Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Exploring 2 Different Approaches To Anti-Rebate Laws

Law360, New York (March 31, 2017, 2:37 PM EDT) -- The practice of rebating has long been prohibited in nearly every state across the country. Despite this long-standing and widespread prohibition, the full scope of services that are and are not permissible under each state's anti-rebating laws has remained unclear. As technological solutions, which are often very valuable to consumers, have the potential to implicate these rebating laws, companies in the insurance industry — particularly the insurtech industry — are growing increasingly concerned with the scope of rebating regulations.

Shawn Hanson

Regulators are also becoming increasingly active in this space, underscoring the collective concern. By way of example, the Louisiana Department of Insurance recently issued a revised advisory letter describing exemplary practices that constitute "value added" services that violate the state's anti-rebating laws and "value added" services that do not.[1]

Crystal Roberts

Most notably, Louisiana Insurance Commissioner James J. Donelon, explicitly stated that the state's anti-rebating laws do not prohibit a person engaged in the business of insurance from giving things of value outside of a contractual arrangement when there is no insurance contract or relationship. Donelon explained, "The term 'value added' services necessarily implies that the services offered to a party do in fact add value to a prior, ongoing, future, or continual purchase or other agreement between a buyer and seller of goods or services. Where there is no purchase or agreement, there can be no addition of value, and therefore, no 'value added' services." Thus, services offered to the general public do not violate the anti-rebating laws.

Similar to advisory opinions and letters issued by several other state insurance departments in recent years, the advisory letter also explains the distinction between certain services that constitute rebating when offered for free or at less than market value. Essentially, services that are incidental to the policy of insurance and that are offered to all insureds do not constitute rebating. This includes services such as risk assessments, insurance consulting services, insurance-related regulatory and legislative updates, and other services. On the other hand, services that are not truly incidental to the contract of insurance, such as certain Consolidated Omnibus Budget Reconciliation Act administration services, payroll processing and/or services, and development of employee handbooks and training materials, and other services, may constitute rebating. This approach falls in line with other states, such as New York, Illinois, New Hampshire and Missouri, that have issued guidance clarifying their anti-rebating and inducement statutes, providing that certain "value-added" services may be provided to insureds or potential insureds if they are provided

incidental to the insurance and in a fair and nondiscriminatory manner.

The revised advisory letter also explains that common and ordinary marketing practices, which are distinguishable from services that are clearly designed as ongoing and continuous services, are not regarded as "consideration" or "inducement" when there is no quid pro quo arrangement and therefore do not violate the anti-rebating laws. Such marketing practices include the giving of tangible goods (e.g., T-shirts, pens), the giving or purchase of consumables (e.g., food and beverages) and other comparable services.

This advisory letter is in stark contrast to the approach recently taken by the Washington State Office of the Insurance Commissioner, which, on Nov. 23, 2016, found that Washington anti-rebating and inducement laws prohibit a licensee, specifically California-based insurance producer Zenefits, from offering valuable software functions or other valuable benefits for free, or at less than fair market value, to the public. While the Washington state legislature recently proposed a bill to amend its anti-rebating and inducement laws to permit more valuable services, the bill has yet to pass, and the order effectively prevents any insurer from offering such services to the general public for free or at less than fair market value.[2]

As a result of the insurance commissioner's order, as of Jan. 1, 2017, Zenefits began charging all Washington state customers $5 per employee per month for its core HR product — a service that was previously free to the public and is free in other states. Zenefits says that the majority of Washington customers decided to pay this price, leading to its announcement of a paid tier structure for other HR product offerings. The paid tier is known as "HR One" and consists of multiple tiers of service bundles sold on top of the core HR product.[3]

The positions taken by Louisiana and Washington illustrate two very different regulatory approaches. On the one hand, there are the more company-friendly states that are supporting innovation by allowing insurers to provide consumers with valuable solutions at low or no cost with relatively little regulatory interference. Indeed, Donelon stated that "an uncritical and broad interpretation [of the state rebating statute] could have the substantially likely effect of fostering a less competitive marketplace for insurance that deprives policyholders of choice and value for their dollars, which is incompatible with and antithetical to" the rebating laws. On the other hand, there are the states that are more inclined to regulate such free or low-cost services offered to the general public in an effort to support fair competition, level the playing field for insurers and avoid consumer harm.

These contrasting approaches are likely to continue to develop, and it remains to be seen whether the majority of states will adopt a more forward-thinking view that continues to support innovation and serves industry and consumer interests alike.

—By Shawn Hanson and Crystal Roberts, Akin Gump Strauss Hauer & Feld LLP

Shawn Hanson is a partner with Akin Gump in San Francisco and Crystal Roberts is a staff attorney.

[1] Louisiana Department of Insurance, Advisory Letter No. 2015-01 (June 3, 2015, revised Mar. 14, 2017), available at http://www.ldi.la.gov/docs/default-source/documents/legaldocs/advisoryletters/al2015-01-cur-valueaddedservicesth.

[2] See Shawn Hanson and Crystal Roberts, Debating Anti-Rebate And Inducement Laws In Washington, Law360 (Feb. 17, 2017), https://www.law360.com/articles/893176/debating-anti-rebate-and-inducement-laws-in-washington.

[3] See William Alden, Loss-Making Zenefits Plans A Paid Software Tier, BuzzFeed (Jan. 13, 2017), https://www.buzzfeed.com/williamalden/loss-making-zenefits-plans-a-paid-software-tier?utm_term=.mnx05AaWZ#.egzzMP36d.
