

SUBCHAPTER C. LARGE EMPLOYER HEALTH INSURANCE REGULATIONS
28 TAC §26.301

INTRODUCTION. The Commissioner of Insurance adopts amended 28 TAC §26.301, relating to Applicability, Definitions, and Scope. The section is adopted with changes to the proposed text published in the September 25, 2020, issue of the *Texas Register* (45 TexReg 6700). TDI revised §26.301(g) in response to public comments.

REASONED JUSTIFICATION. Section 26.301(g) is amended to increase the employee health insurance options available to Texas employers by permitting an employer group or association that qualifies as a bona fide employer association to buy a large employer health benefit plan under Insurance Code Chapter 1501.

In March 2019, a federal court struck down parts of a rule issued by the U.S. Department of Labor (DOL). *New York, et al. v. U.S. Dept. of Labor, et al.*, 363 F.Supp.3d 109 (D.D.C. 2019). The rule, 29 C.F.R. §2510.3–5, defined "Employer" for purposes of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001, et seq. The court did not, however, strike down §2510.3–5(a), which expressly "does not invalidate" a series of DOL advisory opinions addressing circumstances in which the DOL will view a person as able to act directly or indirectly in the interest of direct employers in sponsoring an employee welfare benefit plan that is a group health plan. The advisory opinions identify criteria that, if satisfied, establish that an employer group or association is a bona fide employer association eligible to create one group health plan to cover all of the member employers' employees. This is addressed in DOL Advisory Opinions 2019-01A, 2017-02AC, 2005-25A, 2005-24A, and 2005-20A.

To qualify as a bona fide employer association, an employer group or association must demonstrate that it satisfies the criteria for a bona fide employer association set out in the new text in §26.301, which is based on the DOL's criteria. The DOL's criteria require that employers that participate in a benefit program either directly or indirectly exercise control over the program, both in form and in substance, and that an organization that maintains such a plan is tied to the employers and employees that participate in the plan by some common economic or representational interest and genuine organizational relationship unrelated to the provision of benefits.

An employer group or association can seek designation as a bona fide employer association through the issuer's form filing, as is done for other association plans under 28 TAC Chapter 3, Subchapter A. The issuer's form filing and documentation must include either a DOL advisory opinion specifically identifying it as a bona fide employer association or an attorney's attestation with supporting documentation that the employer group or association meets the criteria established in §26.301(g).

Specifically, the new rule is intended to confirm the group's or association's eligibility by showing the following factors:

(A) The employer group or association has a formal organizational structure with a governing body.

(B) The functions and activities of the employer group or association are controlled by its employer members.

(C) The employer group or association has at least one substantial business purpose unrelated to offering and providing health coverage or other employee benefits to its member employers and their employees.

(D) The member employers of the group or association are in the same trade, industry, line of business, or profession. For example, an association in which all member employers are dentists or dental practices would satisfy this provision, while a city's Chamber of Commerce would not.

(E) The member employers that participate in the group health plan control the plan itself in both form and in substance.

(F) Each member employer participating in the group health plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan. For instance, a sole proprietor of a business with two common law employees enrolled in the plan would qualify. A working owner of a trade or business without common law employees would not.

(G) Health coverage through the group health plan is only available to:

- an eligible employee of a current member employer of the employer group or association;
- a former employee of a current member employer of the employer group or association who became eligible for coverage under the group health plan when the former employee was an employee of the employer;
- a current employer; or
- a dependent of an employee, former employee, or current employer (for example, spouses and dependent children).

(H) The employer group or association is not owned or controlled by a health insurance issuer.

In response to a comment, TDI added §26.301(g)(6) to clarify that if TDI approves an association as a bona fide association, an issuer must treat the employer

group or association as a single large employer, including for purposes of compliance with Insurance Code Chapter 1501, Subchapter M.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: TDI received comments from six commenters.

Commenters in support of the proposal with no changes were Coalition to Protect and Promote Association Health Plans, Texas Association of Health Plans, and Texas Oil & Gas Association.

Commenters in support of the proposal with changes were AARP, Blue Cross and Blue Shield of Texas, and Every Texan.

Comments on §26.301(g)

Comment: A commenter supports the rule and notes that many bona fide employer associations offer more extensive benefits and broader provider networks for a lower cost than would otherwise have been possible for their small employer members. The commenter also notes that bona fide employer associations do not destabilize the market for small employer plans because many of the small employers that join association plans could not afford coverage for their employees outside of an association plan. Finally, the commenter notes that a majority of states permit bona fide employer associations to buy large employer plans.

