Subchapter A. Definitions, Severability, and Small Employer Health Regulations
28 TAC §26.5

Subchapter C. Large Employer Health Insurance Regulations
28 TAC §26.301

INTRODUCTION. The commissioner of insurance adopts amendments to 28 TAC §26.5 and §26.301, concerning employer-related health benefit plan regulations. The amendments clarify that the requirements and mandates of Senate Bill 1264, 86th Legislature, 2019, including Insurance Code Chapter 1467, apply to certificates of insurance (COIs) issued to certain Texas residents. The amendments are adopted without changes to the proposed text published in the December 23, 2022, issue of the *Texas Register* (47 TexReg 8479). A notice of hearing was published in the January 27, 2023, issue of the *Texas Register* (48 TexReg 435), and the hearing was held on February 10, 2023.

REASONED JUSTIFICATION. The amendments to §26.5(g) and §26.301(j) clarify that SB 1264, including Insurance Code Chapter 1467, applies to carriers that:

- are licensed and doing business in Texas,
- issue group accident or health plans to an out-of-state employer, and
- deliver COIs to Texas-resident employees of the out-of-state employer.

The express listing of SB 1264 in §26.5(g) and §26.301(j) does not limit the applicability of other laws and mandates to carriers licensed in this state that issue COIs covering Texas residents.

The Texas Department of Insurance (TDI) has historically applied Texas insurance laws and mandates to COIs issued to Texas-resident employees under a group accident or health plan that is issued to the employee's out-of-state employer by an insurer licensed and doing business in Texas. *See* the adoption order for §26.5 and §26.301 at 42 TexReg 2545 (stating in response to a comment that the language adopted in §26.5(g) and §26.301(j) "is not a change and reflects how TDI has consistently applied the statutory and regulatory requirements"). TDI has, however, received questions from stakeholders about whether the requirements of SB 1264 apply to these COIs.

SB 1264 amended the Insurance Code to establish consumer protections against balance billing by certain out-of-network providers. The bill (1) prohibits those providers from billing health benefit plan enrollees for certain covered health care services or supplies in an amount greater than an applicable copayment, coinsurance, or deductible under the plan; (2) provides for the right of those providers to receive payment for those services or supplies at the usual and customary rate or at an agreed rate; and (3) establishes requirements for the inclusion of a balance billing prohibition notice in an explanation of benefits. *See, e.g.*, Insurance Code §§1271.008, 1271.157, 1301.010, and 1301.164. The bill also establishes procedures for out-of-network claim dispute resolution through arbitration or mediation, depending on the type of provider at issue. *See id.*; Insurance Code Chapter 1467.

The amendments also implement Insurance Code Article 21.42, which provides, "Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to

insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same." *See Howell v. Am. Live Stock Ins. Co.*, 483 F.2d 1354, 1360 n.4 (5th Cir. 1973) (stating in the context of group policies, "the fact that the insurer does any business in Texas is sufficient to require that Texas law apply to any contract between it and a Texas resident, regardless of the intention or expectation of the parties"); *General Am. Life Ins. Co. v. Rodriguez*, 641 S.W.2d 264, 266-67 (Tex. App.--Houston [14th Dist.] 1982, no writ) (holding Insurance Code Article 21.42 applies where group life policy issued to out-of-state employer covered employee residing in Texas).

In addition, an amendment to §26.5 revises a reference to a code chapter for consistency with agency style.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: TDI received written comments from four commenters. One of the commenters also spoke at a public hearing on the proposal held on February 10, 2023. Commenters in support of the proposal were Texas Medical Association and Texas Society of Anesthesiologists. Commenters against the proposal were Texas Association of Health Plans and Texas Association of Life and Health Insurers.

General comments

Comment. Two commenters state that they support the proposed rules, and that the proposed rule amendments provide needed guidance and clarification. They state that

the amendments clarify that employer-sponsored fully insured health plans providing benefits to Texas residents are subject to the Insurance Code's and TDI's independent dispute resolution (IDR) processes, even if the employer is not based in Texas.

Agency Response. TDI appreciates the support.

Comments on statutory authority and rulemaking

Comment. Two commenters state that TDI is impermissibly applying Insurance Code Article 21.42 to "give it extraterritorial effect."

