

**SUBCHAPTER A. SMALL EMPLOYER HEALTH INSURANCE
PORTABILITY AND AVAILABILITY ACT REGULATIONS
§26.7**

**SUBCHAPTER C. LARGE EMPLOYER HEALTH INSURANCE PORTABILITY
AND AVAILABILITY ACT REGULATION
§26.304**

1. INTRODUCTION. The Commissioner of Insurance (Commissioner) adopts amendments to §26.7 and §26.304, concerning small and large employer health insurance regulations. The amendments provide that an employee who is eligible for coverage under a large or small employer health benefit plan and who is the spouse of another employee covered under the plan may elect whether to be treated under the plan as an employee or the dependent of the other employee. The amendments are adopted without changes to the proposed text published in the September 17, 2010 issue of the *Texas Register* (35 TexReg 8473).

2. REASONED JUSTIFICATION. The amendments are necessary to: (1) provide flexibility for coverage options in situations where two married individuals eligible for coverage under a large or small employer health benefit plan are working for the same employer; and (2) implement provisions of House Bill (HB) 407, 79th Legislature, Regular Session, effective June 18, 2005, relating to coverage for school district employees where two married individuals eligible for coverage under a large or small employer health benefit plan are working for the same school district. HB 407 amended the Insurance Code Chapter 1501 to add §1501.0095, which provides that a school

district employee who is eligible for coverage under a large or small employer health benefit plan providing coverage to the school district's employees and who is the spouse of another school district employee covered under the plan may elect whether to be treated under the plan as an employee or the dependent of the other employee.

The amendments provide flexibility for coverage options for employees in situations where two married individuals eligible for coverage under a large or small employer health benefit plan are working for the same employer. Representatives of insurance agencies and benefits services firms provided information to the Department about the potential cost-reduction benefits of providing such flexibility for coverage options in situations where a family-coverage option for a particular employer group product or plan is more cost favorable than an employee-only plus employee-and-children coverage option. The amendments facilitate the opportunity for the married individuals eligible for coverage under the plan to choose between or among coverage options instead of being restricted to each being covered as an employee.

On April 15, 2010, the Department posted on its website, for informal comment, the draft rule text and cost note estimates. On April 29, 2010, the Department held a public meeting to receive oral informal comments on the draft rule text and the note of estimated costs.

The statement of estimated costs was further considered as a result of comments received during the informal posting. As indicated in the Public Benefit/Cost Note portion of the published proposal, however, the Department did not receive information adding to or conflicting with its cost estimates.

Moreover, comments on the proposed text of the rule received during the informal posting or at the public meeting resulted in a clarifying addition to the text as informally posted, to provide that an election by a spouse to be treated as a dependent under the proposed amended rule does not impact the individual's status as an eligible employee for any other purpose under the Insurance Code Chapter 1501, except that such individual may be treated as a dependent for purposes of employer premium contributions.

The proposed amendments were formally published in the September 17, 2010 issue of the *Texas Register* (35 TexReg 8473). The Department did not receive any comments or requests for public hearing on the published proposal.

3. HOW THE SECTIONS WILL FUNCTION. The amendments provide that an employee eligible for coverage under a large or small employer health benefit plan and who is the spouse of another employee covered under the plan shall be given an opportunity to elect whether to be treated as an employee or as the dependent of the other employee.

The amendments to §26.7 set forth that a small employer carrier must provide married eligible employees of the same employer the option to elect to have one spouse be treated under a small employer health benefit plan as an employee or alternatively as the dependent of the other employee. The amendments also provide that an election by a spouse to be treated as a dependent under the amended rule does not impact the individual's status as an eligible employee for any other purpose under the

Insurance Code Chapter 1501, except that such individual may be treated as a dependent for purposes of employer premium contributions.

The amendments to §26.304 set forth that a large employer carrier must provide married eligible employees of the same employer the option to elect to have one spouse be treated under a large employer health benefit plan as an employee or alternatively as the dependent of the other employee. The amendments also provide that an election by a spouse to be treated as a dependent under the amended rule does not impact the individual's status as an eligible employee for any other purpose under the Insurance Code Chapter 1501, except that such individual may be treated as a dependent for purposes of employer premium contributions.

The amendments apply to large or small employer health benefit plans for plan years beginning on or after the effective date of the amendments as adopted.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE. The Department did not receive any comments on the published proposal.

5. STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code Chapter 1501 and §36.001. Chapter 1501 implements provisions regarding small and large employers which were necessary to comply with the federal requirements contained in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). Section 1501.010 requires the Commissioner to adopt rules necessary to implement the Chapter 1501, and to meet the minimum requirements of federal law,

including regulations, which for small and large employer health carriers are contained in HIPAA and in regulations adopted by federal agencies to implement HIPAA. Section 1501.0095 requires the Commissioner to adopt rules to govern the manner in which an election under the section must be made. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

6. TEXT.

SUBCHAPTER A. SMALL EMPLOYER HEALTH INSURANCE PORTABILITY AND AVAILABILITY ACT REGULATIONS

§26.7. Requirement to Insure Entire Groups.

(a) A small employer carrier that offers coverage to a small employer and its employees shall offer to provide coverage to each eligible employee and to each dependent of an eligible employee. Except as provided in subsection (b) of this section, the small employer carrier shall provide the same health benefit plan to each such employee and dependent.

(b) If elected by the small employer, a small employer carrier may offer the eligible employees of a small employer the option of choosing among one or more health benefit plans, provided that each eligible employee may choose any of the plans offered. Except as provided in the Insurance Code, Article 26.21 and Article 26.49 (with respect to an affiliation period or exclusions for pre-existing), the choice among benefit

plans may not be limited, restricted, or conditioned based upon the risk characteristics of the eligible employees or their dependents.

(c) A small employer carrier may require each small employer that applies for coverage, as part of the application process, to provide a complete list of employees, eligible employees and dependents of eligible employees as defined in Insurance Code Article 26.02. The small employer carrier may also require the small employer to provide reasonable and appropriate supporting documentation to verify the information required under this subsection, as well as to confirm the applicant's status as a small employer. The small employer carrier shall make a determination of eligibility within five business days of receipt of any requested documentation. A small employer carrier may not condition the issuance of coverage on an employer's production of a particular document, where the employer can otherwise provide the information required by this section. Similarly, if a particular document an employer produces does not reasonably evidence the employer's compliance with this subsection, the employer must produce other documentation to satisfy the requirements. Following are examples of the types of supporting documentation which a small employer carrier may request, as reasonable and appropriate, from an employer as needed to fulfill the purposes of this subsection:

- (1) a W-2 Summary Wage and Tax Form or other federal or state tax records;
- (2) a loan agreement;
- (3) an invoice;

(4) a business check;

(5) a sales tax license;

(6) articles of incorporation or other business entity filings with the Secretary of State;

(7) assumed name filings;

(8) professional licenses; and

(9) reports required by the Texas Workforce Commission.

(d) A small employer carrier shall not deny two individuals who are married the status of eligible employee solely on the basis that the two individuals are married. The small employer carrier shall provide a reasonable opportunity for the individuals to submit evidence as provided in subsection (c) of this section to establish each individual's status as an eligible employee.

(1) A small employer carrier shall provide married eligible employees of the same employer the option to elect to have one spouse be treated under a small employer health benefit plan as an employee, and the other spouse treated as an employee or alternatively as the dependent of the other employee.

(2) A child of either of the two individuals may only be covered under the same small employer health benefit plan as a dependent by one of the two individuals.

(3) An election by a spouse to be treated as a dependent pursuant to this subsection does not impact the individual's status as an eligible employee for any other purpose under the Insurance Code, Chapter 1501, except that such individual may be treated as a dependent for purposes of employer premium contributions.

(e) A small employer carrier shall secure a waiver with respect to each eligible employee and each dependent of such an eligible employee who declines an offer of coverage under a health benefit plan provided to a small employer. If a small employer elects to offer coverage through more than one small employer carrier, waivers are only required to be signed if the eligible individual is declining all small employer health benefit plans offered and the small employer carriers may enter into an agreement under which one small employer carrier will retain the waiver. Waivers shall be maintained by the small employer carrier for a period of six years. The waiver shall be signed by the eligible employee (on behalf of such employee or the dependent of such employee) and shall certify that the individual who declined coverage was informed of the availability of coverage under the health benefit plan. Receipt by the small employer carrier of a facsimile transmission of the waiver is permissible, provided that the transmission includes a representation from the small employer that the employer will maintain the original waiver on file for a period of six years from the date of the facsimile transmission. The waiver form shall:

- (1) require that the reason for declining coverage be stated on the form;
- (2) include a written warning of the penalties imposed on late enrollees;

and

- (3) include a statement that the eligible employee and dependents were not induced or pressured by the small employer, agent, or health carrier into declining coverage, but elected of their own accord to decline such coverage.

