



Oregon

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OREGON INSURANCE DIVISION BULLETIN INS 2002-5

DATE: February 20, 2003
TO: Health Insurers and Health Agents
RE: Sale of Individual Health Benefit Plans in the Small Employer Market

Bulletin 2002-5 dated September 26, 2002, is hereby amended by adding questions 7 and 8 to further clarify the sale of individual health benefit plans in the small employer market to dependents of eligible employees and the marketing of individual health benefit plans under Health Reimbursement Arrangements (HRA).

Introduction

This bulletin answers questions that have arisen regarding the sale of individual health benefit plans in the health insurance market for small employers. Under Oregon law, small employers are defined under two statutes. See ORS 743.730(30) and ORS 743.733(4). This bulletin applies to small employers as defined under either statute. As expressed in Oregon statutes, the policy of this state is that only group health benefit plans may be offered in the small employer market. Plans offered in the small group market must meet several requirements not applicable to individual plans. Among the key differences are that small group plans must be marketed on a guaranteed issue basis with no health underwriting and that premiums are subject to strict rate bands.

Question 1: When is a health benefit plan subject to Oregon law governing small employer plans?

Response: A health benefit plan is subject to Oregon law governing small employer plans when an employer makes any contribution toward employee coverage. One practical test of a contribution is whether the employer claims a tax benefit for providing health coverage. If so, the employer is making a contribution and coverage is therefore subject to the small group laws.

Only small employer group health benefit plans may be sold in the small employer market. ORS 743.734(1) provides that "Every group health benefit plan shall be subject to the provisions of ORS 743.733 to 743.737, if the plan provides health benefits covering one or more employees of a small employer" and either of the following conditions is met: 1) the employer pays or makes reimbursement for the coverage; or 2) the employer treats the plan as part of a plan or program for federal tax law purposes. Prior to legislation enacted in 1999 (section 8, chapter 987 Oregon Laws 1999), ORS 743.734(1) required that "Every individual or group health benefit plan" was to be subject to ORS 743.733 to 743.737. Deletion of the reference to individual plans indicates that only group plans are contemplated for the small employer market.

An employer or eligible employee treats a health benefit plan as part of a plan or program for tax purposes when the health benefit plan is treated as a plan or program under section 106, section 125 or section 162 of the Internal Revenue Code of 1986, as amended. Consequently, any health benefit plan offered through a federal 125 cafeteria plan, for example, must satisfy Oregon statutes governing small employer health benefit plans. ORS 743.734.

Question 2: Is it lawful for an insurer or an agent to sell individual coverage instead of group coverage to employees of a small employer who is contributing to the coverage?

Response: No. As long as the employer contributes to the coverage of employees as set forth above, the coverage must be provided under a group health benefit plan and not an individual health benefit plan.

An individual health benefit plan does not meet small employer group coverage requirements. For example, small employer coverage must be offered to employees on a guaranteed issuance basis without regard to the actual or expected health status of any eligible employee, but individual coverage is not issued on that basis. Another example is that rating requirements differ between individual and group coverages.

Question 3: May an insurer or agent sell individual coverage to employees of a small employer who is not contributing to the coverage?

Response: Yes. Attention does need to be paid, however, to the nature of an employer's compensation to employees in order to ensure that it does not include conditions that turn some portion of the compensation into an earmarked contribution for health coverage. Compensation, including additional compensation that replaces a prior contribution to health coverage, is not considered a contribution to health coverage as long as the compensation is not conditioned on the employee using the money to purchase health coverage (the test is whether the employee is free to use the money for any purpose) and as long as the employer does not claim federal tax benefits for providing health coverage.

Question 4: Is it lawful for an insurer or agent to promote the sale of individual coverage to employees of a small employer who is not contributing to coverage?

Response: Yes. Such a small employer may work with an insurer or agent to promote individual coverage options for employees. Examples of permissible activities include inviting an agent on site to market individual plans and arranging for voluntary employee payroll deductions.

Insurers and agents should be aware of Insurance Code provisions that specifically forbid issuance of individual policies in particular circumstances. ORS 743.405(4) provides that a policy may not be issued individually to an individual in a group of persons as described in ORS 743.522 for the purpose of separating the individual from health insurance benefits offered or provided in connection with a group health benefit plan. ORS 746.222 prohibits an insurer or licensee from referring an individual to the Oregon Medical Insurance Pool for coverage offered by the pool and from arranging for the separation of an individual from health insurance benefits offered or provided in connection with a group health benefit plan.

Insurers and agents should also be aware that OAR 836-053-0440 has been amended as of November 24, 2002, to prohibit an insurer from list billing an employer for premium due for the employer's individual employees' and employees' dependents health coverage.

Question 5: Are insurers and agents subject to penalty for selling individual coverage to employees of small employers in violation of Oregon law?

Response: Yes. Under the Insurance Code, agents are subject to civil penalties up to \$1000 per violation and may have their licenses suspended or revoked. Agencies and insurers are subject to penalties up to \$10,000 per violation and are also subject to license suspension or revocation.

Question 6: May an employer be sanctioned for providing individual coverage in a manner that violates the requirement of nondiscrimination under federal law (42 USC 300gg-11) as to premium or the employer's contribution?

Response: Yes. Although employers are not subject to sanctions under the Oregon Insurance Code, they are subject to the federal HIPAA requirements, which are enforced by the federal government.

Question 7: Is it lawful for an insurer or an agent to sell individual coverage instead of group coverage to a spouse or dependents (dependents) of employees of a small employer who is contributing to the coverage?

Response: No. A health benefit plan is subject to Oregon law governing small employer plan when the employer is making any contribution toward the coverage or claims a tax benefit for providing health coverage. Group health insurance by definition includes employer, employees and dependents. See ORS 743.730(10)(12) and 743.522. A small employer health benefit plan that covers dependents of eligible employees must be available to all dependents of eligible employees without regard to actual or expected health status of any eligible dependent. See ORS 743.734(6).

Marketing individual health benefit plans to dependents follows the same principle as marketing health benefit plans to employees. If the small employer is contributing towards the coverage or claims a tax benefit, the coverage is subject to the small group laws.

Question 8: Is it lawful for an insurer or an agent to sell individual coverage instead of group coverage to employees of a small employer who sponsors a Section 105 Health Reimbursement Arrangements (HRA)?

Response: No. An HRA is an arrangement that is paid for solely by the employer and not provided pursuant to salary reduction election or otherwise under a section 125 cafeteria plan. If through the HRA program the employees or dependents receive reimbursement for any portion of the premiums for health coverage, the employer is contributing toward the health coverage and is claiming a tax credit for the program.

Therefore, the coverage must be provided under a group health benefit plan and not under an individual health benefits plan. See question 1 response.

Notice

Oregon Insurance Bulletin INS 94-5 Marketing and Issuance of Individual Health Policies to Small Employer Groups is withdrawn as of September 26, 2002.

This bulletin takes effect upon signing.

Signed this 20th day of February 2003.

(Signed)

Joel Ario, Insurance Administrator