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Commissioner's BULLETIN No. B-0043-04

TO: ALL CARRIERS LICENSED TO WRITE SMALL AND LARGE EMPLOYER HEALTH COVERAGE IN TEXAS

RE: UNIFORM UNDERWRITING PRACTICES IN EMPLOYER GROUP HEALTH PLANS AND OTHER EMPLOYER HEALTH COVERAGE ISSUES

The Texas Department of Insurance (TDI) has become aware that some carriers issuing small employer health plans in Texas are not complying with federal and Texas law regarding small employer groups. Issues of concern to TDI include:

(1) Uniform treatment of small employer groups,
(2) Issuance of coverage to small employer health coalitions,
(3) Expansion of participation requirements,
(4) Compliance with guaranteed renewability requirements,
(5) Providing continuation of coverage,
(6) Reporting claims data information, and
(7) Special eligibility and verification.

Note that issues 4, 5, 6 and 7 also pertain to coverage in the large employer market.

The purpose of this bulletin is to provide detailed analysis of employer group health coverage issues and to remind carriers of their responsibility to comply with Texas law. **Due to the broad scope and volume of complaints and inquiries, TDI will be closely monitoring activity in the small employer market and will expect and enforce strict compliance with Texas law.**

(1) UNIFORM TREATMENT OF SMALL EMPLOYER GROUPS

Congress created laws to regulate the small employer group market and to entitle those within that market to certain special rights, applied uniformly and equally except where specifically excepted. The requirement for uniform availability of small employer contracts is also known as the "all-products guarantee." HIPAA addresses this guarantee in 42 U.S.C. §300gg-11(a)(1), requiring that each health insurance issuer offering coverage in the small group market in a state "must accept every small employer in the State that applies

for such coverage." 45 CFR §146.150(a)(1), the federal regulation that clarifies this statute, states that a health insurer offering insurance coverage in the small group market must "[o]ffer, 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, . . ."

The all-products guarantee is also a prominent part of Texas law in the various requirements of Texas Insurance Code (TIC) Article 26.21, as well as in 28 Texas Administrative Code (TAC) §26.13(a), both of which require a small employer carrier to offer all of its small employer health benefit plans to each small employer in this state.

In essence, the law requires that all small employers have equal access to all small employer health coverage plans. TDI has been advised, however, that certain carriers have treated small employers in a disparate manner based on size, which is not compliant with the all-products guarantee. As stated in the preamble to the Joint Interim Rules for Health Insurance Portability for Group Health Plans (62 Federal Register 16893, 16905), allowing some products to be available to "larger" small employers, but not to the smallest employers, would undermine the all-products guarantee. The problem of disparate treatment of small employer groups has been indicated most recently in the areas of applications, underwriting, and rating practices.

Application for Coverage

For example, some carriers have required each eligible employee in smaller groups to complete an individual medical questionnaire as part of the application process, while requiring only the employer of larger small employer groups to provide general employee health information as part of a "gatekeeper" application. The law does not permit a carrier to use different applications for different-size small employer groups. Completion of the individual medical questionnaire requires more extensive information from prospective certificate holders and therefore could delay and possibly deny access. The all-products guarantee requires absolute uniformity in the process for obtaining coverage throughout the small group market; all small employers must have the same access to coverage through use of the same application process.

In addition, several specific aspects of Texas law prohibit this practice:

- 28 TAC §26.10(b) prohibits a health carrier from directly or indirectly using group size as a criterion for establishing eligibility for a health benefit plan.
- TIC Article 26.31 prohibits a small employer carrier from directly or indirectly using the number of employees and dependents of a small employer as a criterion for establishing a separate class of business.

- TIC Article 26.21(g) prohibits a small employer carrier from establishing a separate class or classes of business for small employers, except for three specific exceptions not related to the group size.
- TIC Article 21.21-8, §2 prohibits a person from making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in any of the terms or conditions of such contract or in any other manner whatever. Utilizing a different, and more burdensome, application for "smaller" small employers constitutes such unfair discrimination.

Moreover, the use of different applications has noncompliance implications for rating practices. TIC Article 26.32(e) requires that a group's risk *load* reflect the group's risk *characteristics*. Information provided by individual employees and dependents is likely to be more accurate, producing a more accurate assessment of a particular group's risk, than an employer's general information about the employees and dependents. An employer's secondhand knowledge of the risk characteristics of his employees and their dependents makes the underreporting or misreporting of risk information more likely, thereby imposing a less stringent standard for underwriting on the larger groups than would be imposed on smaller groups required to report more accurate, individual employee and dependent information. In addition, the use of "gatekeeper" questionnaires for larger groups is counterproductive, since an employer's ability to report accurately health status of employees and dependents would seem logically to be inversely related to the number of employees and dependents.

