

July 19, 2018

Legal, Risk Management, & Center for Organizing and Bargaining Advice Memorandum

Problems with District Cafeteria Plan/Dependent Audit Administrators

Many CTA chapters have cafeteria plans, often called “Flex” or “Section 125 Plans,” that have been bargained with the district. Most districts have hired insurance companies to do the plan administration. Although the insurance company does not charge the district for administering the plan, the insurance company in turn gains easy access to school employees. The insurance companies take advantage of this access to sell their own insurance products. These are *optional* insurance products that cost employees money and are often not part of the collectively-bargained benefits. These same insurance company administrators are hired to do “dependent verification audits” on behalf of the district. The process to conduct these audits should be bargained and include language that holds the bargaining unit member harmless for any errors discovered during the audit.

What is a Cafeteria Plan?

A cafeteria plan is a separate written plan maintained by an employer for employees that meets the specific requirements and regulations of Section 125 of the Internal Revenue Code. It provides participants an opportunity to receive certain benefits on a pre-tax basis. These benefits, as well as an amount of district contributions available to participants should be bargained as part of the cafeteria plan.

The only benefits that can be offered as part of the cafeteria plan include the following:

- Health
- Dental
- Vision
- Accidental death and dismemberment

- Short- and long-term disability
- Group term life insurance (up to \$50,000 in coverage)
- Health Flexible Spending Accounts (to cover out-of-pocket medical expenses not covered by insurance)
- Dependent care FSAs

What is the employer's responsibility when a Cafeteria Plan is bargained?

Employers must have a written plan document and operate the plan in compliance with the rules and regulations of Section 125 of the Internal Revenue Code, the Affordable Care Act (ACA) and the Fair Labor Standards Act (FSLA).

What's the Problem?

Insurance companies or brokers who sell voluntary products use their role as “administrator” to gain access to school employees. These vendors then sell optional 403(b) retirement plans, individual or group life/disability plans, cancer insurance, and other products.

Often times, these products have not been vetted or bargained by the union. Many teachers, especially new teachers, may be misled to think these plans are part of the cafeteria plan offering that has been bargained, but they often are not.

Additionally, some of these products directly compete with our union's high-quality endorsed plans which help attract and retain membership. This undermines our union's value proposition and harms members.

During the annual health plan “open enrollment,” the district often requires employees to meet with the vendor individually, usually without any bargained regulations over these meetings. This is typically part of the agreement (verbal or written) the district has with the vendor who wants access to the employees to sell optional products.

Sometimes the district will facilitate a “dependent verification audit” through the same vendor, which requires the employee to document his/her

dependents for eligibility under the health benefits and meet one-on-one with the vendor. Again, a sales pitch often occurs.

There is no legal requirement that a cafeteria plan or dependent verification audit requires an individual meeting with any vendor, including the “administrator.” Annual enrollment or dependent verification can be facilitated on-line, via mailing or website, thereby eliminating interaction with vendors’ sales agents, and these methods of compliance may be bargained as alternatives to the individual meetings. Employees should not feel compelled to spend valuable time on a meeting with the administrator, as these meetings often turn into unsolicited and unwanted sales pitches. As an alternative, an employee may request the necessary enrollment or dependent verification forms and return them without the need for a meeting.

Common complaints we have received include the following:

- Often, districts hire roaming substitutes and require educators to leave their classroom and meet individually with the vendor’s sales agent during open enrollment or during a dependent audit without bargaining with the exclusive representative over the terms of this release time or these meetings.
- Districts require educators to meet individually with a sales rep during open enrollment or a dependent audit, and employees subsequently get a sales pitch to buy products.
- Insurance company sales representatives use aggressive sales tactics to sell optional 403(b) plans, cancer insurance, etc.
- Vendors provide misleading information about the union’s endorsed plans.
- Vendors include lock-up provisions that can prevent cancellation for up to a year when an employee enrolls in the vendor’s products. This happens when the vendor puts its products on the cafeteria plan and premiums are paid pre-tax. This means members will pay taxes on any benefits received and can’t cancel coverage until the next open enrollment period.

- Vendors make it difficult to cancel policies once enrolled. For example, participants have been told they have to drive to the vendor’s office to cancel a policy in person or must talk to a “designated” representative who is not responsive to calls.

What can the union do?

Assert your right to bargain the decision and the effects to your members.

Use the CTA model contract language 24.9.1 – 24.9.6 IRC 125 Plan and Health Reimbursement Accounts which provides the union with protections for members (see Attachment A).

