

**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 Texas Department of Insurance (Department) proposes amendments to §26.7 and §26.304, concerning small and large employer health insurance regulations. The amendments are proposed 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 proposed 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 proposed 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 this 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 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.

Proposed 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 proposed amendments also 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.

Proposed 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 proposed amendments also 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 to the sections would apply to large or small employer health benefit plans for plan years beginning on or after the effective date of the amendments as adopted.

2. FISCAL NOTE. Katrina Daniel, Senior Associate Commissioner for Life, Health & Licensing, has determined that for each year of the first five years the proposed amended sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rule. There will be no measurable effect on local employment or the local economy as a result of the proposal. Any potential fiscal impact to school districts would be the direct result of enactment of HB 407 and the amendment to the Insurance Code occasioned by its enactment, and not the result of adoption or administration of the rule sections as proposed to be amended.

3. PUBLIC BENEFIT/COST NOTE. Ms. Daniel also has determined that for each year of the first five years the amended sections are in effect, the public benefits anticipated as a result of the proposed sections will be the increased flexibility for married eligible employees of the same employer to choose a coverage option for health benefits under large and small employer health benefit plans for themselves and their dependents, if dependent coverage is offered to employees. The proposed amended sections also will potentially increase affordability of health benefit plan coverage to employers and their employees and dependents if dependent coverage is offered to employees. The

proposed amended sections also will promote marketing and business practices that will increase the potential economic value of the group health benefit plan to eligible individuals affected by the amendments, and provide for access to and administration of health benefit plan coverage options not presently available to such individuals. Some health benefit plan issuers may incur additional costs as a result of the amendments depending on their marketing and business practices. The Department, however, has drafted the proposed amendments to maximize public benefits while mitigating costs to persons required to comply with the proposed amendments.

The Department has identified the following costs of compliance associated with the proposed amendments.

1. *Cost of providing election language in application or other forms.* The Department anticipates that the potential costs of compliance with the amendments to §26.7 and §26.304 will involve the addition of the election language in application or other forms.

The Department anticipates that most health benefit plan issuers will choose to include the election language for eligible employees in application materials already in use; however, some issuers might choose to create a separate election form or make the election available electronically. The number of pages an issuer will need to print will depend on the issuer's marketing and business practices, but likely will be limited to one or two pages. The cost of paper and printing is estimated at between \$.06 and \$.08 per page.

In order to make the election available, issuers might need to utilize the services of a number of different types of employees and/or independent contractors, depending on marketing and business practices. Those who might be utilized include compliance specialists, consultants, legal counsel, and/or technical writers to draft the necessary election language; computer programmers to make electronic system changes; and webpage developers if the election form is put on the internet. Staffing costs may vary depending on the skill level required, the number of staff required, and the geographic location where the work is done. Average salaries for these types of positions in Texas may be found by accessing the Wage Information Network database website operated by the Texas Workforce Commission based on data obtained from the federal Bureau of Labor Statistics: <http://www.twc.state.tx.us/customers/rpm/rpmsub3.html>. Information on average wages in other states may be obtained directly from the federal Bureau of Labor Statistics website: <http://www.bls.gov/oes/current/oessrcst.htm>. Depending on the complexity of issuers' current operations and systems, the Department estimates that revising physical forms may take between 5 and 20 staff hours, while revising electronic systems and web pages could take between 10 and 50 staff hours.

2. *Cost of filing endorsements or other forms to conform to amendments.* To the extent that health benefit plan issuers need to file endorsements or forms with the Department to conform to changes resulting solely from these amendments, the Department estimates that the cost to issuers will include a \$100 filing fee per amended form or per endorsement and a paper-and-printing cost of between \$.06 and \$.08 per page. The number of pages an issuer will need to print will depend on the issuer's

marketing and business practices. Based on current practice, the Department anticipates that some issuers will file a single endorsement for use with multiple products.