Under this underwriting/separate application process, smaller groups required to provide individual health questionnaires are **more likely** to be charged higher rates than larger groups, a disparate effect the law prohibits. TIC Article 26.36 also speaks to this practice by requiring a small employer carrier to apply rating factors consistently with respect to all small employers in a class of business.

TDI recognizes a carrier's interest in obtaining accurate and detailed information regarding risk characteristics for a small employer group as a whole, as such information is necessary to comply with TIC Article 26.32(e). Moreover, TDI encourages efforts to streamline the process of applying for small employer coverage, so long as all small employers have access to the same application processes. TDI notes that the legislature has authorized an alternative method for carriers to assess the risk of a particular group – claims data reports authorized by TIC Articles 26.96 and 21.49-19. These reports provide an objective description of a particular group's risk characteristics and should eliminate the need for lengthy, particularized individual medical questionnaires. This bulletin discusses these statutes in greater detail below in item (6).

Composite Rating
TDI has received reports that some small group carriers are offering or applying certain premium rate options, such as composite rates, only to "larger" small employer groups. Again, the all-products guarantee requires uniform treatment of all small employers, including methods a carrier uses to determine premium rates. Any rating methodology offered to certain small employers must be offered to all small employers, regardless of size; otherwise access to the same coverage is effectively denied.

(2) ISSUANCE OF COVERAGE TO SMALL EMPLOYER HEALTH COALITIONS

The 78th Texas Legislature enacted House Bill 897, which authorized small employer health coalitions -- another type of the private purchasing cooperatives addressed in TIC Chapter 26, Subchapter B. These coalitions are limited in size to 2 to 50 eligible employees, just like a single small employer, and accordingly the law extends to them the protection of the small employer law. TIC Article 26.16(b) states that "[a] small employer health coalition that otherwise meets the description of a small employer is considered a single small employer for all purposes under this chapter."

TDI has received reports that some carriers are not treating small employer health coalitions in the same manner as a single small employer. Problems cited include failing to issue coverage, requiring excessive document production to establish eligibility, and charging excessive premium rates to small employer health coalitions.

A small employer health coalition, just like any other small employer group, is protected by the all-products guarantee and is entitled to guaranteed issuance of any small employer policy or plan. The other protections of small employer law, including rating restrictions and guaranteed renewability, also apply to these coalitions.

The law also imposes responsibilities on a small employer health coalition. A small employer carrier can require a coalition to verify its status as a small employer health coalition, just as it can require a single small employer to verify its status as a small employer. The same laws that limit a carrier's documentation requirements for an individual small employer also limit the requirements a carrier may impose on a coalition to prove its eligibility. See 28 TAC §26.7(f), which limits such requests to "reasonable and appropriate supporting documentation." Moreover, the eligibility requirements for a coalition itself are minimal; basically, it must have organizational documents, approved by the Texas Secretary of State and filed with TDI.

Since the law requires a small employer health coalition to be treated as a small employer, a carrier must rate it just as it would any single small employer.

This means complying with TIC Article 26.32 which requires, in pertinent part, small employer carriers to develop premium rates for each small employer group in a two-step process – developing a base premium rate and then adjusting that rate to reflect the risk characteristics of the group. The statute also requires that the risk load a carrier assesses to a particular group reflect the particular group's risk characteristics. A carrier applying a risk load to a small employer health coalition in variance with the coalition's objective risk characteristics would not be in compliance with TIC Article 26.32.

TDI has also heard reports of carriers threatening to terminate an agent's agreement of representation if the agent submitted small employer health coalitions for coverage with the carrier. Such action would be an act of coercion or intimidation resulting in or tending to result in unreasonable restraint of the business of insurance in violation of TIC Article 21.21, §4(4).

(3) EXPANSION OF PARTICIPATION REQUIREMENTS

TDI has had reports that some carriers are requiring, in some circumstances, participation levels greater than 75%. Reports typically involve a carrier requiring 100% participation when an employer pays 100% of the employee (and dependent) premium. Texas law forbids this practice. TIC Article 26.21(c) states that "[c]overage is available under a small employer health benefit plan if at least 75 percent of a small employer's eligible employees, or, if applicable, the lower participation level offered by the small employer carrier under Subsection (d) of this article, elect to be covered." Accordingly, while a carrier can set a participation level *lower* than 75%, it cannot set a participation level *higher* than 75%. The sole exception to this rule is for a small employer group consisting of two eligible employees, which is subject to a 100% participation requirement under 28 TAC §26.8(d).

