



February 4, 2011

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Division of Legal Services  
Florida Department of Financial Services  
200 E. Gaines Street  
Tallahassee, FL 32399-0333

2011-02A  
ERISA SEC.  
3(40), 514(a)  
& 514(b)(6)

Dear Mr. Payne:

This letter is in response to your request for guidance on behalf of the State of Florida Department of Financial Services (DFS) regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to certain health benefits programs offered by Depawix Health Resources, Inc. (Depawix) and Peck & Peck, Inc. (Peck & Peck) d/b/a Green Cross Managed Health System (Green Cross). Specifically, you ask whether certain health benefits programs offered or provided through Green Cross (collectively the “Green Cross Program” or “Program”) and the Depawix Employee Welfare Benefit Plan (Depawix Plan) are “multiple employer welfare arrangements” (MEWAs) within the meaning of ERISA section 3(40). You also ask whether ERISA section 514(a) precludes the State of Florida from applying its insurance laws and regulations to these entities and programs or to any persons who sell or market them in Florida.<sup>1</sup> As set forth below, we conclude that the Program and the Depawix Plan are MEWAs and that ERISA does not supersede the application of Florida insurance law to them. The Department’s conclusion is based on facts and information you provided, and information found on Depawix and Green Cross websites.<sup>2</sup>

Green Cross describes itself variously as a “managed health system” and a “health management program” that offers health benefits to individuals and group health benefits to employers for their employees. Green Cross claims that it is “not an insurance program” but is, rather, “an employment opportunity that also provides medical benefits.” Green Cross also describes itself as a “collaborative effort” between health care

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<sup>1</sup> On August 24, 2009, DFS issued an “Immediate Final Order” ordering Depawix, Peck & Peck, and Green Cross to cease and desist transacting the unauthorized business of insurance in the State of Florida, followed by a “Notice of Intent to Issue Cease and Desist Order” issued on September 11, 2009 (Administrative Proceedings). The Administrative Proceedings also name “Smart Services, Inc.” as a successor to Peck & Peck. In particular, DFS alleges that Depawix, Peck & Peck, and their agents and representatives, solicit and/or enroll Florida employers and Florida employees into unauthorized health insurance plans. DFS further alleges that the health insurance plans are marketed and sold to employers and employees in Florida under the guise of offering to prospective participants an “employment opportunity” that includes health benefits.

<sup>2</sup> Those websites, [depawix.com](http://depawix.com) and [greencrossmanagedhealth.com](http://greencrossmanagedhealth.com), were no longer accessible as of the date of this letter.

providers, benefits professionals, and “dual employment service providers.” In order to participate in the Green Cross Program, prospective participants, whether already employed or not, must agree to become employed with a “dual employment service provider.” The “employees” of “dual employment services providers” allegedly participate in a study Green Cross is conducting to test Green Cross principles of health care management. Depawix appears to be the only named dual employment service provider involved with the Program.

Green Cross offers or provides the Program to employees of dual employment service providers. Some Green Cross benefits programs are self-funded and depend upon pooled contributions and/or fees from various participating employers and/or individual participants. Other Green Cross programs offer benefits insured through Blue Cross Blue Shield of Georgia.<sup>3</sup> An individual must “work” fifteen hours per month to participate in a self-funded program, and at least thirty hours per week to participate in an insured program. Under some arrangements, if it appears in any given month that a participant in a self-funded program will require a higher level of coverage, he or she will be offered “full time employment retroactive to the beginning of that month” in order to participate in an insured program.

Depawix represents that it is “part of the Green Cross Managed Health study” and that one of its purposes is to “test . . . Green Cross principles.” Depawix represents that it obtains its revenues “from the Green Cross study through voluntary funding from employers who sponsor their employees into the study.”<sup>4</sup> Depawix states that it hires these sponsored employees to work as “Research Testers” of the Green Cross managed care system. A Research Tester’s duties consist mainly of completing an annual Green Cross Health Risk Assessment questionnaire; working with a “Patient Advocate” to establish a “program of health management”; checking in monthly with the Patient Advocate and reporting any changes in medical status; obtaining prior approval from the Patient Advocate for all required medical services and new prescriptions; providing to the Patient Advocate copies of medical bills, explanations of benefits, and provider evaluations; and “promot[ing] the concept of the Green Cross program to the general public.”<sup>5</sup> Depawix pays Research Testers \$7.50 per hour.

