

**SUBCHAPTER A. SMALL EMPLOYER HEALTH INSURANCE PORTABILITY AND  
AVAILABILITY ACT REGULATIONS  
28 TAC §26.8**

**1. INTRODUCTION.** The Commissioner of Insurance (Commissioner) adopts amendments to 28 TAC §26.8, concerning contribution and participation requirements for guaranteed issue small employer health benefit plans. The amendments are adopted with non-substantive changes to the proposed text published in the February 3, 2012, issue of the *Texas Register* (37 TexReg 474).

**2. REASONED JUSTIFICATION.** The amendments are necessary to reflect changes in the law as a result of Senate Bill (SB) 80, enacted by the 81st Legislature, Regular Session. Senate Bill 80 amends Insurance Code Chapter 1501 by adding §1501.153(a-1) to permit a small employer health benefit plan issuer (small employer carrier) to offer a small employer the option of a health benefit plan for which the employer is required to contribute 100 percent of the premium paid.

Insurance Code §1501.153(a-1) applies only to a small employer health benefit plan delivered, issued for delivery, or renewed on or after January 1, 2010. Senate Bill 80, §2, provides that a small employer health benefit plan delivered, issued for delivery, or renewed before January 1, 2010, is governed by the law as it existed immediately before the effective date of SB 80. The previous law is continued in effect for that purpose.

Prior to the enactment of SB 80, small employer carriers were already permitted to require an employer contribution based on the small employer carrier's usual and customary practices applicable to its employer group health benefit plans in this state. However, Insurance Code §1501.153(a) requires small employer carriers to apply the employer contribution level requirement uniformly to each small employer offered or issued coverage by the small employer carrier in this state.

New Insurance Code §1501.153(a-1) provides another option for small employer carriers by permitting a small employer carrier to offer a small employer the option of a health benefit plan for which the employer is required to contribute 100 percent of the premium paid. Insurance Code §1501.153(a-1) further provides that a plan offered under this subsection may be offered in addition to a plan offered by the small employer carrier that requires a lower percentage of the premium paid to be contributed by the employer.

The amendments to §26.8 conform the section's requirements for consistency with Insurance Code §1501.153(a-1).

The amendments are also necessary to make non-substantive changes that include updating statutory references, correcting rule citation references, and making technical corrections. The Department is broadening the reference in §26.8(f)(2) to prevent ambiguity in the applicability of the statutes in the chapter as amended by the Legislature.

The Department has made non-substantive changes to correct format errors. However, none of the revisions change the meaning of the text as proposed, introduce

new subject matter, or affect persons other than those previously on notice of the published proposal.

The Department made a non-substantive change to §26.8(c)(2), (c)(4), and (h), deleting *the* prior to *Insurance*. Additionally, the Department made a non-substantive change to §26.8(i), deleting ; *therefore*, and adding , *and*.

**3. HOW THE SECTION WILL FUNCTION.** The amendments to §26.8 provide that a small employer carrier may simultaneously offer to each small employer a plan that requires the small employer to contribute 100 percent of the premium paid for each eligible participating employee when the small employer carrier offers a plan that requires a lower percentage of the premium paid to be contributed by the small employer.

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

**5. STATUTORY AUTHORITY.** The amendments are adopted under Insurance Code §1501.010 and §36.001. Insurance Code §1501.010 provides that the Commissioner shall adopt rules necessary to implement Insurance Code Chapter 1501 and to meet the minimum requirements of federal law, including regulations. Insurance Code §36.001 provides that the Commissioner 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.

### **§26.8. Guaranteed Issue; Contribution and Participation Requirements.**

(a) A small employer carrier shall issue a health benefit plan to any small employer that elects to be covered under the plan and agrees to satisfy other requirements of the plan. A small employer carrier shall provide health benefit plans to small employers without regard to health status related factors.

(b) Health carriers may require small employers to answer questions designed to determine the level of contribution by the small employer, the number of employees and eligible employees of the small employer, and the percentage of participation of eligible employees of the small employer.

(c) A health carrier may require an employer premium contribution for the plan selected by the employer for each eligible employee in accordance with the carrier's usual and customary practices for all employer group health insurance plans in the state.

(1) The same premium contribution level shall be applied to each small employer offered or issued coverage by the small employer carrier, except that a small employer carrier may simultaneously offer to each small employer an additional plan that requires the small employer to contribute 100 percent of the premium paid for each eligible participating employee.

(2) If two or more small employer carriers participate in a purchasing cooperative established under Insurance Code §1501.056, the carrier may use the contribution requirement established by the purchasing cooperative for policies marketed by the cooperative.

(3) A health carrier shall treat all similarly situated small employer groups in a consistent and uniform manner when terminating health benefit plans due to failure of the small employer to meet a contribution requirement.