(f) A small employer carrier may not provide coverage to a small employer or the employees of such employer if the health carrier, or an agent for such health carrier, has knowledge that the small employer has induced or pressured an eligible employee (or dependent of an eligible employee) to decline coverage due to the individual's risk characteristics.

(g) An agent shall notify a small employer carrier, prior to submitting an application for coverage with the health carrier on behalf of a small employer or employee of a small employer, of any circumstances that would indicate that the small employer has induced or pressured an eligible employee (or dependent of an eligible employee) to decline coverage due to the individual's risk characteristics.

(h) New entrants in a health benefit plan issued to a small employer group shall be offered an opportunity to enroll in the health benefit plan currently held by such employer group or shall be offered an opportunity to enroll in the health benefit plan if the plan is provided through an individual franchise policy or more than one plan is available. If a small employer carrier has offered more than one health benefit plan to eligible employees of a small employer group pursuant to subsection (b) of this section, the new entrant shall be offered the same choice of health benefit plans as the other employees (members) in the group. A new entrant that does not exercise the opportunity to enroll in the health benefit plan within the period provided by the small employer carrier may be treated as a late enrollee by the health carrier, provided that the period provided to enroll in the health benefit plan complies with subsection (i) of this section.

(i) Periods provided for enrollment in and application for any health benefit plan provided to a small employer group shall comply with the following:

(1) the initial enrollment period shall extend at least 31 consecutive days after the date the new entrant begins employment or, if the waiting period exceeds 31 days, at least 31 consecutive days after the date the new entrant completes the waiting period for coverage;

(2) the new entrant shall be notified of his or her opportunity to enroll at least 31 days in advance of the last date enrollment is permitted;

(3) the new entrant's application for coverage shall be considered timely if he or she submits the application within the initial enrollment period. Submits, for purposes of this paragraph, means that the item(s) must be postmarked by the end of the specified time period. At the discretion of the small employer carrier, alternative methods of submission, such as facsimile transmission (fax), may be acceptable; and

(4) the small employer carrier shall provide an open enrollment period of at least 31 consecutive days on an annual basis.

(j) Any waiting period shall be established by the small employer and shall not exceed 90 days. A small employer carrier shall not apply a waiting period, elimination period, or other similar limitation of coverage (other than an exclusion for pre-existing medical conditions or impose an affiliation period consistent with the Insurance Code, Article 26.21 and Article 26.49), with respect to a new entrant, that is longer than the waiting period established by the small employer.

(k) New entrants in a health plan issued to a small employer group shall be accepted for coverage by the small employer carrier without any restrictions or limitations on coverage related to the risk characteristics of the employees or their dependents, except that a health carrier may exclude coverage for pre-existing medical conditions or impose an affiliation period, to the extent allowed under the Insurance Code, Article 26.21 and Article 26.49.

(l) A small employer carrier may assess a risk load to the premium rate associated with a new entrant, consistent with the requirements of the Insurance Code, Chapter 26, Subchapter D, and this chapter. The risk load shall be the same risk load charged to the small employer group immediately prior to acceptance of the new entrant into the group.

(m) In the case of an eligible employee (or dependent of an eligible employee) who was excluded from coverage, not eligible for coverage, or denied coverage by a small employer carrier, in the process of providing a health benefit plan to an eligible small employer (as defined in the Insurance Code, Chapter 26, and this chapter), the small employer carrier shall provide an opportunity for the eligible employee (or dependent(s) of such eligible employee) to enroll in the health benefit plan issued to the small employer or the employees of the small employer on the earlier of the first renewal date occurring on or after July 1, 1997, or the first open enrollment period occurring on or after July 1, 1997. The opportunity to enroll shall meet the following requirements.

(1) The opportunity to enroll under this subsection shall comply with subsection (i) of this section.

(2) Eligible employees and dependents of eligible employees who are provided an opportunity to enroll pursuant to this subsection shall be treated as new entrants. Premium rates related to such individuals shall be set in accordance with subsection (l) of this section.