When an individual becomes a Depawix Research Tester, he or she must sign an “Employee Implementation Agreement.” The Implementation Agreement provides that the individual is being hired to “provide and receive health education and information to assist in developing the mechanics for the Patient Advocate and wellness management

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<sup>3</sup> You represent that Blue Cross Blue Shield of Georgia is not a licensed or approved health insurer in Florida.

<sup>4</sup> This may include self-employed or other individuals who “sponsor” themselves into the program.

<sup>5</sup> Green Cross describes the Patient Advocates as “specially trained registered nurses” who “provide an assessment, health information, education, and referral support to assist participants in adhering to their provider treatment plan and suggested wellness program.”

mechanisms under a . . . sponsorship arrangement.” The Implementation Agreement further provides that an individual’s employment with Depawix is “temporary in nature,” that the sponsorship is on a month-to-month basis, and that employment is “contingent upon the continuation in full of that sponsorship.”

A. The Green Cross Program and the Depawix Plan are MEWAs

ERISA section 3(40)(A) defines a MEWA, in relevant part as

an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) [section 3(1) of ERISA] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries . . . .<sup>6</sup>

It appears that the Green Cross Program and the Depawix Plan were established and are maintained for the purpose of offering or providing the type of benefits described in ERISA section 3(1), which include, generally, “medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability. . . .” Thus, if the Program and the Depawix Plan offer or provide such benefits to the employees of two or more employers, they constitute MEWAs within the meaning of ERISA section 3(40).<sup>7</sup>

Throughout the materials we reviewed, Green Cross openly represents that it markets the Program to individuals and to *multiple employers* for their employees. In its marketing materials, Green Cross states that it offers “group programs for small and medium businesses” and that it targets “small businesses” as a source from which to draw Research Testers. In addition, Green Cross consistently refers to its potential employer clients in the plural, and admits that *more than one employer* can employ testers of the Green Cross system. Specifically, Green Cross states on its website that “individuals who contribute to the testing could be employees of one of our health resource partners” and that “[b]ecause multiple mechanisms . . . need to be tested independently there would need to be *multiple employers with multiple plans* [emphasis added]. . . .”

Green Cross marketing materials further advise that “*employers* offering the more modest benefit program are permitted to self fund,” whereas “*employers* offering comprehensive benefits must purchase . . . insured coverage [emphasis added].” In its sponsorship

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<sup>6</sup> In contrast to the general rule that independent contractors are not considered “employees” for ERISA purposes, the MEWA definition in ERISA section 3(40) specifically provides that self-employed individuals can be considered employees for MEWA purposes.

<sup>7</sup> ERISA section 3(6) defines the term “employee” as “any individual employed by an employer.” ERISA section 3(5) defines the term “employer” to include, in pertinent part, “any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan. . . .”

agreement for individuals, Green Cross represents that when an individual is sponsored as an employee into the Program, Green Cross will assign the individual to *an employer* for the duration of the sponsorship agreement. If a participant requires more than basic coverage in any given time period, and must begin “working” full time, the participant will be moved to *another employer*. Thus, as the documents make clear, the Green Cross Program is an arrangement that is established and maintained for the purpose of offering or providing health benefits to the employees of more than one employer. The Green Cross Program is therefore a MEWA within the meaning of ERISA section 3(40).

In the Department's view, the Depawix Plan is also an arrangement that offers or provides health benefits to the employees of more than one employer. The Department does not accept Depawix's representation that the Research Testers who participate in the Depawix Plan are common law employees of Depawix. Rather, it is the Department's view that at least one or more of the research testers are “self-employed individuals.” As noted above, an “employer” includes self-employed individuals for purposes of ERISA section 3(40).

