

INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

SMALL EMPLOYER HEALTH BENEFITS PROGRAM

Changes to the Standard Plans to Comply with Federal Law

Proposed Amendments: Exhibits A, F, G, V, W, Y, HH and II of the Appendix to N.J.A.C. 11:21

Authorized By: New Jersey Small Employer Health Benefits Program, Ellen DeRosa, Executive Director

Authority: N.J.S.A. 17B:27A-17 et seq.

Calendar Reference: See Summary below for an explanation of the exception to the calendar requirement

Proposal Number: PRN 2011-

As required by N.J.S.A. 17B:27A-51, interested parties may testify with respect to the amendments to the standard health benefits plans, set forth in Exhibits A, F, G V, W, Y, HH and II of the Appendix to N.J.A.C. 11:21 at a public hearing to be held on December 1, 2011 at 9:00 a.m. in the 11<sup>th</sup> floor Conference Room, 20 West State Street, Trenton, New Jersey.

Submit written comments by December 22, 2011 to:

Ellen DeRosa  
Executive Director  
New Jersey Small Employer Health Benefits Program Board  
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The agency proposal follows:

Summary

The Small Employer Health Benefits (SEH) Program was established by P.L. 1992, c. 162. The SEH Program is administered through a Board of Directors (SEH Board). One of the primary functions of the SEH Program and the SEH Board is the creation of standard health benefits plans (standard plans) to be offered in the small employer market in New Jersey. There are five standard plans, which have been established through regulation, and are set forth in Exhibits A, F, G, V, W, Y, HH and II of the Appendix to N.J.A.C. 11:21 along with Exhibit K, which provides explanations of how variables in the standard plans may be used by carriers.

Although the SEH Board amended the SEH standard plans and forms in 2010 to comply with State and Federal law, the SEH Board recognizes that additional amendments to comply with recently enacted Federal law are necessary. Additionally, the SEH Board seeks to amend the COBRA continuation provision so it more closely aligns with the specific requirements of COBRA.

The Federal Patient Protection and Affordable Care Act, Public Law 111-148, as amended and supplemented by the Health Care and Reconciliation Act, Public Law 111-152 (herein, collectively, PPACA), includes many requirements for group health insurance coverage. The rules regarding rescission are set forth in 29 C.F.R. § 2590.715-2712. In the interim final rules issued by the Federal Internal Revenue Service, Department of Treasury; Employee Benefits Security Administration, Department of Labor and Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, rescission is defined as “a cancellation or discontinuance of coverage that has retroactive effect.” Rescission is thus a retroactive termination of coverage. As discussed in the following paragraph, there are circumstances in which

retroactive termination of coverage is permissible. The interim final regulations include examples of situations where rescission is impermissible because there was no fraud or intentional misrepresentation of material fact.

The Employee Benefits Security Administration provided a series of Frequently Asked Questions (FAQs) regarding implementation of the market reform provisions of PPACA. Guidance regarding termination in the “normal course of business” is provided in one of the FAQs. The guidance discusses errors that result in coverage extending beyond the date it should have terminated and explains that retroactive termination is permissible if the employee has not paid premium beyond the date coverage should have terminated. Based on the guidance provided in the interim final regulations and FAQs the SEH Board has determined that the amendments to the standard health benefits plans as discussed below are necessary.

The “Premium Amounts” and “Clerical Error-Misstatements” provisions in the standard health benefit plans group contracts address termination in the “normal course of business.” The Premium Amounts provision addresses the circumstance of premium being paid for a person whose coverage should have ended. The Clerical Errors-Misstatements provision addresses coverage that stays in effect as a result of clerical, programming, systems and record-keeping errors. Both provisions allow retroactive termination but are silent as to whether the covered person has contributed toward the cost of the coverage. The SEH Board proposes amending both provisions to address a carrier’s continued authority to terminate coverage retroactively provided the covered person has not contributed toward the premium, and the authority to terminate coverage prospectively in situations where the covered person has contributed toward the premium.

The proposed amendments to the provisions address: the circumstance in which the employee has contributed to the premium and states that coverage remains in effect through the end of the period for which contributions were made; and the circumstance in which no employee contribution has been made and explains that the premium the policyholder paid will be refunded.

The interim final regulations and subsequent guidance also address the continued permissibility of rescission if a person performs an act, practice or omission that constitutes fraud or makes an intentional misrepresentation of material fact. To clarify the policy form language with respect to situations in which rescission or retroactive termination is impermissible and those limited situations in which rescission continues to be permissible, the SEH Board proposes adding a new provision entitled Retroactive Termination of a Covered Person's Coverage. (In HMO-based forms the term Covered Person is replaced with the term Member.) The new provision states that the consequence of fraud or material misrepresentation is retroactive termination and further states that 30 days advance notice of retroactive termination will be provided. The new provision also addresses retroactive termination that would occur if a policyholder continues to pay premiums on behalf of a person who is no longer eligible for coverage. As explained in the Refund of Premium provision if the policyholder has paid the full cost of coverage the carrier will refund the premium paid for the coverage but will refund for no more than two months. The new provision makes it clear that if the premium is refunded the coverage is retroactively terminated for the period coinciding with the period of the refund. The SEH Board proposes amending the Term of Policy – Renewal

Privilege-Termination provision to cross reference the new Retroactive Termination of a Covered Person's Coverage provision.

