

BULLETIN

Docket Number: INS NO. 13-016-AB

TO: All Health Insurers and Third Party Administrators Authorized to Conduct Business in New Hampshire

FROM: Roger A. Sevigny



DATE: August 16, 2013

RE: Professional Employer Organizations (PEOs)

In 2009 and 2010, the New Hampshire Insurance Department (“Department”) issued three bulletins¹ concerning whether a health insurance carrier is permitted to issue a large group health insurance policy to a professional employer organization or employee leasing company (“PEO”) on behalf of a contracting client company that would fall into the small group market if that same company purchased coverage without the PEO. On September 11, 2011, a state law² suspended the third bulletin, Bulletin INS-10-008-AB, until January 1, 2014, the date the market reforms under the federal Affordable Care Act (“ACA”) take effect. Around the same time, the federal agency implementing the market reforms under the ACA, the Center for Consumer Information and Insurance Oversight (“CCIIO”), issued guidance on how it would approach the issue of whether coverage purchased through an organization or association would be considered large group rather than small group coverage.³ The issue is significant because under the ACA, there is a requirement that, as of January 1, 2014, all small group coverage be part of a single risk pool for each carrier.

As discussed in more detail below, applicable federal guidance makes it clear that: (1) the question of whether the employer will be considered to exist at the organization/association level

¹ Bulletin INS-08-079-AB, issued March 11, 2009; Bulletin INS-09-021-AB, issued March 13, 2009; and Bulletin INS-10-008-AB, issued January 22, 2010.

² 2011 N.H. Laws chapter 249:9.

³ The guidance does not explicitly mention PEOs, but lists a variety of similar entities. See “Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through, Associations” (“Association Guidance”), issued September 1, 2011. http://www.cms.gov/CCIIO/Resources/Files/Downloads/association_coverage_9_1_2011.pdf

or at the client company/member level is fact-specific and will be decided by the federal Department of Labor on a case-by-case basis; and (2) federal law preempts state law on this question. Given this federal guidance, Bulletin INS-10-008-AB is hereby withdrawn.

According to formal CCIIO guidance, the determination of whether an organization or association is to be considered the employer rests with the U.S. Department of Labor:

The Department of Labor (DOL) has jurisdiction over ERISA group health plans and, for private sector entities, the determination of whether the group health plan exists at the association level or the employer level is made under ERISA. . .⁴

Given that the DOL is the federal regulator implementing ERISA, CCIIO has advised stakeholders with questions about whether a particular organization or association qualifies as an employer or plan sponsor for rating purposes to contact the DOL's Employee Benefits Security Administration, which will conduct a case-specific and factual inquiry into the question.⁵ Consistent with its formal guidance, in conversations with the Department, CCIIO has stated that it would defer to the DOL on the question of whether a specific PEO qualified as an employer.

Recently, CCIIO also made clear that any state law purporting to make a generalized determination on this issue would be preempted, stating in a guidance document that: "For purposes of Title XXVII of the PHS Act, including the market reforms, any state law that defines coverage sold to individuals and small groups through an association as large group coverage would be preempted by federal law."⁶

In keeping with the approach articulated by CCIIO, as of January 1, 2014, health carriers may write coverage treating an association or a PEO as the employer whenever federal law, as interpreted by the federal DOL, would allow it. The Department will defer to any determination made by the DOL as to whether the employer exists at the organization/association level or at the client company/member level.

⁴ Preamble to regulation defining "small group market." <http://www.gpo.gov/fdsys/pkg/FR-2011-09-06/pdf/2011-22663.pdf>.

⁵ Id.

⁶ Questions and Answers Related to the Health Insurance market Reforms, Question 8, Definition of Association Coverage, http://cciiio.cms.gov/resources/factsheets/qa_himr.html.