

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

INTRODUCTION. The Texas Department of Insurance (TDI) proposes to amend 28 TAC §26.301, concerning the applicability, definitions, and scope of large employer health insurance regulations. The amendment to §26.301 implements Insurance Code Chapter 1501 by allowing an employer group or association that meets certain requirements to establish a large employer health benefit plan. That large employer plan will be subject to Insurance Code Chapter 1501 and 28 Texas Administrative Code Chapter 26, Subchapter C, rather than being regulated as an association plan under Insurance Code Chapter 1251, and both Subchapters A and C of 28 Texas Administrative Code Chapter 26.

EXPLANATION. New §26.301(g) is added to increase the employee health insurance options available to Texas employers by permitting an employer group or association to qualify as a bona fide employer association entitled 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 Department of Labor 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.

(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 addition, §26.301(b) is revised to update punctuation for consistency with TDI's current rule drafting style, and proposed amendments redesignate §26.301's current subsections (g), (h), and (i) as (h), (i), and (j), respectively.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Pat Brewer, team lead for the Regulatory Initiatives Team of the Life and Health Division, has determined that

during each year of the first five years the proposed amendment is in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the sections. Ms. Brewer made this determination because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Ms. Brewer does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendment is in effect, Ms. Brewer expects that administering the proposed amendment will have the public benefit of ensuring that qualifying employer groups and associations will be able to establish large employer health benefit plans that allow member employers to share a single regulatory and rating structure, thereby reducing the members' premiums and increasing access to health insurance.

Ms. Brewer expects that the proposed amendment will impose an initial economic cost on employer groups or associations that choose to seek designation as a bona fide employer association, but this initial cost should be offset by the cost savings employers would experience from the availability of less expensive group coverage and sharing plan expenses with other employers. Under the proposed rule, applicants are required to obtain and submit to TDI either an advisory opinion from the DOL identifying the applicant as a bona fide employer association or an attorney's attestation and supporting documentation to show that the group or association satisfies the rule's requirement. These groups and associations may incur legal and administrative costs to obtain the required documentation.

The costs to obtain an advisory opinion from the DOL should be similar to the costs to obtain an attorney's attestation. TDI estimates individual employee compensation for

a lawyer at \$59.11 per hour for 15 to 20 hours of work to assess and document compliance. This wage is based on the national median hourly wage for an attorney as reported in the May 2018 National Industry Specific Occupational Employment and Wage Estimates, available from the DOL Bureau of Labor Statistics, Occupational Employment Statistics, at www.bls.gov/oes/current/oes436014.htm.

Because the supporting evidence and submission method will vary per filing, TDI cannot predict a specific administrative cost, but expects it to be minimal. TDI estimates individual employee compensation for an administrative assistant at \$18.84 per hour for one to 10 hours of work to mail or scan and email documents. This wage is based on the national median hourly wage for administrative assistants as reported in the May 2018 National Industry Specific Occupational Employment and Wage Estimates.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed amendment will not have an adverse economic effect on small or micro businesses because TDI expects the initial costs to participating employer groups or associations identified in the Public Benefit and Cost Note section of this proposal will be offset through long-term cost savings. Further, employer groups or associations that do not seek to establish a bona fide employer association health plan will not be impacted. TDI has no way of estimating the number of employer groups or associations that exist in Texas that may be interested in establishing a bona fide employer association health plan, because employer groups or associations in any field may be interested in establishing such a plan.

As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

However, because there is an initial expense to those employer groups or associations that choose to establish a bona fide employer association health plan, TDI

considered the following alternatives to minimize any impact on small and micro businesses while still accomplishing the proposal's objective of giving qualified employer groups or associations an opportunity to purchase large employee health benefit plans:

- (1) not proposing the amendment;
- (2) not requiring plans be established as trusts; and
- (3) not requiring employer associations to submit an advisory opinion or attorney attestation.

Not proposing the amendment. If TDI does not propose the amendment to the rule, there will be no initial economic impact to small and micro businesses that seek designation as a bona fide employer association. However, employer associations are looking for ways to provide their employees health benefit plans at lower costs, and the amendment included in this proposal is intended to create another option to do this. If TDI does not amend the rule, this new approach will not become available. For this reason, TDI rejected this option.

Not requiring that plans be established as trusts. TDI considered requiring that bona fide association plans be established as trusts—a requirement generally imposed on multiple employer plans—in order to increase the security of plan assets and to provide a method of governance that easily allows member employers to engage in plan management. But such a requirement would increase the costs for an employer group or association that seeks designation as a bona fide employer association. Bona fide association plans will be large employer plans regulated under Insurance Code Chapter 1501 and 28 TAC Chapter 26, and thus will be fully insured. Because of this, the increased cost imposed by requiring the plans to be organized as trusts does not seem to be justified. For this reason, TDI chose to not include this requirement in the proposed amendment.

Not requiring associations to submit an advisory opinion or attorney attestation. If the proposed amendment did not require that an employer group or association submit an advisory opinion or attestation with its application to establish a bona fide association plan, small and micro businesses would not face the initial economic impact described in this proposal. But requiring an advisory opinion or attestation helps TDI ensure that a group or association has satisfied the rule's protective requirements. For this reason, TDI rejected this option.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal may impose an initial cost on regulated persons. But under Government Code §2001.0045(c)(2), TDI is not required to repeal or amend another rule, because new §26.301(g) is intended to reduce the burden or responsibilities imposed on regulated persons by the rule. An employer group or association that seeks designation as a bona fide employer association will incur costs associated with obtaining an advisory opinion or attestation, as explained in this proposal, but the new rule provides regulatory flexibility to employer groups or associations that meet its requirements by allowing them to establish a large employer plan regulated under Insurance Code Chapter 1501, rather than an association plan under Texas Insurance Code Chapter 1251. The long-term benefits of regulation as a single larger employer plan under this amendment include reduced plan regulation under Chapter 1501 and the elimination of plan regulation under Chapter 26, Subchapter A, of this Title.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:

- will not create or eliminate a government program;

- will not require the creation of new employee positions or the elimination of existing employee positions;
- will not require an increase or decrease in future legislative appropriations to the agency;
- will not require an increase or decrease in fees paid to the agency;
- will not create a new regulation;
- will expand an existing regulation;
- will increase the number of individuals subject to the rule's applicability; and
- will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. TDI 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. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI will consider any written comments on the proposal that are received by TDI no later than 5:00 p.m., central time, on October 26, 2020. Send your comments to ChiefClerk@tdi.texas.gov; or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

To request a public hearing on the proposal, submit a request before the end of the comment period to ChiefClerk@tdi.texas.gov; or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. The request for public hearing must be separate from any comments and received by the

department no later than 5:00 p.m., central time, on October 26, 2020. If TDI holds a public hearing, TDI will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. TDI proposes §26.301 under Insurance Code §1501.010 and §36.001.

Insurance Code §1501.010 states 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.

CROSS-REFERENCE TO STATUTE. Section 26.301 implements Insurance Code Chapter 1501.

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, ~~[(c)]~~concerning the Health Insurance Portability and Availability Act, ~~[(d)]~~ 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; or

(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.

(h) [~~(g)~~] 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) [~~(h)~~] 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:

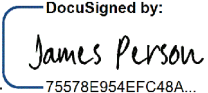
(1) majority of employees are employed in this state on the issue date or renewal date; or

(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) [~~(i)~~] 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 proposal and found it to be within the agency's authority to adopt.

Issued in Austin, Texas, on September 11, 2020.

DocuSigned by:

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James Person, General Counsel
Texas Department of Insurance