In addition to the amendments necessary to align the standard health benefits plans with guidance provided with respect to Federal law, the SEH Board proposes amending the provisions for clarity and to eliminate unnecessary text. For example, the Premium Amounts provision previously addresses premium refunds as separate paragraphs within the provision. In this proposal the SEH Board proposes the addition of a subheading to highlight the circumstances for a premium refund.

Under the continuation provisions of Consolidated Omnibus Reconciliation Act of 1985 (COBRA), as amended, 29 U.S.C. §§1161 et seq, certain disabled qualified beneficiaries have an opportunity to extend the duration of COBRA continuation for an additional 11 months. Although the standard plans have included a provision to allow the extra continuation for disabled qualified continuees, the SEH Board proposes amending the provision so the election opportunity more closely tracks the three events specified in the Federal law from which the 60-election period may be measured.

The proposed amendments appear in Appendix Exhibits A, F, G, V, W, Y, HH and II, which create standard plans commonly known as Plans A, B, C, D, E, HMO and HMO-POS.

### **SEH Rulemaking Procedures**

Because most of the proposed amendments are necessary to conform with guidance on a provision of Federal law that was effective in September 2010, there is urgency with respect to amending the standard health benefit plans. The SEH Board is

therefore proposing these amendments in accordance with the special action process established at N.J.S.A. 17B:27A-51, as an alternative to the common rulemaking process specified at N.J.S.A. 52:14B-1 et seq. Pursuant to N.J.S.A. 17B:27A-51, the SEH Board may expedite adoption of certain actions, including modifications of the SEH Program's health benefits plans and policy forms, if the SEH Board provides interested parties a minimum 20-day period during which to comment on the SEH Board's intended action following notice of the intended action in three newspapers of general circulation, with instructions on how to obtain a detailed description of the intended action and the time, place and manner by which interested parties may present their views regarding the intended action. Concurrently, the SEH Board must forward notice of the intended action to the Office of Administrative Law (OAL) for publication in the New Jersey Register, although the comment period runs from the date the notice is submitted to the newspapers and OAL, not from the date of publication of the notice in the New Jersey Register. The SEH Board also sends notice of the intended action to affected trade and professional associations, carriers, and other interested persons who may request such notice. In addition, for intended modifications to the health benefits plans, the SEH Board must allow for testimony to be presented at a public hearing prior to adopting any such modifications. Subsequently, the SEH Board may adopt its intended action immediately upon the close of the specified comment period or close of a public hearing (whichever is later) by submitting the adopted action to the OAL for publication. The adopted action is effective upon the date of its submission to the OAL, or such later date as the SEH Board may designate. If the SEH Board does not respond to commenters as part of the notice of adoption, the SEH Board will respond to the comments timely submitted within a

reasonable period of time thereafter in a separately-prepared report which will be submitted to OAL for publication in the New Jersey Register.

Pursuant to N.J.S.A. 17B:27A-51, all actions may be adopted by the SEH Board pursuant to the requirements of this special rulemaking procedure notwithstanding the provisions of the Administrative Procedure Act. As a result, the quarterly calendar requirement set forth at N.J.A.C. 1:30-3.1 is not applicable when the SEH Board uses its special rulemaking procedures.

Please note that the provisions of N.J.S.A. 17B:27A-51 may result in the publication of this rule proposal in the New Jersey Register after the comment period has concluded.

#### Social Impact

The SEH Board anticipates a positive social impact as a result of the proposed amendments. The proposed amendments will bring the forms into compliance with guidance on the Federal law, and make it easier for consumers to understand their benefits, and assure appropriateness in the timing of termination of benefits. The proposed amendments will provide guidance for carriers in administering the standard plans and help assure that consumers are not impermissibly terminated from coverage.

#### Economic Impact

The SEH Board anticipates minimal economic impact from the proposed amendments. There will be some administrative cost associated with compliance with the Federal requirements regarding rescission. The SEH Board notes that carriers are

required to comply with official guidance on Federal law whether or not the standard plans contain provisions consistent with the guidance.

For consumers who have paid premiums with the expectation that their coverage continued in force, the proposed amendment will allow them to better understand their rights to remain covered and seek benefits for services received.

Carriers are unlikely to require any new or additional professional or technical services to accommodate the proposed amendments beyond those already at their disposal.

#### Federal Standards Analysis

The proposed amendments comply with 29 CFR 2590.715-2712 and 29 U.S.C. §§1161 et seq. The rules do not expand upon the requirements set forth in the Federal law. There are no other Federal laws that apply to these amendments.

#### Jobs Impact

The SEH Board does not anticipate that any jobs will be generated or lost as a result of the proposed amendments.

#### Agricultural Industry Impact

The SEH Board does not believe the proposed amendments will have any impact on the agriculture industry in New Jersey.

#### Regulatory Flexibility Statement



The SEH Board believes that all carriers subject to these rules have in excess of 100 full-time employees or are located outside of the State of New Jersey and thus are not “small businesses” as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Therefore, a regulatory flexibility analysis is not required.

#### Housing Affordability Impact Analysis

The SEH Board does not believe the proposed amendments will have an impact on housing affordability in this State. In that the proposed amendments relate to the provision of small employer health insurance.

#### Smart Growth Development Impact Analysis

The SEH Board does not believe the proposed amendments will have an impact on the number of housing units or the availability of affordable housing in the State, or that the proposal will have an affect on smart growth development in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The proposed amendments relate to the benefit levels and terms of standard health benefits plans offered in New Jersey.

Full text of the proposal follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):