended to be offered generally to the public in this state.

A licensee complies with this section if the licensee notifies the division within thirty days or a period reasonable under the circumstances, whichever is later.

Section 7. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as follows:

Circumstances where a licensee reasonably should know that a product is unauthorized health insurance include the following:

- (1) The licensee knows that the product is represented to be a self-funded plan and that it is offered widely to the multiple employers or generally to individuals;
- (2) The licensee knows that the product is a professional employer organization self-funded plan and that it is offered widely to multiple client employers; or
- (3) The licensee knows that the plan is represented to be a self-funded plan established or maintained pursuant to a collective bargaining agreement and that the plan is offered widely to multiple employers, or generally to individuals, or both, through agents who are compensated on a commission or similar basis.

A licensee may provide other evidence to the division to indicate that the licensee did not

1 reasonably know that a product is unauthorized. In making its determination regarding whether
2 a licensee should have known the product is unauthorized and the appropriateness of any penalty
3 for failing to notify the division of such a product, the division shall consider the prior
4 experience and the existence or lack of training of that licensee.

5 Section 8. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
6 follows:

7 Any notification made pursuant to section 6 of this Act is confidential and privileged from
8 disclosure in response to a subpoena or otherwise, and is not subject to discovery or admissible
9 in evidence in any private action. Nothing in this Act limits the director's authority to use a
10 report filed or information provided pursuant to this Act in the furtherance of any legal or
11 regulatory action that the director, in the director's sole discretion, determines to be necessary
12 to further the purposes of this Act.

13 Section 9. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
14 follows:

15 Nothing in this Act prevents the director from disclosing the contents of a report or
16 notification filed under this section to the insurance division of any other state or agency of the
17 federal government at any time, or any other regulatory or law enforcement agency if the agency
18 or office receiving the report or matters relating thereto agrees to hold it confidential and in a
19 manner consistent with this Act. A report filed or notification provided under this Act is
20 confidential and privileged from disclosure in response to a subpoena or otherwise except to the
21 extent the director determines disclosure is appropriate to accomplish a regulatory purpose.
22 There is no civil liability imposed on and no cause of action arises from a person's furnishing
23 information pursuant to this Act concerning suspected, anticipated, or completed acts, if the
24 information is provided to or received from:

- 1 (1) The director or the director's employees, agents, or representatives;
- 2 (2) Federal, state, or local law enforcement or regulatory officials or their employees,
- 3 agents, or representatives;
- 4 (3) A person involved in the prevention and detection of fraudulent insurance acts or that
- 5 person's agents, employees, or representatives; or
- 6 (4) The NAIC or its employees, agents, or representatives.

7 Section 10. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
8 follows:

9 An insurance producer, prior to engaging in or assisting any person to engage in offering a
10 health benefit plan to an employer or person located in this state, shall carry out appropriate due
11 diligence to establish that the health benefit plan is not unauthorized health insurance, including
12 those measures reasonably appropriate to establish:

- 13 (1) For any insurance coverage that is represented as issued relating to the health benefit
14 plan:
 - 15 (a) The insurer issued the policy;
 - 16 (b) The coverage is as represented;
 - 17 (c) The insurer is an admitted insurer in this state; and
 - 18 (d) The policy has been filed with, and approved by, the division or is exempt
19 from filing requirements;
- 20 (2) For any health benefit plan that is represented as established or maintained pursuant
21 to a collective bargaining agreement, the health benefit plan is established or
22 maintained under or pursuant to a collective bargaining agreement under the criteria
23 provided under 29 CFR 2510.3-40 as of January 1, 2007;
- 24 (3) For any health benefit plan that is represented as established or maintained by an

employee leasing arrangement or professional employer organization, the health benefit plan is fully insured; or

- (4) For any health benefit plan that is represented as established by a single employer, the health benefit plan is covering solely employees and their dependents, and the employer controls and directs the work of the employee.

Section 11. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as follows:

An insurance producer, prior to submitting an application for a stop loss policy to an insurer for a health benefit plan offered to employees, employee dependents, or a person located in this state, shall carry out appropriate due diligence to establish that the health benefit plan is not unauthorized health insurance, including measures reasonably appropriate to establish:

- (1) For any health benefit plan that is represented as established or maintained pursuant to a collective bargaining agreement, the health benefit plan is established or maintained under or pursuant to a collective bargaining agreement under the criteria provided under 29 CFR 2510.3-40 as of January 1, 2007;
- (2) The health benefit plan that is not offered by an employee leasing arrangement or professional employer organization to client employers; or
- (3) For any health benefit plan that is represented as established by a single employer, that the health benefit plan is covering solely employees, and dependents of employees, of the employer and the employer controls and directs the work of the employee.