In addition to the two cost items described above, health plans potentially might experience a decrease in contribution amounts to the plan and/or have to pay more in claims depending on elections made by particular married eligible employees employed by the same employer, and their particular health benefit plan utilization circumstances. Prospective election by a married eligible employee to be treated as a dependent rather than as an employee is accompanied by the possibility that the contribution amounts a health benefit plan receives in exchange for provision of coverage to persons might decrease, the dollar value of claims paid by a health benefit plan might increase, or both, depending on the dynamics of occurrences affecting plan utilization subsequent to decisions by couples making elections that they believe will be in their financial best interest.

The Department does not have data to quantify the number of married couples working for the same employer and covered under an employer health plan that would be entitled to utilize this election. It is anticipated, however, that an election made pursuant to the proposed amendments would be the result of an identified or anticipated financial benefit to married employees in the form of lower required contributions or other diminished costs occasioned by the exercise of the coverage election.

The Department is unaware of any other costs that health benefit plan issuers would incur as a result of allowing two married individuals employed by the same

employer to elect whether to be treated under the plan as separate employees or as an employee plus dependent.

In its April 15, 2010 posting, the Department sought additional information on its cost estimates and components. 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 Department did not receive any information adding to or conflicting with its cost estimates either from issuers or from association representatives of such issuers.

The total compliance cost of the proposed amendments to a health benefit plan issuer is not dependent upon the size of the issuer, but is dependent upon the number of persons to whom the carrier markets and/or provides health coverage. Both small and micro businesses as well as the largest businesses affected by the proposed amendments will incur the same cost per unit. The cost per hour of labor should not vary between the smallest and largest businesses, based on the types of forms or systems that will require either modification or creation, and the nature of technical requirements associated with creating or updating such forms or systems. Total costs for both a small business and the largest business will depend on the percentage of applicants or insured groups for which such issuers will have to create or modify forms or systems.

Finally, the costs incurred by large or small health benefit plan issuers to comply with the proposed amendments with respect to a plan providing coverage to a school district's employees are the direct result of enactment of HB 407, which amended the

Insurance Code Chapter 1501 to add §1501.0095, providing 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.

4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small or micro businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. The Government Code §2006.001(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(1) does not specify a maximum level of gross receipts for a "micro business." The Government Code §2006.001(f) requires a state agency to adopt provisions concerning micro businesses that are uniform with those provisions outlined in the Government Code §2006.001(b)-(d) for small businesses.

As required by the Government Code §2006.002(c), the Department has determined that the proposed amended sections may have an adverse economic effect on 10 - 40 large or small employer health benefit plan issuers that qualify as small or micro businesses under the Government Code §2006.001(1) and (2) and that are required to comply with the proposal.

The estimated number of small and micro businesses is based on an analysis of the financial data collected by the Department, such as the annual gross premiums of large and small employer health benefit plan issuers and on self-reporting by preferred provider benefit plan issuers regarding whether they qualify as small businesses. The adverse economic impact will result from the necessary costs incurred to comply with this proposal that are discussed in the Public Benefit/Cost Note part of this proposal for health benefit plan issuers.

Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule.

Section 2006.002(c-1) requires that the regulatory analysis "consider, if consistent with the health, safety, and environmental welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses."

As described and indicated in the Public Benefit/Cost Note portion of this proposal, the costs incurred by large or small health benefit plan issuers to comply with

the proposed amendments with respect to a plan providing coverage to a school district's employees are the direct result of enactment of HB 407, which amended the Insurance Code Chapter 1501 to add §1501.0095, and its corresponding coverage election option for eligible employee spouses.

The Department considered regulatory alternatives for achieving the purpose of the Insurance Code §1501.0095 and the proposed rule amendments to minimize any adverse impact on the estimated 10 - 40 large or small employer health benefit plan issuers that qualify as small or micro businesses under the Government Code §2006.001(1) and (2).

The purpose of the Insurance Code §1501.0095 - and in a broader scope of application the proposed amendments - is to permit a school district employee in the case of §1501.0095 - and an employee of a covered employer in the case of the proposed amendments - who is eligible for coverage under a large or small employer health benefit plan providing coverage to the employer's employees and who is the spouse of another employee covered under the plan to elect whether to be treated under the plan as an employee or the dependent of the other employee.

