



Texas Department of Insurance
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COMMISSIONER'S BULLETIN #B-0028-06

August 1, 2006

TO: All Insurance Companies, Corporations, Exchanges, Mutuals, Reciprocal, And Lloyds Licensed to Issue Accident and Health Insurance; All Health Maintenance Organizations; All Licensed Agents; All Third Party Administrators; Trade Associations; and The Public Generally.

RE: Individual Employer Health Plan Coverage

The Texas Department of Insurance (TDI) has become aware of questions regarding federal and Texas law governing small and large employer group coverage and its applicability to individual health benefit plan coverage arrangements in the Texas market. **This bulletin addresses the applicability of Chapter 1501 of the Texas Insurance Code (TIC) to health reimbursement arrangements (HRAs), Internal Revenue Code §125 plans (cafeteria plans), and other alternative employee welfare benefit plans providing health care coverage, and reminds carriers, agents, and other regulated entities of their responsibility to comply with Texas law.**

State Law

TIC §1501.003 states that an individual or group health benefit plan^[1] is a small employer health benefit plan subject to Insurance Code Chapter 1501 if it provides health care benefits covering two or more eligible employees of a small employer and

(1) The employer pays a portion of the premium or benefits;

(2) The employer or a covered individual treats the health benefit plan as part of a plan or program for purposes of Section 106 or 162 of the Internal Revenue Code; or

(3) The health benefit plan is an employee welfare benefit plan under 29 C.F.R. Section 2510.3-1(j).

Texas Insurance Code §1501.004 contains similar provisions for a large employer.

A number of individual health benefit plan coverage arrangements meet one or more of the conditions listed in these three paragraphs and are thus governed by TIC Chapter 1501. Some of the more common arrangements are HRAs and cafeteria plans, but others may be subject to Chapter 1501 as well.

HRAs and the Internal Revenue Code

An HRA is a flexible spending account as defined in IRC §106(c)(2), and is, therefore, part of a plan or program for purposes of §106 of the IRC. Under TIC §§1501.003(2) and 1501.004(2), if an employer or a covered individual treats a health benefit plan as part of a plan or program for purposes of Section 106 or 162 of the IRC, the plan is subject to the group health provisions of TIC Chapter 1501. Accordingly, if a health benefit plan issuer offers coverage in conjunction

with an employer HRA or for which the premium is paid or reimbursed through an HRA, the coverage, even if provided through an individual health benefit plan, is subject to those same provisions, including any requirements regarding guaranteed issuance of coverage.

Employee Welfare Benefit Plan Status

An HRA, as well as a cafeteria or §125 plan, is also an employee welfare benefit plan. Title 29 U.S.C §1002 of the Employee Retirement Income Security Act (ERISA), defines "employee welfare benefit plan" as

"any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase as insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident disability, death or unemployment...."

If an employer reimburses insurance premiums through an HRA or allows pre-tax deductions from employer paid salaries through a cafeteria plan, the arrangement is an employee welfare benefit plan providing medical care to employees through the reimbursement of premiums or otherwise. Under TIC §§1501.003(3) and 1501.004(3), if a health benefit plan is an employee welfare benefit plan under 29 C.F.R. Section 2510.3-1(j), the plan is subject to the group health provisions of TIC Chapter 1501.

Accordingly, the payment of individual health benefit plan premiums through an employer-funded HRA, a cafeteria plan, or another alternative employee welfare benefit plan creates a small or large employer health benefit plan subject to the provisions of TIC Chapter 1501, including any requirements for guaranteed issuance of coverage.

Federal HIPAA Law

Texas law is consistent with federal law in classifying individual health benefit plans in this situation as coverage offered in connection with a group health plan subject to HIPAA group market provisions. The preamble to the Final Rules on Health Insurance Portability for Group Health Plans [2] provides that if an employer makes contributions to health insurance premiums, directly or indirectly, whether the policy is individual or group or whether the employer is a party to the insurance contract, the coverage is treated as group health plan coverage for HIPAA purposes. Separation of the employer from the issuer through an HRA or other alternative plan does not prevent classification as a group health benefit plan. The preamble notes that "...the employer need not be a party to the insurance policy, or arrange or pay for it directly, in order for its coverage to be considered group health benefit plan coverage."