(3) The terms of coverage offered to an individual described in this subsection may exclude coverage for preexisting medical conditions or impose an affiliation period only if the health benefit plan currently held by the small employer contains such an exclusion or an affiliation period.

(4) A small employer carrier shall provide written notice at least 45 days prior to the opportunity to enroll provided in this subsection or if less than 45 days are available, within five working days after determination that subsections (h) - (m) of this section apply to each small employer insured under a health benefit plan offered by such health carrier. A small employer carrier may provide the notice to the employer if the carrier has entered into an agreement with the employer to provide the notice to the employees. The notice shall clearly describe the rights granted under subsections (h) - (m) of this section to employees and dependents who were previously excluded from, not eligible for, or denied coverage and the process for enrollment of such individuals in the employer's health benefit plan.

(n) A small employer carrier may require an individual who requests enrollment under subsection (m) of this section to sign a statement indicating that such individual

sought coverage under the group contract or franchise policy (other than as a late enrollee) and that the coverage was not offered or provided to the individual.

SUBCHAPTER C. LARGE EMPLOYER HEALTH INSURANCE PORTABILITY AND AVAILABILITY ACT REGULATION

§26.304. Requirement to Insure Entire Groups.

(a) A large employer carrier that offers coverage to a large employer and its employees shall offer to provide coverage to each eligible employee who meets the large employer's participation criteria. If dependent coverage is offered to enrollees under a large employer health benefit plan, then a large employer carrier shall offer to provide coverage to each eligible dependent. Except as provided in subsection (b) of this section, the large employer carrier shall provide the same health benefit plan to each such employee and dependent.

(b) If elected by the large employer, a large employer carrier may offer the eligible employees of a large employer, who meet the participation criteria, the option of choosing among one or more health benefit plans, provided that each eligible employee who meets the participation criteria may choose any of the plans offered to the employee. Except as provided in the Insurance Code, Articles 26.83 and 26.90 (with respect to an affiliation period or exclusions for preexisting conditions), the choice among benefit plans may not be limited, restricted, or conditioned based upon the health status related factors of the eligible employees or their dependents, if applicable.

(c) A large employer carrier may require each large employer that applies for coverage, as part of the application process, to provide a complete list of employees, eligible employees, and if dependent coverage is offered to enrollees under a large employer health benefit plan, a complete list of dependents of eligible employees as defined in Insurance Code Article 26.02. The large employer carrier may also require the large employer to provide reasonable and appropriate supporting documentation to verify the information required under this subsection, as well as to confirm the applicant's status as a large employer. The large employer carrier shall make a determination of eligibility within five business days of receipt of any requested documentation. A large employer carrier may not condition the issuance of coverage on an employer's production of a particular document, where the employer can otherwise provide the information required by this section. Similarly, if a particular document an employer produces does not reasonably evidence the employer's compliance with this subsection, the employer must produce other documentation to satisfy the requirements. Following are examples of the types of supporting documentation which a large employer carrier may request, as reasonable and appropriate, from an employer as needed to fulfill the purposes of this subsection.

(1) a W-2 Summary Wage and Tax Form or other federal or state tax records;

(2) a loan agreement;

(3) an invoice;

(4) a business check;

(5) a sales tax license;

(6) articles of incorporation or other business entity filings with the Secretary of State;

(7) assumed name filings;

(8) professional licenses; and

(9) reports required by the Texas Workforce Commission.

(d) A large employer carrier shall not deny two individuals who are married the status of eligible employee solely on the basis that the two individuals are married. The large employer carrier shall provide a reasonable opportunity for the individuals to submit evidence as provided in subsection (c) of this section to establish each individual's status as an eligible employee.

(1) A large employer carrier shall provide married eligible employees of the same employer the option to elect to have one spouse be treated under a large employer health benefit plan as an employee, and the other spouse treated as an employee or alternatively as the dependent of the other employee.

(2) A child of either of the two individuals may only be covered under the same large employer health benefit plan as a dependent by one of the two individuals.

(3) An election by a spouse to be treated as a dependent pursuant to this subsection does not impact the individual's status as an eligible employee for any other purpose under the Insurance Code, Chapter 1501, except that such individual may be treated as a dependent for purposes of employer premium contributions.