One commenter contends that the *Wann* rule should not be applied broadly to cover out-of-state plans and that TDI should wait until courts clarify its applicability. *See Metropolitan Life Ins. Co. v. Wann*, 109 S.W.2d 470 (Tex. 1937). The commenter urges that in the meantime, when a policy covers risks in several jurisdictions, the places of contracting, negotiation, domicile, and business should determine which law applies, and neither the location of the insured risk nor location of the payment should be of any consequence.

The other commenter maintains that TDI is erroneously interpreting *Howell* and should not rely on the *Howell* court's dictum in footnote 4 regarding the *Wann* rule. *Howell*, 483 F.2d at 1360 n.4 ("The difficulty *Wann*, *Zorn*, and *Schroder* present is that they seem to assume a theory of article 21.42 that is basically contradictory to the theory implicit in the *Austin Building Co.* case, which we regard as controlling. *Austin Building Co.* interprets article 21.42 to mean that Texas law applies only when the insurance company has made the contract in question within the same course of 'business done in Texas' which satisfies the statutory condition of its 'doing business in Texas.' *Wann* and its

progeny, on the other hand, permit a kind of 'bootstrapping,' whereby the fact that the insurer does *any* business in Texas is sufficient to require that Texas law apply to any contract between it and a Texas resident, regardless of the intention or expectation of the parties."). The commenter states that TDI's explanation does not comply with the reasoning used in the case, and the commenter also states that the proposed rule does not allow for the inquiry and determination of whether a particular group contract was negotiated, issued, or delivered as part of the insurer's business in Texas. The commenter states that such an inquiry is necessary before Insurance Code Article 21.42 can be applied. The commenter also states that the cases cited in the proposal should not be given more weight than the holdings in *Austin Building Co.*, 432 S.W.2d 697 (Tex. 1968) or *Great Am. Ins. Co. v. North Austin Utility*, 908 S.W.2d 415 (Tex. 1995).

Agency Response. TDI declines to make a change. The issue of extraterritorial effect focuses on whether the interpretation of Insurance Code Article 21.42 results in regulation of business outside of Texas. TDI's proposal does not result in extraterritorial effect because the proposed rules apply SB 1264 to an insurer that is licensed in Texas, doing business in Texas, and providing insurance services and payments to Texas residents. Under the commenters' interpretation, TDI would be unable to regulate insurance services provided to Texas residents and thus unable to fulfill its mission to protect and ensure the fair treatment of consumers of insurance services in Texas.

As the *Howell* court recognized, the *Wann* rule applies to group insurance policies and has been the law in Texas since 1937, and TDI declines to discount the rule. *Howell*, 483 F.2d at 1360 n.4 (interpreting *Wann*, 109 S.W.2d at 472 and its progeny, "This 'bootstrapping' logic is, of course, consistent with the literal language of the statute. This

tension between *Wann and Austin Building Co*. does not appear ever to have been confronted by the Texas courts. The Texas Supreme Court decided *Austin Building Co.* in 1968, after the *Wann* rule had existed for over thirty years, without mentioning *Wann*. The *Wann* rule represents an exceptional rule designed only for the special case of group insurance contracts. The efforts of the Texas courts to apply article 21.42 to group insurance contracts have a very peculiar history, and the *Wann* rule can be understood only in light of that history. [...] *Wann* and *Austin Building Co*. continue to coexist, however uneasily, and *Austin Building Co.* governs cases outside the context of group insurance policies."). As Texas courts have held, the *Wann* rule can apply to group policies contracted by entities outside of Texas. *See Int'l Bhd. of Boilermakers, Iron Shipbuilders & Helpers of Am. v. Huval*, 166 S.W.2d 107 (Tex. 1942) ("Very clearly, the contract [for disability and death benefits] entered into by the Insurance Company [with the association] was a contract of insurance payable to the [members of the association].").

TDI also declines to disregard the *Howell* court's comments about the *Wann* rule; Texas courts have acknowledged that a higher court's dicta can be binding authority. *See, e.g., Kuykendall v. State*, 335 S.W.3d 429, 433 (Tex. App.--Beaumont 2011, pet. ref'd) ("A higher court's statements of law that are not pivotal to that Court's decision may still be considered binding on lower courts."). As the commenter acknowledges, the *Howell* reasoning was specific to the circumstances of the case and did not involve group policies.

