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Insurance Department**
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BULLETIN

Docket Number: INS NO 05-033-AB

TO: All Companies Licensed to Sell Health Insurance
FROM: Roger A. Seigny 
Insurance Commissioner
DATE: June 29, 2005
RE: Clarification of Employer Group Size

Purpose

The Department has been informed of confusion among small group carriers concerning the rules relative to how the number of employees should be counted for the purpose of determining whether the group is a small employer or a large employer group. This Bulletin addresses the method that the Department will require carriers to use for the following purposes: the determination of guaranteed issue rights; the determination of participation requirements; the right to obtain loss claim information; and the application of group size rating factors. It is important to note that the method by which employees are to be counted will vary depending on the specific purpose.

Since the Department last published guidance on these issues in its Bulletin of August 30, 1994, changes at both the state and federal level have affected the determination of small employers' and their employees' rights. At the federal level, the enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the issuance of related guidance promulgated by the Centers for Medicare and Medicaid Services (CMS) established federal rules for counting employees for the purpose of determining guaranteed issue rights. At the state level, amendments to RSA 420-G, including the enactment of SB 119 in 2001, SB 110 in 2003, and SB 125 in the 2005 session have impacted the previous guidance.

The Determination of Guaranteed Issue Rights

RSA 420-G:6, RSA 420G:8

Under federal law, small employer groups that have between 2 and 50 employees are guaranteed access to health insurance products. New Hampshire has expanded the federal definition to include groups of one in the small employer market. Under federal law, carriers that write health insurance in the small group market must make all of the products they sell to small employers available at all times to all small employer groups that have 2 to 50 employees. Under New Hampshire law, small employer groups having one employee, e.g. self-employed individuals, have limited guaranteed access to the small employer market. During two specified periods, March and September, carriers must make all of the products they sell to small employers available to self-employed individuals.

To determine whether a group is a small employer group entitled to some form of guaranteed issue, small group health carriers shall apply a two-step analysis.

The first step of the analysis is established under federal law and federal guidance. Under HIPAA a small employer group is defined as “an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year.” In a Program Memorandum 00-05, the federal Department of Health and Human Services stated that the “the term ‘employee’ has the meaning given such term under section 3(6) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).”¹ Under section 3(6) of ERISA the term ‘employee’ means any individual employed by an employer. The determining factor is not the number of hours worked, but whether an employment relationship exists. If any employment relationship is present, the employee must be counted for determining whether the group is a small group subject to guaranteed issue rights.

Accordingly, the first step of the analysis shall require a carrier to count *all* employees in accordance with the guidance promulgated by HIPAA. If, using this method, the number of employees is from 2 to 50, then the employer shall be considered a small employer and shall be afforded unlimited, guaranteed access to products being sold in the small employer group health insurance market. If the number of employees under this test is 1, the small employer shall be considered a group of one and shall be entitled to limited guaranteed issue under RSA 420-G:8².

The carrier shall then apply the second step of the analysis to all groups determined to have over 50 employees under the first step. RSA 420-G, XVI (a) defines the term “small employer” as a “business or organization which employed on average, one and up to 50 employees, including owners and self-employed persons, on business days during the previous calendar year.” To effectuate the purpose of the statute of providing guaranteed issue rights to employer groups that are not credible for rating purposes, carriers are required to apply the second step of the two-step

¹ See section 2791(d)(5) (42 U.S.C. § 300gg-91(d)(5)), and the regulation at 45 CFR § 144.103.

² However, even in this case, the self employed individuals would have to be eligible. E.g. work more than 15 hours per week.

analysis to groups determined to have over 50 employees under the first step. In this step a different test is used for determining group size. Under this test, the term “employee” shall include only those employees who have the right to participate in the employer’s group plan, i.e. eligible employees. If, using this method, the number of employees is determined to be 50 or fewer, the carrier shall treat the employer as a small employer group and shall provide the group with unlimited, guaranteed access to all products sold in the small employer group market.

In all cases, only those employees who meet the eligibility requirements established by the employer for coverage are entitled to purchase coverage. In no event shall a carrier be required to guarantee issue coverage to an employee who works fewer than 15 hours a week.

The Determination of Eligible Employees

The determination of eligible employee is largely left to the employer, which is subject to labor rules regarding nondiscrimination and tax rules regarding qualified plans. However, in New Hampshire, no insurer need accept or issue coverage to any employee deemed eligible by the employer who works less than 15 hours per week pursuant to RSA 415:18 I.(q).

The Determination of Participation Rights

RSA 420-G:9

Although an employer group may have the right to guaranteed issue, a carrier is not required to sell insurance to that group unless a certain percentage of the employees participate in the employer’s plan. The participation rule considers the ratio of the number of enrolled employees to the number of eligible employees, modified in accordance with the statute, RSA 420-G:9. To determine which employees should be counted for the purpose of applying the participation rule, the carrier shall consider only those employees who are eligible to participate in the employer’s plan. The number of eligible employees, for the purpose of applying the participation rule, shall not include those employees who are eligible for coverage, but are covered as a dependent on another person’s coverage. A carrier may apply the rule on a plan-by- plan basis. The ratio shall be compared to the statutory standard; 75% if the plan is the only option offered to the group’s employees and 37.5% if more than one plan is offered.

The Application of the Group-Size Rating Factor

Carriers may apply a rating factor reflective of group size. This factor reflects the varying costs that a carrier may incur when it does business with different size groups. In determining a group’s size for the purpose of applying the group-size rating factor, carriers shall use the number of enrolled employees in the group.

The Right to Obtain Health Plan Loss Information

RSA 420-G:12-a

By statute all large employers are entitled to receive their specific health plan loss information. Under this statute, the two-step test described previously should be used to determine whether an employer is a small employer. An employer that has any guaranteed issue rights as a small employer as delineated above shall be deemed a small employer. All other employers shall be deemed large employers. Only large employers are entitled to loss information under RSA 420-G:12-a.

Questions regarding this bulletin should be directed to david.sky@ins.nh.gov.