- Tell the district you do not want its administrator to sell **any** products to your members.
- Ask for a copy of the agreement between the district and vendor.
- Review the Section 125 Plan document to ensure it has a no solicitation policy for the administrator.
- Request to have a mail or on-line process for your annual health plan enrollment. If there is an annual health fair, ensure only vendors that provide bargained-for benefits attend (Kaiser, Anthem, VSP, Delta Dental).
- Limit interaction with sales agents. For example, some chapters have insisted that the district provide a verification slip to unit members for dependent verification audits. Employees hand the form to the sales representative, thus avoiding the one-on-one sales pitch.

In summary, inform the district you do not want its cafeteria plan administrator to use this function as a sales or marketing opportunity to sell or highlight its products to your members. There are alternative independent administrators who do not sell products and provide quality service and administration for the district and the employees. That is the way these plans should operate.

Inform your members

While the union is working out these issues with the district, consider sending the attached email (refer to Attachment B) to local members in the event a process has not otherwise been bargained.

Questions regarding this advisory should be directed to the Risk Management/Business Initiatives & Development Department at 650-552-5200.

Attachment A

The following is an excerpt from the model contract language developed by the CTA Risk Management Department, CTA Legal Department, and the CTA Center for Organizing and Bargaining (C4OB):

24.9 IRC 125 Plan and Health Reimbursement Accounts

- 24.9.1 The District shall maintain an IRC 125 Plan and/or Health Reimbursement Arrangement and shall contribute an amount equal to the cost of fully paid family PPO health plan, family dental, family vision care, disability and long-term care insurance. The District contribution amount shall be increased each year by the increased cost of the premiums.
- 24.9.2 All unit members must enroll in a health, dental and vision plan.
- 24.9.3 The IRC 125 Plan and or Health Reimbursement Arrangement shall allow a unit member to expense certain benefits provided by the plan on a pretax basis. The following voluntary programs shall be offered, and unit members may participate in any or all by contributing, through payroll deduction, the actual cost of these programs:
1. Qualifying medical expenses
 2. Term and Whole Life Insurance
 3. Elder Care
 4. Child Care
- 24.9.4 The District and the Association shall jointly select the various insurance vendors and individual plans health, vision and dental insurance. They shall also select vendors and the third-party administrator for the voluntary programs offered under the 125 Plan and/or health reimbursement arrangement.
- 24.9.5 The District shall pay the fees associated with the general administration of the IRS 125 Plan, health reimbursement arrangement and the mandated insurance programs.
- 24.9.6 A good faith effort shall be made to contract only with a fee base vendor that does not solicit, sell or represent insurance products other than the benefits under the IRS 125 plan and/or health reimbursement arrangement.

This should only be used if you do not have a negotiated agreement with the employer.

Attachment B

Prepare for Upcoming Open Enrollment or Benefit Meetings

It's that time of year when we need to enroll in our bargained benefit programs (health, dental, vision, and others) through the district's plan administrator, (name). Currently the district has structured this enrollment to allow (name) to meet (individually or via a group) with school employees.

What you need to know

During these meetings, (name) may attempt to sell their voluntary and completely optional products to you, such as life and disability insurance, 403(b) plans, or cancer care policies. (You should be aware that CTA has a policy against cancer care/dread disease policies).

Please note:

- These policies have not been vetted or endorsed by your union.
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- These programs may include commissions (see 403bcompare.com) or have higher rates than your union plans.
- **YOU ARE NOT REQUIRED TO PURCHASE ANY OF THESE PRODUCTS OR MAKE A PURCHASE DECISION DURING THE OPEN ENROLLMENT MEETING.**

Your Rights

- You have the right to restrict the conversation during this meeting to our bargained benefits, such as health, dental, vision, etc., and your Section 125 or cafeteria plan elections.
- You have the right to compare these products with your union-endorsed products, or other products and make the best decision for you and your family.
- You have the right to decline enrollment in these optional and voluntary plans.

- You have the right to inform the representative you do not wish to spend any time discussing optional and voluntary programs outside your employer's cafeteria plan.
- You have the right to research the programs they offer prior to making a decision.
- You have the right to decline coverage pending your investigation of the costs and fees associated with the programs they offer.
- You have the right to ask questions and are entitled to straightforward responses.
- You do not have to make any decision right away. Take your time and learn more about the programs you are being offered and the amount you will pay for the plan, as well as any commissions and fees.
- You have the right to understand that declining coverage for voluntary and optional programs will have NO impact on your collectively bargained benefits.