Section 12. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as follows:

A third party administrator, prior to entering into any administrative contract for a health

benefit plan, and prior to assisting any person with administration of a health benefit plan, covering employees of an employer or a person located in this state, shall carry out appropriate due diligence to establish that the health benefit plan is not unauthorized health insurance, including those measures reasonably appropriate to establish:

(1) Through initial inquiry, contract provisions and measures to monitor and enforce compliance with the contract provisions, that for any insurance coverage that is represented as issued relating to the health benefit plan:

(a) The insurer issued the policy;

(b) The coverage is as represented;

(c) The insurer is an admitted insurer in this state; and

(d) The policy has been filed with, and approved by, the division or is exempt from filing requirements;

(2) For any health benefit plan that is represented as established or maintained pursuant to a collective bargaining agreement, the health benefit plan is established or maintained under or pursuant to a collective bargaining agreement under the criteria provided under 29 CFR 2510.3-40 as of January 1, 2007;

(3) For any health benefit plan that is represented as established or maintained by an employee leasing arrangement or professional employer organization, the health benefit plan is fully insured; or

(4) For any health benefit plan that is represented as established by a single employer, that the health benefit plan is covering solely employees and their dependents, and the employer controls and directs the work of the employee.

Section 13. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as follows:

1 An insurer, prior to issuing a stop loss policy for a health benefit plan covering employees,
2 employee dependents, or individuals located in this state, shall carry out appropriate due
3 diligence to establish that the health benefit plan is not unauthorized health insurance, including
4 those measures reasonably appropriate to establish:

5 (1) For any health benefit plan that is represented as established or maintained pursuant
6 to a collective bargaining agreement, the health benefit plan is established or
7 maintained under or pursuant to a collective bargaining agreement under the criteria
8 provided under 29 CFR 2510.3-40 as of January 1, 2007;

9 (2) The health benefit plan is not offered by an employee leasing arrangement or
10 professional employer organization to client employers; or

11 (3) For any health benefit plan that is represented as established by a single employer,
12 the health benefit plan is covering solely employees, and dependents of employees,
13 of the employer and the employer controls and directs the work of the employee.

14 Section 14. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
15 follows:

16 No insurer may engage in the transacting of insurance by issuing a stop loss policy unless
17 the insurer is an admitted insurer in this state and the stop loss policy form has been filed and
18 approved by the division, unless the form is exempt by law from filing. The transacting of
19 insurance includes:

20 (1) Issuing a stop loss policy covering an employer located in this state. Coverage of an
21 employer for claims incurred under the employer's self-funded health benefit plan
22 with a stop loss policy is insurance, not reinsurance, regardless of whether the
23 contract is described by the insurer as reinsurance; or

24 (2) Issuing a stop loss policy to a trust or trustee, whether the trust or trustee is located

1 in this state or otherwise, if an employer located in this state is directly or indirectly
2 the beneficiary of the trust.

3 Section 15. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
4 follows:

5 No insurer may engage in the transacting of insurance in this state by issuing a stop loss
6 policy unless, prior to issuing a contract for the stop loss policy, the insurer discloses clearly and
7 conspicuously to the employer, in writing the following:

- 8 (1) The employer is not covered for claims below the stop loss attachment point;
- 9 (2) A description of the attachment point, including the specific and aggregate
10 attachment points; and
- 11 (3) The insurer provides no other coverage of the employer's retention.

