

**SUBCHAPTER A. SMALL EMPLOYER HEALTH INSURANCE PORTABILITY AND
AVAILABILITY ACT REGULATIONS
28 TAC §26.8**

1. INTRODUCTION. The Texas Department of Insurance (Department) proposes amendments to §26.8, concerning contribution and participation requirements for guaranteed issue small employer health benefit plans. The proposed amendments are necessary to reflect changes in the law as a result of Senate Bill (SB) 80, enacted by the 81st Legislature, Regular Session. SB 80 amends Insurance Code Chapter 1501 by adding §1501.153(a-1) to permit a small employer health benefit plan issuer (small employer carrier) to offer a small employer the option of a health benefit plan for which the employer is required to contribute 100 percent of the premium paid.

Insurance Code §1501.153(a-1) applies only to a small employer health benefit plan delivered, issued for delivery, or renewed on or after January 1, 2010. SB 80, SECTION 2, provides that a small employer health benefit plan delivered, issued for delivery, or renewed before January 1, 2010, is governed by the law as it existed immediately before the effective date of SB 80. The previous law is continued in effect for that purpose.

Prior to the enactment of SB 80, small employer carriers were already permitted to require an employer contribution based on the small employer carrier's usual and customary practices applicable to its employer group health benefit plans in this state. However, Insurance Code §1501.153(a) requires small employer carriers to apply the

employer contribution level uniformly to each small employer offered or issued coverage by the small employer carrier in this state.

New Insurance Code §1501.153(a-1) provides another option for small employer carriers by permitting a small employer carrier to offer a small employer the option of a health benefit plan for which the employer is required to contribute 100 percent of the premium paid. Insurance Code §1501.153(a-1) further provides that a plan offered under this subsection may be offered in addition to a plan offered by the small employer carrier that requires a lower percentage of the premium paid to be contributed by the employer.

The proposed amendments to §26.8 conform the section's requirements for consistency with Insurance Code §1501.153(a-1).

The proposed amendments are also necessary to make non-substantive changes that include updating statutory references, correcting rule citation references, and making technical corrections. The Department is broadening the reference in §26.8(f)(2) to prevent ambiguity in the applicability of the statutes in the chapter as amended by the Legislature.

2. FISCAL NOTE. Judy Wooten, Project Manager for the Regulatory Matters Team, Life, Accident and Health Section, has determined that for each year of the first five years the proposed amendments are in effect, there will be no fiscal impact to state or local government as a result of enforcing or administering the sections. There will be no

measurable effect on local employment or the local economy as a result of enforcing or administering this proposal.

3. PUBLIC BENEFIT/COST NOTE. Ms. Wooten also has determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of the proposal include allowing small employer carriers to present additional plans with full employer premium contribution as options for small employer consideration. The Department anticipates there will be no costs to comply with the requirements as a result of the proposed amendments to §26.8.

The proposed amendments do not impose any new requirements upon small employer carriers in offering coverage to small employers, or upon small employers in selecting health coverage options for employees. Neither Insurance Code §1501.153(a-1) nor the proposed amendments to §26.8 require a small employer carrier to offer a small employer the option of a health benefit plan for which the employer is required to contribute 100 percent of the premium paid.

Additionally, neither Insurance Code §1501.153(a-1) nor the proposed amendments require a small employer to select a health benefit plan for which the employer is required to contribute 100 percent of the premium paid. However, Insurance Code §1501.153(a-1) specifies that a plan issued under this subsection must require the employer to contribute 100 percent of the premium paid for each eligible participating employee. Therefore, any costs to comply with proposed amendments to §26.8 result from the enactment of SB 80.

4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with Government Code §2006.002(c), the Department has determined that the proposed amendments will not have an adverse economic effect on small or micro businesses that are required to comply with the proposal. The proposed amendments do not impose any new requirements or costs with which businesses, including small and micro businesses as identified by Government Code §2006.001(1) and (2), must comply that are not already required under statutes.

The proposed amendments are consistent with Insurance Code §1501.153(a-1) that allows a small employer carrier to offer a small employer the option of a health benefit plan for which the employer is required to contribute 100 percent of the premium paid. The proposed amendments are also consistent with the requirement that a plan offered under Insurance Code §1501.153(a-1) may be offered in addition to a plan that requires a lower percentage of the premium paid to be contributed by the employer.

Additionally, the proposed amendments and Insurance Code §1501.153(a-1) do not require a carrier to offer a plan that would require a small employer to make a 100 percent premium contribution for each eligible participating employee; nor do the statute and proposed amendments require a small or micro business to purchase insurance coverage for its employees. Therefore, in accordance with Government Code §2006.002(c), the Department has determined that a regulatory flexibility analysis is not

required because the proposal will not have an adverse impact on small or micro businesses.

5. TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

6. REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on March 5, 2012, to Sara Waitt, Acting General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Judy Wooten, Project Manager for the Regulatory Matters Team, Life, Accident and Health Section, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

Any request for a public hearing should be submitted separately to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

7. STATUTORY AUTHORITY. The amendments are proposed under Insurance Code §1501.010 and §36.001. Insurance Code §1501.010 provides that the Commissioner shall adopt rules necessary to implement Insurance Code Chapter 1501 and to meet the 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 the Texas Department of Insurance under the Insurance Code and other laws of this state.

8. CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §§1501.056, 1501.108 – 1501.110, and 1501.151 – 1501.154.

9. TEXT.

§26.8. Guaranteed Issue; Contribution and Participation Requirements.

- (a) and (b) (No change.)
- (c) A health carrier may require an employer premium contribution for the plan selected by the employer for each eligible employee in accordance with the carrier's usual and customary practices for all employer group health insurance plans in the state.
 - (1) The same premium contribution level shall be applied to each small employer offered or issued coverage by the small employer carrier, except that a small employer carrier may simultaneously offer to each small employer an additional plan

that requires the small employer to contribute 100 percent of the premium paid for each eligible participating employee.

(2) If two or more small employer carriers participate in a purchasing cooperative established under the Insurance Code §1501.056, [Article 26.14,] the carrier may use the contribution requirement established by the purchasing cooperative for policies marketed by the cooperative.

(3) (No change.)

(4) If a small employer fails to meet a contribution requirement for a small employer health benefit plan, the health carrier may terminate coverage as provided under the plan in accordance with the terms and conditions of the plan requiring such contribution and in accordance with the Insurance Code §§1501.108, 1501.109, and 1501.110 [, Articles 26.23, 26.24, and 26.25].

(d) Coverage under a small employer health benefit plan is available if at least 75 percent [75%] of the eligible employees of a small employer elect to be covered, as provided in Insurance Code §1501.154 [Article 26.24]. This 75 percent [75%] requirement shall not apply to a small employer that has only two eligible employees. A small employer that has only two eligible employees shall be subject to a 100 percent [100%] participation requirement.

(1) If a small employer makes available multiple health benefit plans to its employees, the collective enrollment of all of those plans must be at least 75 percent [75%] of the small employer's eligible employees or, if applicable, the lower participation level offered by the small employer carrier under subsection (e) of this section.

(2) A small employer carrier may elect not to offer health benefit plans to a small employer who offers multiple health benefit plans if such plans are to be provided by more than one carrier and the carrier would have less than 75 percent [75%] of the small employer's eligible employees enrolled in the carrier's health benefit plan unless the coverage is provided through a purchasing cooperative.

(e) A small employer carrier may offer small employer health benefit plans to a small employer even if less than 75 percent [75%] of the eligible employees of that employer elect to be covered if the small employer carrier permits the same percentage of participation as a qualifying percentage for each small employer benefit plan offered by that carrier in the state.

(f) A small employer carrier may offer small employer health benefit plans to a small employer even if the employer's percentage of participation is less than the small employer carrier's qualifying participation level established under subsection (e) of this section if the small employer carrier:

- (1) obtains the written waiver required by §26.7(e) of this subchapter [title] (relating to Requirement to [To] Insure Entire Groups); and
- (2) accepts or rejects the entire group of eligible employees that choose to participate and excludes only those employees that have declined coverage. A carrier may not provide coverage under this subsection if the circumstances set out in §26.7(f) of this subchapter [title] apply and may not use this subsection to circumvent the guaranteed issue and other requirements of Insurance Code[,] Chapter 1501 [26, Subchapters A—G,] or this subchapter.

- (g) (No change.)
- (h) If a small employer fails to meet the qualifying participation requirement for a small employer health benefit plan, for a period of at least six consecutive months, the health carrier may terminate coverage under the plan upon the first renewal date following the end of the six-month consecutive period during which the qualifying participation requirement was not met, provided that the termination shall be in accordance with the terms and conditions of the plan concerning termination for failure to meet the qualifying participation requirement and in accordance with the Insurance Code §§1501.108, 1501.109, and 1501.110 [~~, Articles 26.23, 26.24, and 26.25~~] and §26.15 of this subchapter [title] (relating to Renewability of Coverage and Cancellation).
 - (i) In determining whether an employer has the required percentage of participation of eligible employees, if the percentage of eligible employees is not a whole number, the result of applying the percentage to the number of eligible employees shall be rounded down to the nearest whole number. For example: 75 percent [75%] of 5 employees is 3.75, so 3.75 would be rounded down to 3; therefore, 75 percent [75%] participation by a five employee group will be achieved if three [3] of the eligible employees participate.
 - (j) If a small employer fails to meet, for a period of at least six consecutive months, the qualifying minimum group size requirement set forth in §26.5(a) of this subchapter [chapter] (relating to Applicability and Scope) for a small employer health benefit plan, the health carrier may terminate coverage under the plan no earlier than the first day of the next month following the end of the six-month consecutive period

during which the small employer did not meet the qualifying minimum group size requirement, provided that the termination shall be in accordance with the terms and conditions of the plan concerning termination for failure to meet the qualifying minimum group size requirement and in accordance with Insurance Code §§1501.108, 1501.109, and 1501.110 [Articles 26.23, 26.24, and 26.25] and §26.15 of this subchapter [chapter (relating to Renewability of Coverage and Cancellation)].