Agency Response: The department appreciates the support.

Comment: A commenter supports the proposed amendments, stating that the rule appropriately acknowledges and aligns Texas law with federal law by allowing a

qualified AHP to be considered a bona fide employer association and therefore to be treated as a large employer under Texas insurance law. The commenter also states that the rule will allow qualified Texas associations to offer their employer-members a wider range of more affordable health insurance options, ultimately making health coverage more accessible for a large number of hard-working Texans.

Agency Response: The department appreciates the support.

Comment: A commenter expresses appreciation for the department's efforts in proposing rules to increase the employee health insurance options available to Texas employers, and strongly supports this rule change that will allow a qualified employer group or association to be considered a bona fide employer association eligible to obtain a large employer health benefit plan under Insurance Code Chapter 1501. The commenter also notes the rule change will give associations and their member employers flexibility to design health insurance plans that are best suited for their employees.

Agency Response: The department appreciates the support.

Comment: A commenter recommends that TDI should evaluate what effect this rule would have on the cost and availability of fully insured small group coverage, and examine what, if any, reduction in benefits and cost shifting would be expected compared to a small group plan that is required to provide essential health benefits.

Agency Response: TDI anticipates assessing this issue after the rule has been effective for sufficient time to develop relevant data.

Comment: A commenter recommends that TDI conduct an analysis similar to that applied by the DOL in determining whether an employer group is a bona fide employer association. The commenter urged that TDI critically examine the facts and circumstances presented to determine whether an employer group meets the criteria for a bona fide association.

Agency Response: TDI will review every application for bona fide employer association status on a case-by-case basis, evaluating all factors enumerated in the rule, which are based on the DOL's factors.

Comment: A commenter requests that TDI clarify whether self-employed individuals and independent contractors are eligible for coverage through a bona fide employer association, given the ambiguity around the term "independent contractor" in the Chapter 1501 definition of "eligible employee."

Agency Response: TDI's application of Insurance Code Chapter 1501's definition of "eligible employee" has consistently permitted a self-employed individual or independent contractor to enroll in a plan under that chapter only if the individual is enrolled as a member of an employed group. For instance, a self-employed individual or independent contractor who employs at least one common-law employee would be eligible to enroll in an employee group health plan along with his or her common-law employees. In contrast, a working owner with no common-law employees would not be eligible to enroll in an employee group health plan.

Comment: A commenter recommends that TDI clarify that a bona fide association under the rule will be treated as a large employer for purposes of rating under Insurance Code §1501.610(b).

Agency Response: TDI agrees with the comment and has added paragraph (6) to §26.301(g) to clarify that a bona fide employer association is to be treated by an issuer as a large employer plan for purposes of Insurance Code Chapter 1501 and 28 TAC Chapter 26. This includes Insurance Code Chapter 1501, Subchapter M, regulating large employer health benefit plans.

Comment: A commenter notes that issuers of large employer plans are prohibited from considering health status-related factors or duration of coverage in rating, and recommended that the rule prohibit varying rates based on rough proxies for health status of employees, like gender and age.

Agency Response: TDI notes that while age and gender are permissible rating factors for large employer plans, any adjustment must be applied uniformly to the rates charged for all employees and dependents of employees of a large employer. As previously noted, TDI has added paragraph (6) to §26.301(g). The addition clarifies that if TDI approves an association as a bona fide employer association, an issuer must treat the employer group or association as a single large employer, including for purposes of compliance with Insurance Code Chapter 1501, Subchapter M, so that that the issuer cannot vary rates among members or employers within the association for health status-related factors or duration of coverage.

Comment: A commenter urges that TDI consider whether and how an association existed before offering a health plan.

Agency Response: TDI will review all applications for bona fide employer association status on a case-by-case basis. TDI anticipates evaluating the status of an association before it starts offering a health plan, but does not agree that the rule should mandate this as a requirement for TDI.

Comment: A commenter suggests that TDI incorporate ERISA's definition of "employer" by reference, so that if in the future that definition is interpreted more broadly than it is now, other groups may be eligible for consideration as large employer plans.