Whether an employer-employee relationship exists for purposes of Title I of ERISA must be determined by applying common law of agency principles.<sup>8</sup> *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). In applying such common law principles, consideration must be given to, among other things, whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is to be accomplished; whether the person for whom services are being performed has the right to discharge the individual performing the services; and whether the individual performing the services is as a matter of economic reality dependent upon the business to which he or she renders service. *See Darden*, 503 U.S. at 323-24; Advisory Opinion 95-22A. *See also Yates v. Hendon*, 541 U.S. 1 (2004). Further, the Department has taken the position that the payment of wages, payment of federal, state, and local employment taxes, and the provision of health or pension benefits (or both) by a hiring party do not, in and of themselves, determine whether an employer-employee relationship exists for purposes of Title I.<sup>9</sup> *See* Advisory Opinion 93-29A. Similarly, the Department has stated that the mere existence of a contract purporting to create an employer-employee relationship must be viewed in light of the facts and circumstances surrounding the contract and will not control such determination where common law factors, as applied to the existing

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<sup>8</sup> While common law of agency factors typically have been applied to determine whether a person is an employee or independent contractor, those principles apply equally to determining by whom an individual is employed. *See Professional & Executive Leasing, Inc. v. Commissioner*, 89 T.C. 225 (1987), *aff'd*, 862 F.2d 751 (9<sup>th</sup> Cir. 1988).

<sup>9</sup> The materials you provided indicate that some Depawix Research Testers are provided IRS Form 1099, which reports, among other things, *nonemployee* compensation.

facts and circumstances, indicate that an employer-employee relationship does not in fact exist. *See* Advisory Opinion 2005-12A.

Although Depawix Research Testers sign “implementation” or “sponsorship” agreements, which purport to constitute employment contracts, we note from the materials you provided that Depawix Research Testers do not have any assigned “work” location; they are not required to possess any particular work-related skills; and they are not subject to Depawix’s discretion regarding when and how long to work (aside from the basic requirement that they report having “worked” a certain number of hours per week or month). In addition, Depawix does not appear to have any meaningful right or ability to control or direct Research Testers with regard to the work result to be accomplished or the means by which such result is to be accomplished. More specifically, Depawix does not control whether a Research Tester creates any “data” or reports for use in any Green Cross “study,” although that is allegedly the Research Tester’s primary job function.

Another important factor in this analysis is whether the “work” performed by Depawix Research Testers constitutes part of Depawix’s “regular business,” or whether Depawix is in fact even engaged in a “regular business” separate and apart from offering and/or providing health benefits. *See* Advisory Opinion 95-22A, Advisory Opinion 93-29A. As previously noted, Depawix represents in various documents that it “obtains [its] revenues from the Green Cross study through voluntary funding from employers who sponsor their employees into the study.” Further, a Depawix “mission statement” we reviewed states that Depawix “is a company founded and dedicated to the structuring and implementation of medically oriented studies” and that it is “constantly looking for and hiring individuals who are experiencing one of [sic] more of the medical conditions that Depawix . . . studies are focusing on.” Thus, Depawix in effect obtains its revenues from fees and contributions related to providing health benefits under the Depawix Plan and/or the Program, and its “employees” sole qualification is that they want health benefits.

In addition to the foregoing, you represent, and the materials we reviewed indicate, that the individuals who purportedly “work” for Depawix are not, as a matter of economic reality, dependent on Depawix as a source of employment. In this regard we note, in particular, that you provided affidavits from Depawix Research Testers confirming that they do not consider themselves to be “employed” by Depawix. Other Research Testers represent that when they agreed to become Research Testers for Depawix/Green Cross, they were seeking health benefits, not employment. Further, many of the materials we reviewed indicate that an individual’s “employment” with Depawix begins with, and is entirely dependent upon, the individual seeking health benefits and paying for health benefits coverage. Moreover, it appears that a typical paycheck for a part-time Research Tester, after deductions for contributions to the Program and some taxes, averages approximately \$13.50 per paycheck.