Prior to small group reform in Texas, carriers were not obligated to issue coverage to all members of an employer group, which often made persons with adverse health risk factors unable to obtain coverage. HIPAA and TIC Chapter 1501 were enacted to eliminate this type of health-based discrimination and promote broader spreading of risk in the employer group market.[3] The primary means by which the law achieves this end is by vesting small employers and their employees and dependents with certain special rights, including the right to uniform availability of small employer coverage.

While this availability of coverage must extend to all employers,[4] it is critical to remember that it also must reach all employees of each employer. [5] Issuing health benefit plan coverage on an individual, non-guaranteed issue basis to employees of employers will result in the same type of risk-based coverage discrimination that HIPAA and Texas law were enacted to eliminate. Many of the alternative plans the Department has seen, while available to employers broadly, do not provide guaranteed issuance at the employee and dependent level and thus are not compliant with Texas law.

Required Action by Carriers and Agents

The intentional marketing and sale of individual health benefit plans in a manner intended to circumvent group market regulation is fraudulent and actionable under Texas law. Each carrier should review its forms, marketing and underwriting practices, the standards and practices of its agents, and other procedures for compliance with Texas law regarding small and large employers. Carriers must then take immediate action to correct any non-compliant practices, procedures, forms, and rates to ensure compliance and avoid an enforcement action.

Regulated entities may take a number of actions to maintain compliance with TIC Chapter 1501. The best solution is to prevent issuance of coverage in violation of TIC Chapter 1501, so carriers and agents marketing individual health benefit plans should include questions on their applications for coverage to determine whether premiums will be paid or reimbursed through an employee welfare benefit plan, such as an HRA or cafeteria plan.

If a health benefit plan issuer learns, however, that it has unknowingly issued an individual health benefit plan for which premium is paid or reimbursed by an employee welfare benefit plan, the issuer may take the following steps in lieu of compliance with TIC Chapter 1501:

- Offer the employee or employer an opportunity to modify the HRA, cafeteria plan, or similar program to disqualify health benefit plan coverage premiums as an allowable expense;
- Cancel the coverage if the arrangement was not disclosed; and
- Offer to the employer all small or large employer plans, as applicable, marketed by the carrier in the geographic service area of the employer. The employer must satisfy all of the health benefit plan issuer's customary participation and contribution requirements before issuance to the employer.

Texas law does not prohibit an employer from funding employees' health benefit plan coverage premiums through an HRA, cafeteria plan, or other alternative employee welfare benefit plan. When a health benefit plan issuer offers an individual health benefit plan in conjunction with such an arrangement, however, and TIC §1501.002 does not exclude the coverage from the scope of TIC Chapter 1501, the individual plan is subject to TIC Chapter 1501. Accordingly, pursuant to TIC §§1501.003 and 1501.004 and applicable federal law, such arrangements are employer health benefit plans subject to all group health provisions, including guaranteed issuance of coverage for small employers and prohibitions against discrimination based on health status related factors for all employers.

If you have any questions regarding this bulletin, please contact Bill Bingham, Deputy Commissioner, Regulatory Matters at bill.bingham@tdi.state.tx.us or at 512-305-7333 or Ana Smith-Daley, Deputy Commissioner, Life/Health Division at ana.smith-daley@tdi.state.tx.us or at 512-305-7430.

Jennifer Ahrens

Associate Commissioner

Life, Health & Licensing

[1] TIC §1501.002(5) defines a "health benefit plan".

[2] Appendix B. 8.

[3] 28 TAC §26.1

[4] 42 U.S.C. 300gg-11(a)(1) requires each health issuer offering coverage in the small group market in a state to "accept every small employer in the state that applies for such coverage."

45 CFR §146.150(a)(1), the federal regulation clarifying this statute, provides that an issuer offering coverage in the small group market must offer, to any small employer in the State, all products that are approved for sale in the small group market and that the issuer is actively marketing,... See also TIC §1501.151 and 28 TAC §26.13(a).

[5] **28 TAC §26.7(a) requires that a small employer carrier offering coverage to a small employer shall offer to provide coverage to each eligible employee and to each dependent of an eligible employee.**

For more information contact: ChiefClerk@tdi.state.tx.us