Agency Response: TDI, in drafting this rule, retains its historic interpretation of "employee health benefit plan," which requires the existence of an employer-employee relationship. An association that includes individuals who are not employers is not, under Texas insurance law, an employer association, and cannot be a bona fide employer association.

STATUTORY AUTHORITY. The Commissioner adopts amendments to 28 TAC §26.301 under Insurance Code §1501.010 and Insurance Code §36.001.

Insurance Code §1501.010 provides that the Commissioner may adopt rules necessary to implement Chapter 1501 and to meet minimum requirements of federal law, including regulations.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

TEXT.**§26.301. Applicability, Definitions, and Scope.**

(a) The applicable terms defined in §26.4 of this title (relating to Definitions) are incorporated into this subchapter.

(b) Insurance Code Chapter 1501, concerning the Health Insurance Portability and Availability Act, and this subchapter regulate all health benefit plans sold to large employers, whether the plans are sold directly or through associations or other groupings of large employers.

(c) Except as otherwise provided, this subchapter applies to any health benefit plan providing health care benefits covering 51 or more employees of a large employer, whether provided on a group or individual franchise insurance policy basis, regardless of whether the policy was issued in this state, if it provides coverage to any citizen or inhabitant of this state and if the plan meets one of the following conditions:

(1) A portion of the premium or benefits is paid by a large employer.

(2) The health benefit plan is treated by the employer or by a covered individual as part of a plan or program for the purposes of the United States Internal Revenue Code of 1986 (26 U.S.C. §106, concerning Contributions by Employer to Accident and Health Plans, or §162, concerning Trade or Business Expenses).

(3) The health benefit plan is a group policy issued to a large employer.

(4) The health benefit plan is an employee welfare benefit plan under 29 C.F.R. §2510.3-1 (concerning Employee Welfare Benefit Plan).

(d) For an employer that was not in existence the previous calendar year, the determination is based on the average number of employees the employer reasonably

expects to employ on business days in the calendar year in which the determination is made.

(e) If a large employer or the employees of a large employer are issued a health benefit plan under the provisions of Insurance Code Chapter 1501 and this subchapter, and the large employer subsequently employs fewer than 51 employees, the provisions of Insurance Code Chapter 1501 and this subchapter continue to apply to that particular health plan if the employer elects to renew the large employer health benefit plan subject to the provisions of §26.308 of this title (relating to Renewability of Coverage and Cancellation). A health carrier providing coverage to an employer must, within 60 days of becoming aware that the employer has fewer than 51 employees, but not later than the first renewal date occurring after the employer ceases to be a large employer, notify the employer of the following:

(1) The employer may renew the large employer policy.

(2) If the employer does not renew the large employer health benefit plan, the employer will be subject to the requirements of Insurance Code Chapter 1501 that apply to small employers, and Chapter 26, Subchapter A, of this title (relating to Definitions, Severability, and Small Employer Health Regulations), including:

(A) guaranteed issue;

(B) rating protections; and

(C) minimum participation, contribution, and minimum group size requirements.

(3) The employer has the option to purchase a small employer health benefit plan from the employer's current health carrier if the carrier is offering small employer

coverage or from any small employer carrier currently offering small employer coverage in this state.

(4) If the employer fails to comply with the qualifying minimum participation, contribution, or group size requirements of §26.303 of this title (relating to Coverage Requirements) and Insurance Code §1501.605 (concerning Minimum Contribution or Participation Requirements), the health carrier may terminate coverage under the plan, provided that the termination complies with the terms and conditions of the plan concerning termination for failure to meet the qualifying minimum participation, contribution, or minimum group size requirement and in accordance with Insurance Code §§1501.108 - 1501.111 (concerning Renewability of Coverage: Cancellation; Refusal to Renew: Discontinuation of Coverage; Notice to Covered Persons; and Written Statement of Denial, Cancellation, or Refusal to Renew Required, respectively) and §26.308 of this title.

(f) If a health benefit plan is issued to an employer that is not a large employer, but subsequently the employer becomes a large employer, the provisions of Insurance Code Chapter 1501 and this subchapter apply to the health benefit plan on the first renewal date, unless the employer was a small employer and renews its current health benefit plan as provided under §26.5(e) of this title (relating to Applicability and Scope).

(g) An employer group or association that is a bona fide employer association under this subsection is a single large employer for purposes of this subchapter and Insurance Code Chapter 1501.