(4) COMPLIANCE WITH GUARANTEED RENEWABILITY REQUIREMENTS

TDI has also had reports of noncompliance with state law respecting guaranteed renewability. TIC Art. 26.23(a) states that "a small employer carrier shall renew the small employer health benefit plan for any covered small employer, at the option of the small employer." The statute contains specific exceptions to this requirement, which is also subject to a carrier's right to discontinue a particular type of small employer coverage under TIC Article 26.24.

The critical part of this statute is renewal of the plan "at the option of the small employer." This means that the employer has the right to approve any changes to the plan or its coverage at any time, including plan renewal, with the exception of authorized rate changes or changes required by state or federal law. While a carrier can suggest changes to a guaranteed renewable policy or plan, the carrier cannot make such changes unilaterally; the employer must

agree to any changes in that plan. This includes changes of substance, such as eliminating covered benefits, as well as seemingly minor changes such as copayment or deductible amounts. The corresponding large employer statute is TIC Article 26.86.

(5) PROVIDING CONTINUATION OF COVERAGE

Some carriers have apparently confused eligibility requirements for state continuation with those for COBRA coverage. These carriers have refused to offer state continuation in certain situations where federal law did not require an employer to offer COBRA coverage. The state law requiring an offer of group continuation coverage is a separate requirement from the offer of continuation under COBRA, and is found in TIC Article 3.51-6, §1(d)(3). The eligibility requirements for the two types of continuation are not identical. For state law purposes, a carrier must make this offer to any employee, member, or dependent whose insurance under the group policy has been terminated *for any reason, including discontinuance of the policy with respect to an insured class.* The only exception to the requirement to offer coverage is where the employee was involuntarily terminated for cause. Involuntary termination for cause does not include termination for any health-related cause. To qualify for the offer, the employee, member, or dependent must have been continuously insured under the group policy, or an analogous replacement policy, for at least three consecutive months immediately prior to termination. Once accepted, there are a number of specific events which may terminate continuation coverage; as a general rule, however, coverage may not terminate until six months after the date of the election.

A specific problem brought to TDI's attention involved a large employer that decided to stop offering health benefit plan coverage to its class of hourly employees while continuing to offer coverage to other classes of employees. The decision did not trigger COBRA rights for the hourly employees, and the employer and its carrier asserted that it also did not trigger state continuation rights. That assertion was incorrect -- the hourly employees were an insured class whose coverage was terminated, not involuntarily for cause, and they were entitled to the offer of group continuation under Texas law.

(6) REPORTING CLAIMS DATA INFORMATION

There continues to be confusion and misunderstanding regarding carriers' statutory obligations to provide claims cost data to their insured employers. Two separate provisions in the Texas Insurance Code require this type of reporting, TIC Articles 26.96 and 21.49-19. Each has slightly different requirements, and carriers must take care to comply with the law governing a particular request.

TIC Article 26.96 requires any employer carrier, small or large, to report to the employer claims data information from *the 12 months preceding the date of the*

report. A carrier has at least 30 days to respond to the request. Similarly, TIC Article 21.49-19 requires a group health benefit plan to provide to an employer plan sponsor the claims cost information for employees covered by the plan during *the preceding calendar year*.

Both articles safeguard the privacy of individual enrollees. TIC Article 26.96 prohibits reporting information protected by federal law or regulation and requires carriers to provide claim information in the aggregate. TIC Article 21.49-19 allows a carrier to provide claims cost information either in the aggregate or on a detailed basis, so long as the report does not include information revealing the identity or diagnosis of a specific individual.

Compliance with these provisions is particularly important in light of concerns that have arisen regarding use of different applications for different sized small employer groups.

(7) SPECIAL ELIGIBILITY AND VERIFICATION

TIC and TAC Chapters 26 convey "eligible employee" status on three categories of persons that may not meet the regular requirements for eligibility – sole proprietors, partners, and independent contractors. TDI has received numerous questions and complaints regarding alleged attempts to frustrate or delay issuance of coverage to groups with these categories of eligible employees. In some cases, the issue relates to broad eligibility for coverage; in others, the concern is the requirement of particular documents to substantiate eligibility. The following information is intended to supplement and clarify the direction provided by Commissioner's Bulletin B-0035-01.

