



**The State of New Hampshire
Insurance Department**

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BULLETIN

Docket Number INS No. 09-023-AB

TO: All New Hampshire Licensed Health Insurance Companies, Health Maintenance Organizations, Fraternal Benefit Societies and Third Party Administrators

FROM: Roger A. Seigny 

DATE: April 3, 2009

RE: Guidance Concerning Effect of the American Recovery and Reinvestment Act of 2009 On State Continuation Coverage

Additional questions have been raised concerning how certain implementation provisions set forth in the American Recovery and Reinvestment Act of 2009 (“ARRA”) should be applied to state continuation coverage. These questions pertain to 1) whether a carrier is required to provide notice of a second election period to all of its fully insured groups, or only to those groups with fewer than 20 employees; and 2) whether a carrier is responsible for providing a subsidy in the amount of 65% of the premium to all subsidy eligible individuals, or only to those subsidy eligible individuals in groups having fewer than 20 employees.

State continuation coverage establishes continuation rights comparable to COBRA for employees who lose coverage in a fully insured benefit plan. Under New Hampshire law, RSA 415:18 XVI (a), a carrier is required to provide state continuation coverage to an employee in a fully insured plan who loses coverage for medical, hospital, dental, and /or surgical expense benefits. This requirement applies to all fully insured plans without regard to the size of the employer group. Under COBRA, a plan maintained by an

employer that has fewer than 20 employees is exempt from providing continuation benefits. In contrast, the right to obtain state continuation coverage applies to all employer plans, except plans with only one employee.

Under state continuation law, which applies to all fully insured employer plans regardless of size, the insurance carrier is responsible for providing notice to an individual of his or her continuation rights. Although some carriers assign this responsibility to their insured employer groups, the statute places the responsibility for providing notice on the carrier. See RSA 415:18 (e). Under COBRA, the employer is responsible for notifying eligible individuals of their federal continuation rights. By bulletin issued on March 11, 2009, the department required all carriers to provide notice to employer groups or individuals who previously were eligible for state continuation of the right to a second election period for state continuation coverage in accordance with ARRA.

A question has now been raised regarding whether the carrier is obligated to provide notice to all fully insured employer groups or whether the obligation extends to only those groups with fewer than 20 employees. The express language of the statute, RSA 415:18, XVI. (e) does not limit the carrier's obligation to provide notice to groups of fewer than 20 employees. Rather, the statute provides: "When an individual loses coverage, it shall be the responsibility of the carrier to notify the individual of the right to elect continuation coverage." Accordingly, the carrier is responsible for providing the notice of a second election period to all fully insured employer groups and eligible individuals.

The other question that has been raised pertains to the implementation of the premium subsidy provision. Under the ARRA, an individual who is eligible for the subsidy is responsible for paying 35 percent of the premium. The remaining portion of the premium is either paid by the employer, with the employer recouping the cost through a payroll tax credit, or absorbed by the carrier, with the carrier recouping the cost through a tax credit. In either case, the eligible individual is only responsible for making a payment of 35% of the premium. The question presented is whether the employer or the carrier should claim the tax credit for premium payments made by eligible individuals on state continuation.

Although the New Hampshire Insurance Department is not the final arbiter of questions involving the construction of federal tax law, federal guidance on this issue clearly establishes that the tax credit for state continuation coverage for fully insured groups with fewer than 20 employees should be claimed by the carrier. For those continuation policies, eligible individuals are responsible for making a premium payment of 35% of the cost of the policy. The carrier is required to assume the 65% subsidy and can recoup that amount as a tax credit. With respect to state continuation coverage for fully insured groups with 20 or more employees, federal guidance is not clear. For COBRA coverage that is provided to subsidy eligible individuals in self-insured groups with 20 or more employees, the former employer is required to pay the remaining 65% of the premium and recoup that amount through a reduction in payroll taxes.

The question that has been raised with the department is how the subsidy should be implemented for fully insured groups with 20 or more employees, where the former employer would be required under COBRA to pay the 65% premium subsidy. The department has been unable to locate explicit federal guidance on this issue. Because this question raises an issue of federal tax law, the department is unable to provide guidance on whether the employer or the carrier is legally obligated to assume the liability for the 65% premium subsidy and recoup the subsidy by claiming a tax credit. The department recommends that the carriers and/or employers seek direction from the Internal Revenue Service on this issue.