12 Section 16. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
13 follows:

14 A preferred provider organization, prior to entering into any contract with a person offering
15 or providing a health benefit plan in this state, shall carry out appropriate due diligence to
16 establish that the health benefit plan is not unauthorized health insurance, including those
17 measures reasonably appropriate to establish:

- 18 (1) Through initial inquiry, contract provisions, and measures to monitor and enforce
19 compliance with the contract provisions, that for any insurance coverage that is
20 represented as issued relating to the health benefit plan:
 - 21 (a) The insurer issued the policy;
 - 22 (b) The coverage is as represented;
 - 23 (c) The insurer is an admitted insurer in this state; and
 - 24 (d) The policy has been filed with and approved by the division or is exempt from

1 filing requirements;

2 (2) For any health benefit plan that is represented as established or maintained pursuant
3 to a collective bargaining agreement, the health benefit plan is established or
4 maintained under or pursuant to a collective bargaining agreement under the criteria
5 provided under 29 CFR 2510.3-40 as of January 1, 2007;

6 (3) For any health benefit plan that is represented as established or maintained by an
7 employee leasing arrangement or professional employer organization, the health
8 benefit plan is fully insured; or

9 (4) For any health benefit plan that is represented as established by a single employer,
10 the health benefit plan is covering solely employees, and dependents of employees,
11 of the employer and the employer controls and directs the work of the employee.

12 Section 17. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
13 follows:

14 A licensee or other person who acts according to the written advice of the MEWA contact
15 has a defense to any violation of sections 11 to 16, inclusive, of this Act if the information
16 provided by the licensee or other person to the MEWA contact, to the extent material to the
17 MEWA contact's advice, is accurate and complete.

18 For the purpose of this Act, the division's published list of admitted insurers on its web site
19 is deemed to be accurate. A licensee or other person has a defense to any allegation that a listed
20 insurer is not an admitted insurer. Nothing in this Act requires a licensee or other person to
21 notify the division of an unauthorized product or insurer if that licensee or person has reviewed
22 the division's website and the unauthorized insurer is listed as an admitted insurer.

23 Section 18. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
24 follows:

Any violation of sections 10 to 16, of this Act, is mitigated, and the division shall reduce or eliminate any sanction otherwise applicable, if a licensee or other person demonstrates all of the following:

- (1) The licensee or other person maintained supervisory procedures and controls that complied with section 20 of this Act;
- (2) The violation occurred despite the maintenance of those procedures and controls;
- (3) The licensee or other person promptly reported the health benefit plan to the MEWA contact once the licensee or other person had actual knowledge that it was unauthorized health insurance; and
- (4) The licensee or other person took prompt corrective action.

Section 19. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as follows:

Nothing in sections 17 or 18 of this Act requires a producer, third party administrator, insurer, or preferred provider organization to conduct due diligence with respect to a health benefit plan that it is not assisting and with respect to which it does not engage in the transacting of insurance.

Section 20. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as follows:

An insurance producer, third party administrator, insurer, preferred provider organization, or an agent of the same shall establish and maintain documented supervision procedures and controls that are reasonably designed to achieve compliance with this Act. The supervisory procedures shall include:

- (1) Training;
- (2) Internal controls;

- 1 (3) Periodic audits;
- 2 (4) Supervisory review; and
- 3 (5) Monitoring and enforcement of contractual provisions established under sections 12
- 4 and 16 of this Act.

5 The extent of the supervisory procedures and controls a producer is required to maintain
6 under this section may appropriately reflect the size and complexity of the producer's operations
7 and the scope and nature of the producer's insurance activities.

8 Section 21. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
9 follows:

10 An insurer providing health insurance in this state shall require its listed producers to obtain
11 not less than one hour of continuing education every four years covering:

- 12 (1) Identification of unauthorized health insurance; and
- 13 (2) The producer's responsibilities under this Act.

14 A third party administrator, preferred provider organization, or insurer shall include in its
15 application for a license a brief summary of its procedures and controls required under section
16 20 of this Act. A license or registration application may be denied if the applicant fails to
17 demonstrate that the applicant maintains the required procedures and controls.

18 Section 22. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as
19 follows:

20 If a preferred provider organization violates a provision of this Act, the organization's
21 registration may be suspended or revoked or other action may be taken by the director as is
22 otherwise authorized by this title to ensure that compliance with this Act will be achieved in the
23 future.

24 Section 23. That chapter 58-33 be amended by adding thereto a NEW SECTION to read as

1 follows:

2 Nothing in this Act applies to a joint powers agreement authorized pursuant to chapter 1-24.

3 Section 24. Nothing in this Act applies to an admitted insurer, nonadmitted insurer, or a

4 MEWA if the arrangement is neither issued to a person in this state nor solicited in this state.

5 For purposes of this section, the phrase, issued to a person, does not include providing a

6 certificate of coverage, evidence of coverage, or other similar documents to an employee,

7 participant, or dependent showing coverage under an employer's health benefit plan or

8 arrangement.