Facts that arise from situations like *Austin Building Co.* are distinguishable because they involve covered losses occurring outside of Texas. Further, the *Austin Building Co.* court did not overturn the *Wann* rule, nor did it limit the rule's applicability to group insurance policies. The 5th Circuit's analysis has not been called into question in any

subsequent case, and TDI is not aware of any subsequent case that took a different approach to group plans.

Comment. A commenter states that the proposed rule completely disregards agreements made between the issuer and the employer, that Insurance Code Article 21.42 is most properly understood as a choice of law provision, and that Texas courts such as the *Reddy Ice* court have acknowledged that an express choice of law provision in an insurance contract is controlling and only in the absence of such a provision should the court look to statute. *See Reddy Ice Corp. v. Travelers Lloyds Ins. Co.*, 145 S.W.3d 337 (Tex. App.--Houston [14th] 2004, pet. denied).

The commenter cites Texas courts' reliance on the Restatement (Second) of Conflict of Laws §187 and contends that the parties' agreement should control unless the selected state has no substantial relationship or applying the selected state's law would be contrary to the interest of another state with greater interest. The commenter further contends that TDI is attempting to longarm its way into contracts when the parties have chosen the laws of another state to control and that TDI does not have the authority to circumvent non-Texas laws.

Agency Response. TDI declines to withdraw or amend the rule. Insurance Code Article 21.42 mandates the application of Texas law to certain out-of-state insurance contracts. *See* Restatement (Second) of Conflict of Laws §6 ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.").

Assuming that Insurance Code Article 21.42 is applicable, the inquiry is whether it would control over a contractual choice-of-law provision to the contrary. Contrary to the commenter's contention, the answer to that question is not clear-cut, and there appears

to be a divergence of opinions on the issue. As the commenter notes, at least one court has indicated that when a contract contains a choice-of-law provision, that provision controls over Insurance Code Article 21.42. *Reddy*, 145 S.W.3d at 340 ("In Texas, when . . . a contract does not contain an express choice-of-law provision, a court must determine whether a relevant statute directs the court to apply the laws of a particular state."). However, in multiple other instances, courts have held that if Insurance Code Article 21.42 is applicable, Texas law will govern despite a contractual choice of law provision to the contrary. *See Prashant P. v. Liberty Life Assurance Co. of Boston*, 2017 WL 10109450 (S.D. Tex. 2017); *Preferred Contractors Ins. Co. Risk Retention Grp., LLC v. Oyoque Masonry, Inc.*, 2013 WL 3899332 (S.D. Tex. 2013); *In re ATP Oil & Gas Corp.*, 531 B.R. 694, 701 (Bankr. S.D. Tex. 2015).

Furthermore, as the commenter notes, a contractual choice-of-law provision may be set aside if "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence" of the contractual provision. *See* Restatement (Second) of Conflict of Laws §187(2)(b).

The rule applies to policies where the ultimate beneficiaries--the employees--reside. Texas has a material interest in seeing that Texas residents are protected by its laws even if they happen to work for employers that are based outside the state. *See, e.g.,* Tex. Ins. Code §31.002(2) (TDI shall "protect and ensure the fair treatment of consumers."). Texas's strong consumer protection policy is codified in TDI's statutory mandate to protect consumers and supports TDI's position that contractual choice-of-law provisions

in insurance contracts can be set aside, and Texas law should apply to the COIs issued to Texas consumers.

Comment. Two commenters state that the rule circumvents the specific applicability language of Insurance Code Chapter 1467, specifically Insurance Code §1467.002. The commenters state that since Insurance Code Chapter 1467 applies to plans operating under Insurance Code Chapter 843 or offered under Insurance Code Chapter 1301, and Insurance Code Chapters 843 and 1301 apply only to insurers authorized to offer coverage issued in Texas, then the proposed amendments to Insurance Code Chapter 1467 should not apply to out-of-state plans. One commenter cites Government Code §311.026, which requires that if a general provision conflicts with a special provision, the special provision prevails over the general.