(4) If a small employer fails to meet a contribution requirement for a small employer health benefit plan, the health carrier may terminate coverage as provided under the plan in accordance with the terms and conditions of the plan requiring such contribution and in accordance with Insurance Code §§1501.108, 1501.109, and 1501.110.

(d) Coverage under a small employer health benefit plan is available if at least 75 percent of the eligible employees of a small employer elect to be covered, as provided in Insurance Code §1501.154. This 75 percent requirement shall not apply to a small employer that has only two eligible employees. A small employer that has only two eligible employees shall be subject to a 100 percent participation requirement.

(1) If a small employer makes available multiple health benefit plans to its employees, the collective enrollment of all of those plans must be at least 75 percent of the small employer's eligible employees or, if applicable, the lower participation level offered by the small employer carrier under subsection (e) of this section.

(2) A small employer carrier may elect not to offer health benefit plans to a small employer who offers multiple health benefit plans if such plans are to be provided by more than one carrier and the carrier would have less than 75 percent of the small employer's eligible employees enrolled in the carrier's health benefit plan unless the coverage is provided through a purchasing cooperative.

(e) A small employer carrier may offer small employer health benefit plans to a small employer even if less than 75 percent of the eligible employees of that employer elect to be covered if the small employer carrier permits the same percentage of participation as a qualifying percentage for each small employer benefit plan offered by that carrier in the state.

(f) A small employer carrier may offer small employer health benefit plans to a small employer even if the employer's percentage of participation is less than the small employer carrier's qualifying participation level established under subsection (e) of this section if the small employer carrier:

(1) obtains the written waiver required by §26.7(e) of this subchapter (relating to Requirement to Insure Entire Groups); and

(2) accepts or rejects the entire group of eligible employees that choose to participate and excludes only those employees that have declined coverage. A carrier may not provide coverage under this subsection if the circumstances set out in §26.7(f) of this subchapter apply and may not use this subsection to circumvent the guaranteed issue and other requirements of Insurance Code Chapter 1501 or this subchapter.

(g) A health carrier shall treat all similarly situated small employer groups in a consistent and uniform manner when terminating health benefit plans due to a participation level of less than the qualifying participation level or group size.

(h) If a small employer fails to meet the qualifying participation requirement for a small employer health benefit plan, for a period of at least six consecutive months, the health carrier may terminate coverage under the plan upon the first renewal date following the end of the six-month consecutive period during which the qualifying participation requirement was not met, provided that the termination shall be in accordance with the terms and conditions of the plan concerning termination for failure to meet the qualifying participation requirement and in accordance with Insurance Code §§1501.108, 1501.109, and 1501.110 and §26.15 of this subchapter (relating to Renewability of Coverage and Cancellation).

(i) In determining whether an employer has the required percentage of participation of eligible employees, if the percentage of eligible employees is not a whole number, the result of applying the percentage to the number of eligible employees shall be rounded down to the nearest whole number. For example: 75 percent of 5 employees is 3.75, so 3.75 would be rounded down to 3, and 75 percent participation by a five employee group will be achieved if three of the eligible employees participate.

(j) If a small employer fails to meet, for a period of at least six consecutive months, the qualifying minimum group size requirement set forth in §26.5(a) of this subchapter (relating to Applicability and Scope) for a small employer health benefit plan,

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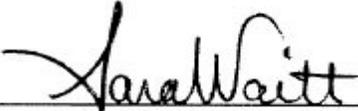
TITLE 28. INSURANCE  
Part I. Texas Department of Insurance  
Chapter 26. Small Employer Health Insurance Regulations

Adopted Section  
Page 8 of 9

the health carrier may terminate coverage under the plan no earlier than the first day of the next month following the end of the six-month consecutive period during which the small employer did not meet the qualifying minimum group size requirement, provided that the termination shall be in accordance with the terms and conditions of the plan concerning termination for failure to meet the qualifying minimum group size requirement and in accordance with Insurance Code §§1501.108, 1501.109, and 1501.110 and §26.15 of this subchapter.

**CERTIFICATION.** This agency certifies that the adopted section has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

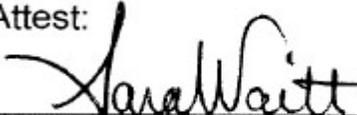
Issued at Austin, Texas, on April 23, 2012

  
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Sara Waitt, General Counsel  
Texas Department of Insurance

**IT IS THE ORDER** of the Commissioner of Insurance that the amendments to 28 TAC §26.8, concerning contribution and participation requirements for guaranteed issue small employer health benefit plans, are adopted.

**AND IT IS SO ORDERED.**

  
ELEANOR KITZMAN  
COMMISSIONER OF INSURANCE

Attest:  
  
Sara Waitt, General Counsel  
Texas Department of Insurance

COMMISSIONER'S ORDER NO. 12-0419