(1) An employer group or association is a bona fide employer association if:

(A) the employer group or association has a formal organizational structure with a governing body and has bylaws or other similar indications of formality;

(B) the functions and activities of the employer group or association are controlled by its member employers;

(C) the employer group or association has at least one substantial business purpose unrelated to offering and providing health coverage or other employee benefits to its member employers and their employees;

(D) the member employers of the group or association are in the same trade, industry, line of business, or profession;

(E) the member employers that participate in the group health plan control the plan in form and in substance;

(F) each member employer participating in the group health plan is a person acting directly as an employer of at least one eligible employee who is a participant covered under the plan;

(G) the employer group or association does not make health coverage through the group health plan available to individuals other than:

(i) an eligible employee of a current member employer;

(ii) a former employee of a current member employer who became eligible for coverage under the group health plan when the former employee was an employee of the employer;

(iii) a current member employer; or

(iv) a dependent of an individual described in clause (i), (ii), or (iii) of this subparagraph (for example, spouses and dependent children); and

(H) the employer group or association is not a health insurance issuer, or owned or controlled by a health insurance issuer or by a subsidiary or affiliate of a health insurance issuer, other than if and to the extent such entities participate in an

employer group or association in their capacity as member employers of the employer group or association. For purposes of this subparagraph, control is the power to direct, or cause the direction of, the management and policies of a person, other than power that results from an official position with or corporate office held by the person. The power may be possessed directly or indirectly by any means, including through the ownership of voting securities or by contract, other than a commercial contract for goods or nonmanagement services.

(2) An issuer wanting to issue coverage to an employer group or association seeking designation as a bona fide employer association under this subsection must submit to TDI an association filing and any supporting documents establishing that the group or association meets the requirements of this subsection. The filing must be made as provided in Chapter 3, Subchapter A, of this title (relating to Submission Requirements for Filings and Departmental Actions). The department will review the filing and all supporting documents and will determine whether to approve or disapprove the employer group's or association's eligibility as a bona fide employer association. The filing must include either:

(A) an advisory opinion from the U.S. Department of Labor recognizing the employer group or association as a bona fide employer association that is no more than three years old; or

(B) an opinion from an attorney attesting to the fact that the employer group or association qualifies as a bona fide employer association under paragraph (1) of this subsection. An attorney attestation must adequately explain how and why the employer group or association meets all of the criteria, based on the facts and circumstances of the employer group's or association's governance and operations

during the 12 months immediately preceding submission of the application, with explicit references to relevant language drawn from the employer group's or association's bylaws, trust agreement, or other organizational documents, which must be submitted to the department with the attorney's attestation.

(3) For purposes of paragraph (1)(C) of this subsection, the employer group or association will be treated as having a substantial business interest unrelated to the provision of benefits under the plan if:

(A) the employer group or association would be a viable entity in the absence of sponsoring an employee benefit plan;

(B) the member employers have a shared or common purpose that is not generally applicable to the population at large; and

(C) the primary method of obtaining new members is not through, or in conjunction with, the solicitation of insurance.

(4) When determining whether an entity is a bona fide employer association, the department may consider whether the employer group or association ever existed without offering a health benefit plan.

(5) An employer group or association must not condition employer membership in the group or association on any health-status-related factor, as defined in §26.4 of this title (relating to Definitions), of any individual who is or may become eligible to participate in the group health plan sponsored by the bona fide group or association.

(6) If TDI approves an association as a bona fide employer association, an issuer must treat the employer group or association as a single large employer, including for purposes of compliance with this chapter and Texas Insurance Code Chapter 1501.

(h) A large employer nonfederal governmental employee health benefit plan that is not self-funded is subject to the Insurance Code and this title, as applicable, including Chapter 1501 and this chapter.

(i) If a large employer has employees in more than one state, the provisions of Insurance Code Chapter 1501 and this subchapter apply to a health benefit plan issued to the large employer if the:

(1) majority of employees are employed in this state on the issue date or renewal date; or

(2) primary business location is in this state on the issue date or renewal date and no state contains a majority of the employees.

(j) A carrier licensed in this state that issues a certificate of insurance covering a Texas resident is responsible for ensuring that the certificate complies with applicable Texas insurance laws and rules, including mandated benefits, regardless of whether the group policy underlying the certificate was issued outside the state.

CERTIFICATION. This agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on December 4, 2020.

DocuSigned by:
James Person
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