Agency Response. TDI declines to make a change. TDI disagrees that the provisions of Insurance Code Chapter 1467 conflict with Insurance Code Article 21.42 or that Insurance Code Chapter 1467 cannot apply to out-of-state plans.

There is no express blanket exemption of out-of-state plans in Insurance Code Chapters 843, 1301, and 1467. Section 843.003 allows certain entities to organize and operate a health maintenance organization (HMO) and Insurance Code §843.101 provides that an HMO may provide or arrange for care. Under Insurance Code §1301.001, Insurance Code Chapter 1301 applies to insurers that issue, deliver, or issue for delivery policies in Texas. Neither chapter expressly exempts out-of-state plans.

Insurance Code §1467.002(2) applies IDR requirements, in part, to preferred provider benefit (PPO) plans "offered by an insurer under Chapter 1301." Insurance Code

§1301.001(9) defines a PPO plan by referencing a "health insurance policy," which in turn is defined in Insurance Code §1301.001(2) to include a group "policy, certificate, or contract." And an "insurer" under Insurance Code Chapter 1301 means an insurance company "operating under Chapter 841, 842, 884, 885, *982*, or 1501, that is authorized to issue, deliver, or issue for delivery in this state health insurance policies" (emphasis added). That includes foreign insurers licensed in Texas.

Also, it is not TDI's position that all out-of-state HMOs or PPOs must comply with the rule. Rather, in accordance with Insurance Code Article 21.42, the rule applies if the insurance company is licensed in Texas, does business in Texas, and delivers COIs to Texas residents. The applicability language of Insurance Code Chapters 843 and 1301 does not conflict with this approach, and, therefore, conflict-of-law canons are not pertinent.

The Legislature in other instances has exempted COIs issued under out-of-state group plans from Texas mandates; that is not the case here. *See* Insurance Code §1651.002(a) (chapter governing long-term care benefit plans does not apply to "a certificate that is delivered or issued for delivery in this state under a single employer or labor union group policy that is delivered or issued for delivery outside this state.").

Comment. One commenter states that SB 1264 does not specifically allow rulemaking to apply to out-of-state policies and that none of the statutes cited in TDI's proposal (Insurance Code Article 21.42 and Insurance Code §§843.151, 1301.007, 1467.003, 1501.010, and 36.001) provide rulemaking authority to adopt the proposed rules or refer to certificates for policies issued and delivered outside of Texas. The commenter states

that this lack of specific legislative authority raises serious questions about the validity of the proposed changes.

Agency Response. TDI declines to make a change. TDI acknowledges that the statutory authority cited, other than Insurance Code Article 21.42, is generally silent on out-of-state group contracts with certificates issued in Texas. However, TDI disagrees that this significantly undermines the statutory authority for the rule. Insurance Code Article 21.42 is the key statutory authority, and TDI agrees that if Insurance Code Article 21.42 were to be limited in the future by the courts or legislation, then such limitation would affect the sufficiency of statutory authority for the TDI rules as proposed and adopted. However, under the current interpretation of Insurance Code Article 21.42--which is consistent with TDI's proposal--the statutory authority cited, although mainly general in nature, is sufficient to propose and adopt these rules. In addition, Insurance Code §36.001 states that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under this code and other laws of this state.

Comment. One commenter states that the rule constitutes regulation of the business of insurance outside of the state of Texas, which is not within TDI's regulatory purview. The commenter states that Insurance Code §101.053 defines the business of insurance to exclude transactions involving group policies issued or delivered outside of Texas and to exclude certificates.

The commenter also states that because Insurance Code §1251.451(a) expressly lists specific chapters of the Insurance Code that apply to COIs issued to Texas residents

under a policy delivered outside of Texas, that demonstrates legislative intent to exclude all other Insurance Code provisions, including Insurance Code Chapter 1467.

Agency Response. TDI declines to make a change. Regarding the citation to Insurance Code §101.053, the Texas Supreme Court has noted that the definition is limited to Insurance Code Chapter 101 and does not determine the applicability of other provisions of the Insurance Code. *See Tex. Dep't of Ins. v. Am. Nat'l Ins. Co.*, 410 S.W.3d 843, 849-50 (Tex. 2012); *Great Am. Ins. Co. v. North Austin Utility*, 908 S.W.2d 415, 423 (Tex. 1995).