An alternative method considered by the Department was whether to exempt small or micro business large or small employer health benefit plan issuers from the requirements of the proposed amendments. The Department rejected the alternative as being inconsistent with the objective and intent of §1501.0095 for school district employees and inconsistent with the objective and intent of the proposed rule amendments.

If small or micro business large or small employer group health benefit plan issuers are exempted from complying with the proposed amendments, the employer groups issued plans by such exempted plan issuers will not be guaranteed the issuance of a plan that provides their applicable eligible employees the election for coverage, and its potential benefit, afforded by a plan that complies with the proposed amendments. Such method would result in disparity between applicable eligible employees with plans issued by small or micro issuers contrasted with those issued by large issuers. Such method would be inconsistent with the clear intent of §1501.0095 for school district employees.

An alternative method considered by the Department was whether to partially exempt small or micro business large or small employer health benefit plan issuers from the requirements of the proposed amendments. Such method would require compliance with §1501.0095 for plans issued to cover school district employees, but would exempt compliance for other plans. The Department rejected the alternative as being inconsistent with the objective and intent of the proposed rule amendments.

If small or micro business large or small employer group health benefit plan issuers are partially exempted from complying with the proposed amendments, the non-school district employer groups issued plans by such exempted plan issuers will not be guaranteed the issuance of a plan that provides their applicable eligible employees the election for coverage, and its potential benefit, afforded by a plan that complies with the proposed amendments. Such method would result in disparity between applicable eligible employees with non-school district plans issued by small or micro issuers

contrasted with those issued by large issuers. Such method would be inconsistent with the objective and intent of the proposed rule amendments. Moreover, such a method would require that for school district plans, the costs associated with the rule amendments would nonetheless be borne by small and micro issuers, mitigating diminution of economic impact otherwise afforded by such method in the instance of small and micro issuers that issue school district plans.

As described and explained in the Public Benefit/Cost Note portion of this proposal, the costs associated with compliance with the proposed amended sections will involve the addition of the election language in application or other forms, and, to the extent that health benefit plan issuers need to file endorsements or forms with the Department to conform to changes resulting solely from the proposed amendments, the cost of filing endorsements or other necessary forms.

Also as indicated in the Public Benefit/Cost Note portion of this proposal, the total compliance cost of the proposed amendments to a health benefit plan issuer is not dependent upon the size of the issuer, but is dependent upon the number of persons to whom the carrier markets and/or provides health coverage. Total costs for both a small business and the largest business will depend on the percentage of applicants or insured groups for which such issuers will have to create or modify forms or systems.

For reasons set out in this part, the Department has determined, in accordance with the Government Code §2006.002, that regardless of the economic effect, it is neither legal nor feasible to waive or modify the requirements of the proposed rule amendments for small or micro businesses because the proposed amendments are

either required by statute or waiver of requirement would result in improper differentiation of coverage options for benefits between the eligible applicants/covered individuals of small and micro issuers, compared to those coverage options for benefits provided to the applicants/covered individuals of large issuers.

5. TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

6. REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on October 18, 2010, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be submitted simultaneously to Judy Wooten, Project Manager for Regulatory Matters, Life, Health, & Licensing Program, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

7. STATUTORY AUTHORITY. The amendments are proposed 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.

8. CROSS REFERENCE TO STATUTE. The following articles are affected by this proposal:

<u>Rule</u>	<u>Statute</u>
§26.7 and §26.304	Insurance Code Chapter 1501 and §1501.0095

9. TEXT.

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

§26.7. Requirement to Insure Entire Groups.

(a) – (c) (No change.)

(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. [~~The two individuals will not be eligible for coverage as a dependent. Each must be covered as an employee.~~]

(2) (No change.)

(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) - (n) (No change.)

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

§26.304. Requirement to Insure Entire Groups.

(a) – (c) (No change.)

(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. [~~The two individuals will not be eligible for coverage as a dependent. Each must be covered as an employee.~~]

(2) (No change.)

(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) - (h) (No change.)