(e) New entrants who meet the large employer's participation criteria in a health benefit plan issued to a large employer group shall be offered an opportunity to enroll in the health benefit plan currently held by such employer group or shall be offered an opportunity to enroll in the health benefit plan if the plan is provided through an individual franchise policy or more than one plan is available. If a large employer carrier has offered more than one health benefit plan to eligible employees of a large employer group pursuant to subsection (b) of this section, the new entrant shall be offered the same choice of health benefit plans as the other employees (members) in the group. A new entrant that does not exercise the opportunity to enroll in the health benefit plan within the period provided by the large employer carrier may be treated as a late enrollee by the health carrier, provided that the period provided to enroll in the health benefit plan complies with §26.305(a) of this title (relating to Enrollment).

(f) New entrants meeting the participation criteria in a health benefit plan issued to a large employer group shall be accepted for coverage by the large employer carrier without any restrictions or limitations on coverage related to the health status related factors of the employees or their dependents, if applicable, except that a health carrier may exclude coverage for pre-existing medical conditions or impose an affiliation period, to the extent allowed under Insurance Code, Articles 26.83 and 26.90.

(g) In the case of an eligible employee that meets the participation criteria (or dependent of an eligible employee, if applicable) who was excluded from coverage, not eligible for coverage, denied coverage by a large employer carrier, or in the process of providing a health benefit plan to an eligible large employer, the large employer carrier

shall provide an opportunity for the eligible employee that meets the participation criteria (or dependent(s) of such eligible employee) to enroll in the health benefit plan issued to the large employer or the employees of the large employer on the earlier of the first renewal date occurring on or after July 1, 1997, or the first open enrollment period occurring on or after July 1, 1997. The opportunity to enroll shall meet the following requirements:

(1) The opportunity to enroll under this subsection shall comply with §26.305(a) of this title.

(2) Eligible employees that meet the large employer's participation criteria and dependents of eligible employees who are provided an opportunity to enroll pursuant to this subsection shall be treated as new entrants.

(3) The terms of coverage offered to an individual described in this subsection may exclude coverage for preexisting conditions or impose an affiliation period only if the health benefit plan currently held by the large employer contains such an exclusion or an affiliation period.

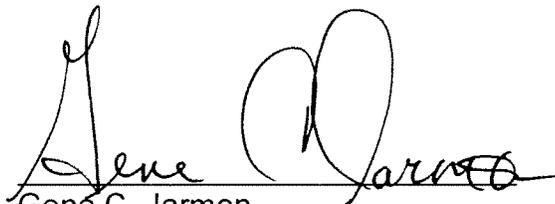
(4) A large employer carrier shall provide written notice at least 45 days prior to the opportunity to enroll provided in this subsection or if less than 45 days are available, within five working days after determination that subsections (e) - (g) of this section apply to each large employer insured under a health benefit plan offered by such health carrier. A large employer carrier may provide the notice to the employer if the carrier has entered into an agreement with the employer to provide the notice to the employees. The notice shall clearly describe the rights granted under subsections (e) -

(g) of this section to employees and dependents who were previously excluded from, not eligible for, or denied coverage and the process for enrollment of such individuals in the employer's health benefit plan.

(h) A large employer carrier may require an individual who requests enrollment under subsection (g) of this section to sign a statement indicating that such individual sought coverage under the group contract or franchise policy (other than as a late enrollee) and that the coverage was not offered or provided to the individual.

CERTIFICATION. This agency hereby certifies that the adopted amendments have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on November 12, 2010.


Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance

10-0991

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 26. Small Employer Health Insurance Regulations

Adopted Sections
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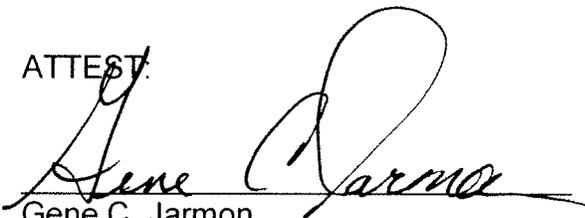
IT IS THEREFORE THE ORDER of the Commissioner of Insurance that amendments to §26.7 and §26.304 specified herein, concerning small and large employer health insurance regulations, are adopted.

AND IT IS SO ORDERED.



MIKE GEESLIN
COMMISSIONER OF INSURANCE

ATTEST:



Gene C. Jarmon
General Counsel and Chief Clerk

COMMISSIONER'S ORDER NO. **10-0991**
NOV 15 2010