Regarding Insurance Code §1251.451(a), the stated purpose of the predecessor statute was to ensure that COIs issued under out-of-state plans by foreign insurers not licensed in Texas complied with various provisions of Texas law that the bill authors assumed applied to COIs issued by foreign insurers licensed in Texas. The legislative history of Insurance Code §1251.451(a) does not indicate any clear intent to narrow the list of applicable laws, and predates Insurance Code Chapter 1467.

Comment. One commenter disagrees with TDI's assertion that the proposed amendments to the rule are consistent with TDI's historical practice. The commenter states that from the inception of the surprise billing requirements in 2009, up through the current law, all claims for mediation under Insurance Code Chapter 1467 for plans issued out of state were rejected on the basis that the claim was ineligible. The comment indicates that the subsequently amended "mark ineligible" checkbox was included on the IDR platform as part of the rollout after passage of SB 1264 and then subsequently removed in July 2020. The commenter also states that this significant change in policy should have been made through Administrative Procedure Act rulemaking. Another

commenter states that Insurance Code Article 21.42 has been the subject of litigation on its extraterritorial application dating back nearly 100 years and that the statute has not always been construed consistently by either TDI or courts.

Agency Response. TDI acknowledges that Insurance Code Article 21.42 and the issues of extraterritorial application have been litigated several times in the past. The current position is consistent with court decisions and legislative guidance. TDI did not modify its interpretation of how Insurance Code Article 21.42 should be applied to Insurance Code Chapter 1467.

To the extent that the portal checkbox provided incorrect instructions, TDI changed the portal so that claims could not be marked as ineligible on the basis that the plan was issued outside of Texas. The checkbox, for the brief time it appeared on the portal, conflated out-of-state group contracts without Texas resident certificates with group contracts that, when viewed properly through Insurance Code Article 21.42, the state could regulate. Notably, marking the checkbox did not automatically mark the claim as ineligible. It indicated only that the contract required manual examination by TDI staff and possible follow-up with the parties. To the best of TDI's knowledge, no claims marked as "ineligible" and not processed further were actually eligible for IDR under Chapter 1467.

TDI disagrees that rulemaking was necessary to correct the portal checkbox error described above. However, to the extent that any inadvertent rulemaking process errors occurred, this rulemaking corrects them. TDI appreciates the input from all stakeholders, and this rulemaking is made consistent with the procedure and intent of the Administrative Procedures Act.

TDI's position is consistent with the *Wann* rule. The *Wann* rule dates to 1937, and the *Austin Building* decision did not extinguish *Wann*'s interpretation of Insurance Code Article 21.42. The 1973 *Howell* case acknowledges the continued existence of the *Wann* application of Insurance Code Article 21.42, which TDI continues to recognize and apply. Absent administrative rulemaking that would overturn this long-standing position, or other legal decisions such as an Attorney General opinion or court ruling, TDI is obligated to maintain its long-standing position.

Comments regarding implementation concerns

Comment. One commenter states that the proposed rule would create confusion and be difficult to implement because of conflicts between SB 1264 and the No Surprises Act and/or other states' regulations. The commenter notes that some states, including Arkansas, have their own balance billing protections. The commenter also notes that the proposed framework could require some insurers to provide coverage and cost sharing to Texas residents compliant with Texas regulations, while other insurers might be subject to another state's regulations under the No Surprises Act. The commenter states that plans would be required to comply with different notice and consent requirements, resolution processes, and appeals procedures, and that insurers will have other difficulties such as providing required notations on enrollee identification cards. The commenter claims that the rule does not provide any additional protections since the federal No Surprises Act already provides balance billing protections and an IDR pathway. Another commenter poses questions relating to implementation of the rule, including compliance with out-of-network billing limits, COI disclosure requirements, reimbursement rates, and

notice requirements in SB 1264 that may conflict with other states' regulations or the No Surprises Act.