Sole proprietors

With regard to sole proprietors, the main area of confusion appears to relate to a sole proprietor who would otherwise qualify as an eligible employee. In such cases, the sole proprietor would count as an eligible employee for the purpose of determining whether the business was a small employer under law. It is only where the sole proprietor does not meet the requirements for an eligible employee that his other employees would determine his eligibility for coverage.

Partners

Regardless of the common-law employment status of a partner, TIC Article 26.02(9) confirms that they are employees by deeming a partnership the employer of a partner. Accordingly, as with sole proprietors, it is only where partners do not otherwise qualify as eligible employees (e.g., if they do not usually work at least 30 hours a week for the business) that their employees must constitute a small employer to qualify them for coverage. For example, a two-person partnership, where both partners work on a full-time basis and who usually work at least 30 hours a week (provided neither partner is not an eligible employee for such reason as coverage under another health benefit plan) would qualify as a small employer group. If one of those partners did not

work full-time, however, the business would need at least one other eligible employee to qualify as a small employer group. If the business has small employer status and obtained a health benefit plan, then the partnership could include the part-time partner as an eligible employee under the plan.

Independent contractors
By definition, an independent contractor is not an employee, and thus cannot qualify as an "eligible employee" except where included as an employee under a health benefit plan of a small or large employer. Accordingly, unlike with sole proprietors or partners, an employer cannot count an independent contractor as an eligible employee to meet minimum group size requirements. The small or large employer must qualify for that legal status without the independent contractor.

Scope of application
TDI has received questions regarding whether these categories of persons, if included as employees under a small employer health benefit plan, count as eligible employees for other purposes, such as determining the 75% participation requirement. The answer is yes – once sole proprietors, partners, or independent contractors become "eligible employees," they are treated as any other eligible employee.

TDI also received a query regarding a carrier's obligation to issue coverage to a sole proprietor who was a part-time employee and who employed two other eligible employees. Only one of the eligible employees, however, was willing to enroll in health benefit plan coverage. Texas law would not obligate a carrier to issue coverage to the employer. The statute deems a part-time sole proprietor an eligible employee only if the sole proprietor is included as an employee under a health benefit plan of a small or large employer, and 28 TAC §26.8(d) requires a small employer with only two eligible employees to meet a 100% participation requirement to qualify for guaranteed issuance of coverage. If only one of the "eligible employees" was willing to enroll in coverage, then the group would not be in compliance with 28 TAC §26.8(d) and would not be eligible for guaranteed issuance of coverage. The owner, as a part-time employee, would not count as an eligible employee for the purpose of creating small employer status; he would only qualify for coverage if included on an already-existing small employer health benefit plan.

Eligibility determinations
Neither the TIC nor the TAC require an applicant to present a specific document to establish eligibility, so a small employer carrier may not decline to cover an employer or employee based solely on the employer's inability to produce a specific document, such as a W-2 form. Although a small employer carrier is not required to issue coverage to an individual who does not meet the definition of an eligible employee, 28 TAC §26.7(c) and (d), require a carrier to act reasonably in judging the various proofs offered to substantiate eligibility and in making eligibility decisions. It would not be reasonable for a carrier to

deem an employee ineligible for failure to produce a specific document if the employer produces another document that does substantiate eligibility.

Income requirements
TDI continues to receive inquiries relating to the income requirements for an eligible employee. As stated in B-0035-01, under Chapters 26 of the TIC and TAC, a carrier may not require that an employee earn the federal minimum wage to qualify as an "eligible employee." Similarly, carriers should be cautious about using lack of income to determine that a business that does not show a profit is not an "employer." Businesses, particularly small firms in early development, may not produce a constant or consistent stream of income; in fact, it may be some time before they produce any income. Carriers should give deference to the U.S. Internal Revenue Service's treatment of a putative employer, as well as examining other factors indicating that a particular enterprise is or is not an employer, in making any such determination. While it is not our intent to specify particular limits on or requirements for income production, TDI cautions all parties to be reasonable in seeking and providing proof regarding the validity of an employer's business.

ACTION BY CARRIERS

Each carrier should review its forms, rating structures, commission schedules, 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.

If you have any questions regarding this bulletin or the requirements of Chapter 26, TIC, or Chapter 26, TAC, please contact the Life/Health Division at 512-322-3409 or HMO Division at 512-322-4266.

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