



State of New Jersey

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To: SEH Program Member Carriers that Issue Coverage
SEH Program Interested Parties

From: Ellen DeRosa
Executive Director

Re: Guaranteed Renewability When Crossing the 50 Employee Threshold

The purpose of this Advisory Bulletin is to address how the guaranteed renewability requirements set forth in 42 U.S.C. § 300 gg-2 and 45 C.F.R. § 147.106 apply when an employer group size fluctuates from year to year such that the employer is a small employer one year and a large employer another year or is a large employer one year and becomes a small employer during a subsequent year. Generally, an employer has the right to renew the group policy that was issued. However, as discussed in this Advisory Bulletin, there are exceptions to that right. This Advisory Bulletin also addresses the consequences of the definition of Small Employer as operative January 1, 2017.

Since small employer plans issued through the SHOP are administered by the SHOP, the guidance in this Advisory Bulletin does not address small employer plans purchased through the SHOP.

Small Employer (1 – 50 employees) Grows to Large Employer (51+ employees)

Consistent with guidance the SEH Board has previously provided, an employer that qualified as a small employer at the time the employer bought a small employer health benefits plan has the right to renew that plan even if the employer subsequently grows to 51 or more employees and ceases to be a small employer.

What is *renewable*?

The employer can elect to renew the specific small employer group plan that employer bought. All of the terms of the group plan remain in place. Of course, when the employer grows to become a large employer the employer is subject to the infertility benefit requirements of

N.J.S.A. 17B:27-46.1x and infertility benefits consistent with N.J.S.A. 17B:27-46.1x must be provided.

What may change?

The group rates. Small employer rating rules do not apply to the employer that has become a large employer. Carriers that have large group rates for the small employer plans may charge those large group rates.

What must change?

As a large employer, the 85% MLR must apply as with other large employer plans issued by that Carrier.

Remember: The definition of small employer requires counting the number of employees on business days in the *preceding* calendar year.

Opting for a large group plan: Employers that increase in size to become large employers are protected by the guaranteed availability protections of Federal law. All carriers selling group health benefit plans to employers with 51 or more employees must make coverage available on a continuous, year-round open enrollment basis. Carriers may *never* impose any participation or contribution requirements.

*The small employer plan bought by a small employer **may be renewed** even after the small employer grows and is now a large employer.*

Large Employer (51+ employees) Decreases to Small Employer (1 – 50 employees)

An employer that qualified as a large employer at the time the employer bought a large employer health benefits plan does not have the right to renew that plan when the employer subsequently has fewer than 51 employees and ceases to be a large employer.

Why not?

The renewal of the large group plan to an employer that is a small employer at the time of the renewal would violate Federal law. (See 45 CFR § 147.106(h)(1) as amended at 79 Fed. Reg. 3020–39, 30340 May 27 2014.) The small group market provisions of the Affordable Care Act take precedence over the guaranteed renewability provisions. The *only* plans small employers may purchase or renew are plans that comply with the small group market provisions that govern essential health benefits, actuarial value and fair health insurance premiums with the single risk pool. Since no large group plans comply with these provisions and are approved for use in the small employer market, no large group plan could be renewed for an employer that has become a small employer.

Again, remember: The definition of small employer requires counting the number of employees on business days in the *preceding* calendar year.

What are employer's options?

Although the employer *cannot* renew the large employer plan, the employer *can* apply for a small employer plan for his employees.

*The large employer plan bought by a large employer **cannot be renewed** after the large employer shrinks and is now a small employer.*

Definition of Small Employer Operative January 1, 2017

An employer that qualified as a small employer at the time the employer bought a small employer health benefits plan using the definition of small employer in N.J.A.C. 11:21-2 that was in place at the time of purchase but that would not have been a small employer using the definition of small employer that was operative January 1, 2017 does not have the right to renew the previously issued small employer plan.

Why not?

As explained in the rule proposal the SEH Board filed on July 7, 2016, the SEH Board aligned the definition of small employer set forth in N.J.A.C. 11:21-2 with the Federal definition of small employer. The amended definition was operative January 1, 2017. Some employers that qualified as small employers using the prior definition do not qualify as small employers using the new definition and in fact did not qualify as small employers under the Federal definition. The renewal of the small employer plan to an employer that would not have qualified as a small employer under the Federal definition of small employer would be inconsistent with Federal law.

What are employer's options?

Although the employer *cannot* renew the small employer plan, the employer *can* apply for a large employer plan for his employees.

Remember: The definition of small employer requires counting the number of ALL employees on business days in the *preceding* calendar year. This means employees who obtain health coverage under a union welfare plan must be counted when determining whether an employer is a small employer.

*The small employer plan bought by what the prior NJ definition considered to be a small employer **cannot be renewed** after the January 1, 2017 operative date of the amended definition of small employer.*

Please contact me with any questions at ellen.derosa@dobi.nj.gov