Agency Response. TDI acknowledges that the patchwork of state and federal balance billing protections can pose practical challenges. However, this is true even if Texas does not require SB 1264 protections to apply where the state has jurisdiction. Health benefit plans doing business in multiple states will face regulatory complexity no matter what position TDI takes. Health benefit plans already need to potentially comply with their home state's regulations, the federal No Surprises Act for ERISA or other situations falling outside state regulations, and regulations in any other jurisdictions that may apply. Similarly, providers are faced with a multitude of relevant regulatory regimes. However, applying SB 1264 as described in this rule has the benefit of including Texas providers and Texas resident insureds under the protection of regulations passed by the Texas Legislature and TDI.

TDI's position, consistent with the *Wann* rule, protects Texas insureds and enrollees where the health plan is licensed to do business in this state. The health plans, by virtue of being licensed in this state, have already voluntarily consented to the authority and jurisdiction of state law. The amendments adopted here, like the *Wann* rule, are designed only for the special case of group insurance contracts. TDI has a duty to ensure that the insurance laws are executed, and to protect and ensure the fair treatment of consumers. *See* Tex. Ins. Code §31.002.

TDI acknowledges that the federal regulations may apply where a covered state law is not applicable. However, here a state law is applicable. There are some differences between the Texas and federal IDR procedures. The Texas law--SB 1264 and later

amendments--represents the Texas Legislature's vision for how balance billing disputes ought to be handled in this state. The rule clarifies how the legislation is applied in Texas. In addition, federal rules implementing the No Surprises Act have multiple lawsuits pending, and until those suits or additional rulemaking are concluded, parties may lack a federal alternative. Even where federal regulations could apply, Texas law reflects the measured policy decisions the Legislature has decided ought to apply to situations within the state's jurisdiction.

Commenter recommendations

Comment. Two commenters suggest that TDI withdraw the proposal. One commenter asks TDI to instead alter the portal to reflect the commenter's view of SB 1264's applicability and provide a clarifying statement so that plans and consumers understand the applicability of the IDR process.

The other commenter asks TDI to instead consider amending §26.5 and §26.301 to delete the requirement that mandates apply on all out-of-state group health policies. This commenter also requests that TDI consider adopting other rules that clarify how it will apply Insurance Code Article 21.42 to be consistent with constitutional requirements imposing limitations on its extraterritorial application, including the application of Texas laws to certificates for group accident and health policies issued outside of Texas. The commenter requests that if the proposed rule is not withdrawn, TDI include in its Reasoned Justification section the reasons why it disagrees with the legal issues raised in these comments and provide answers to the specific questions submitted as part of these comments.

Agency Response. TDI declines to withdraw the proposal. TDI has a different view as to the scope and application of Texas state law than the commenters. TDI has addressed its long-standing and present view of the legal issues raised by commenters. Unless and until the Legislature, courts, or TDI through future APA rulemaking provides otherwise, TDI's position on IDR is as provided in this rule adoption.

Subchapter A. Definitions, Severability, and Small Employer Health Regulations 28 TAC §26.5

STATUTORY AUTHORITY. The commissioner adopts amendments to §26.5 under Insurance Code Article 21.42 and §§843.151, 1301.007, 1467.003, 1501.010, and 36.001.

Insurance Code Article 21.42 provides that any insurance payable to any citizen or inhabitant of this state by a company doing business within this state is held to be a contract made and entered into and governed by Texas insurance law despite execution of the contract or payment of the premiums outside of this state.

Insurance Code §843.151 authorizes the commissioner to adopt rules as necessary and proper to implement laws applicable to HMOs, including Insurance Code Chapters 843 and 1271.

Insurance Code §1301.007 authorizes the commissioner to adopt rules as necessary to implement Insurance Code Chapter 1301 and ensure reasonable accessibility and availability of preferred provider services to residents of Texas.

Insurance Code §1467.003 requires the commissioner to adopt rules as necessary to implement the commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §1501.010 authorizes the commissioner to adopt rules necessary to implement Insurance Code Chapter 1501.

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.

TEXT.

§26.5. Applicability and Scope.

(a) Insurance Code Chapter 1501, concerning Health Insurance Portability and Availability Act, and this subchapter regulate all health benefit plans sold to small employers, whether sold directly or through associations or other groupings of small employers.