For the foregoing reasons, and based on your representations and the materials we reviewed, it is the Department's view that the Research Testers are not employees of Depawix for purposes of ERISA.<sup>10</sup> Rather, the Research Testers appear to be self-employed individuals and/or employees of other employers. Accordingly, because the Depawix Plan offers or provides health benefits to the employees of two or more employers, "including one or more 'self-employed' individuals," it is the Department's view that the Depawix Plan is a MEWA within the meaning of ERISA section 3(40).<sup>11</sup>

B. ERISA section 514(a) does not preempt application of Florida insurance laws to the Green Cross Program or the Depawix Plan

Section 514(a) of ERISA generally preempts state laws that "relate to" ERISA-covered employee benefit plans.<sup>12</sup> ERISA section 514(b)(6)(A), however, provides certain exceptions to this broad preemption provision in the case of ERISA-covered employee welfare benefit plans that are also MEWAs within the meaning of ERISA section 3(40). Pursuant to ERISA section 514(b)(6)(A), if an employee welfare benefit plan MEWA is not "fully insured," state insurance laws may be applied to the MEWA to the extent that such laws are "not inconsistent" with the provisions of Title I. If such a plan MEWA is considered "fully insured" for ERISA purposes, application of state insurance laws is limited to laws pertaining to the maintenance of specified levels of contributions and reserves. *See* ERISA § 514(b)(6)(A); Advisory Opinion 2007-06A. On the other hand, and more pertinent to your request, if a MEWA is not *itself* an ERISA-covered employee welfare benefit plan, nothing in Title I of ERISA would preclude a state from applying its insurance laws to regulate the MEWA.

As noted above, the Green Cross Program and the Depawix Plan are MEWAs within the meaning of ERISA section 3(40). The materials we reviewed do not suggest, however, that either the Green Cross Program or the Depawix Plan is also an employee welfare benefit plan within the meaning of ERISA section 3(1).<sup>13</sup> Because neither arrangement is an employee welfare benefit plan for purposes of ERISA, section 514(a) of ERISA would

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<sup>10</sup> This letter should not be read as expressing a view as to whether Depawix is an "employer" under state or federal laws other than Title I of ERISA. Indeed, Depawix may have assumed various employer responsibilities and liabilities under federal or state tax or other labor laws. *See generally* Information Letter to the Honorable George J. Chanos, Attorney General, Nevada Department of Justice (May 8, 2006).

<sup>11</sup> Although we conclude, based on materials we reviewed, that the Depawix Plan and the Program constitute MEWAs pursuant to section 3(40), the Depawix Plan and the Program may also be fairly characterized as integrated components of a single MEWA. Our conclusion regarding state regulation would not be affected by whether they are characterized as separate MEWAs or integrated components of a single MEWA.

<sup>12</sup> Section 514(b)(2)(A) of ERISA reserves to the states the right to regulate the business of insurance and persons engaged in that business, thereby saving those laws from preemption under section 514(a). ERISA section 514(b)(2)(B), however, makes clear that an employee benefit plan generally cannot be "deemed" to be an insurance company for the purpose of applying state insurance laws to regulate the plan as an insurer.

<sup>13</sup> We note, however, that an employer who arranges for its employees to participate in the Program or the Depawix Plan may have established its own separate employee welfare benefit plan subject to Title I of ERISA.

not limit application of state insurance laws to either arrangement. Accordingly, ERISA would not prohibit the State of Florida from applying its insurance laws directly to the Green Cross Program, the Depawix Plan, or to any persons or entities who sell or market the Program or the Depawix Plan in Florida.<sup>14</sup>

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Lisa M. Alexander  
Chief, Division of Coverage, Reporting and Disclosure  
Office of Regulations and Interpretations

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<sup>14</sup> You represent that Depawix, Peck & Peck, and/or Green Cross may previously have operated under other names, and/or may be in the process of changing names or creating successor entities. To the extent the renamed or successor entities operate in substantively the same way as the Depawix Plan and the Green Cross Program, we would view those entities or arrangements as MEWAs subject to state insurance regulation as well.