(b) Except as otherwise provided, this subchapter applies to any health benefit plan providing health care benefits covering two or more employees of a small employer, whether provided on a group or individual franchise insurance policy basis, regardless of whether the policy was issued in this state, if the plan meets one of the following conditions:

(1) a portion of the premium or benefits is paid by a small 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 small employer; or

(4) the health benefit plan is an employee welfare benefit plan under 29 C.F.R. §2510.3-1(j) (concerning Employee Welfare Benefit Plan).

(c) For an employer that was not in existence the previous calendar year, the determination of whether the employer is a small employer 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.

(d) The provisions of Insurance Code Chapter 1501 and this subchapter apply to a health benefit plan provided to a small employer or to the employees of a small employer without regard to whether the health benefit plan is offered under or provided through a group policy or trust arrangement of any size sponsored by an association or discretionary group.

(e) If a small employer or the employees of a small employer are issued a health benefit plan under the provisions of Insurance Code Chapter 1501 and this subchapter, and the small employer, due to an increase or decrease in the number of employees, ceases to meet the definition of a small employer, the provisions of Insurance Code Chapter 1501 and this subchapter continue to apply to that particular health plan, subject to the provisions of §26.15 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 no longer meets the definition of small employer, but not later than the first renewal date occurring after the small employer has ceased to be a small employer, notify the employer of its change in status. The carrier must also notify the employer that the protections provided to small employers under Insurance Code Chapter 1501, and this subchapter will cease to apply to the employer if the employer

fails to renew its current health benefit plan; fails to comply with the contribution, minimum group size, or minimum participation requirements of this subchapter; or elects to enroll in a different health benefit plan. The notice requirement of this subsection does not apply to a health carrier electing to issue coverage to a group consisting of one employee.

(f) If a small employer has employees in more than one state, the provisions of Insurance Code Chapter 1501 and this subchapter applicable to small employer plans, including provisions regarding marketing and rates, apply to a health benefit plan issued to the small employer if:

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

(2) the primary business location is in this state on the issue date or renewal date and no state contains a majority of the employees.

(g) 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 Senate Bill 1264, 86th Legislature, 2019, and other mandated benefits, regardless of whether the group policy underlying the certificate was issued outside the state.

(h) A small 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) This chapter is applicable to an insurance policy, evidence of coverage, contract, or other document that is delivered, issued for delivery, or renewed on or after September

1, 2017. An insurance policy, evidence of coverage, contract, or other document that is delivered, issued for delivery, or renewed prior to September 1, 2017, is subject to the rules in effect at the time the insurance policy, evidence of coverage, contract, or other document was delivered, issued for delivery, or renewed.

Subchapter C. Large Employer Health Insurance Regulations
28 TAC §26.301

STATUTORY AUTHORITY. The commissioner adopts amendments to §21.301 under Insurance Code Article 21.42 and §§843.151, 1301.007, 1467.003, 1501.010, and 36.001.

Insurance Code Article 21.42 provides that any insurance payable to any citizen or inhabitant of this state by a company doing business within this state is held to be a contract made and entered into and governed by Texas insurance law despite execution of the contract or payment of the premiums outside of this state.

Insurance Code §843.151 authorizes the commissioner to adopt rules as necessary and proper to implement laws applicable to HMOs, including Insurance Code Chapters 843 and 1271.

Insurance Code §1301.007 authorizes the commissioner to adopt rules as necessary to implement Insurance Code Chapter 1301 and ensure reasonable accessibility and availability of preferred provider services to residents of Texas.

Insurance Code §1467.003 requires the commissioner to adopt rules as necessary to implement the commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §1501.010 authorizes the commissioner to adopt rules necessary to implement Insurance Code Chapter 1501.

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.

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, concerning the Health Insurance Portability and Availability Act, 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.

(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.

(6) If TDI approves an association as a bona fide employer association, an issuer must treat the employer group or association as a single large employer, including for purposes of compliance with this chapter and Texas Insurance Code Chapter 1501.

(h) 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) 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) 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 Senate Bill 1264, 86th Legislature, 2019, and

other 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 adoption and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on June 22, 2023.

DocuSigned by:
Jessica Barta
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Jessica Barta, General Counsel
Texas Department of Insurance

The amendments to 28 TAC §26.5 and §26.301 are adopted.

DocuSigned by:
C Brown
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Cassie Brown
Commissioner of Insurance

Commissioner's Order No. 2023-8037