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MISSISSIPPI INSURANCE DEPARTMENT BULLETIN 2016-9

TO: ALL ISSUERS OF SMALL GROUP AND LARGE GROUP HEALTH INSURANCE PRODUCTS IN MISSISSIPPI

**FROM: MIKE CHANEY
COMMISSIONER OF INSURANCE**

DATE: July 20, 2016

SUBJECT: CLARIFICATION ON HOW AND WHEN EMPLOYEES MUST BE COUNTED FOR THE PURPOSES OF DETERMINING GROUP HEALTH PLAN SIZE

I. Purpose

The purpose of this Bulletin is to provide the Mississippi Insurance Department's ("MID") position on two questions recently received from several Mississippi health insurance carriers ("carriers") that issue small group and large group health insurance products:

- (1) For purposes of determining an employer's group size for rating purposes, is the term "employee" defined according to Federal or Mississippi law?
- (2) What time period does an employer use to determine the number of employees that it employs?

II. Background

MID has recently become aware that carriers are using and/or relying on different definitions of the term "employee" when calculating an employer's group size for rating purposes. Specifically, some carriers are relying on the Federal definition of "employee" which requires that "all" employees be counted (e.g. full-time and part-time). The application of this definition has been called the Average Total Number of Employees ("ATNE") method. Meanwhile, other carriers are relying on Mississippi's definition, found in Mississippi Code Section 83-63-3, which requires that only "eligible" employees be counted (e.g. only full-time). The application of this definition has been called the Eligible Employee ("EE") method.

MID was also recently made aware that carriers are looking at and/or using different time periods when determining group size. For instance, certain carriers are counting the number of “employees” that an employer employed during the preceding calendar year, while others are counting the number of employees currently employed during the present calendar year.

III. Applicable Law

Federal Statutes

Following the passage of both the Affordable Care Act (“ACA”) and the recently passed Protecting Affordable Coverage for Employees (“PACE”) Act, current Federal law provides the following applicable definitions:

The term "small employer" means, "in connection with a group health plan with respect to a calendar and a plan year, an employer who employed an average of at least 1 but not more than 50 employees on business days during the preceding calendar year and who employs at least 1 employee on the first day of the plan year. A State may elect to define small employer by substituting '100 employees' for '50 employees' ..."

The term "large employer" means, "in connection with a group health plan with respect to a calendar year and a plan year, an employer who employed an average of at least 51 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year."

The term "employee" is defined to have the meaning given "to the term under section 3(6) of ERISA." ERISA defines employee as "any individual employed by an employer."

Such definitions are found at Public Health Service Act (“PHS Act”) section 2791. It is worth noting that section 1304 of the ACA contains similar definitions for “small employer” and “large employer,” but it does not contain a comparable definition for “employee.”

Federal Guidance

Although the plain language in the Federal definition of "employee" (just listed above) means "any employee" (e.g. full-time and part-time), prior disputes over the term's meaning have occurred due to conflicting State law definitions. In 1999, the Health Care Financing Administration ("HCFA" which is the previous name of the Centers for Medicare and Medicaid Services “CMS” (the HCFA will hereafter be referred to as CMS)) published a bulletin containing its interpretation of the term "employee" for purposes of the PHS Act in response to such a conflict. The conflicting State law definitions referenced in the bulletin were “eligible employee” definitions similar to Mississippi’s current definition (see Mississippi Statutes below).

In the bulletin (Transmittal No. 99-03), CMS explained that any employee of an employer must be counted when determining employer size under the PHS Act, regardless of whether the employee is full-time or part-time. It also clarified that where Federal and State definitions of "employee" conflicted, if the State's definition prevented the application of the Federal requirement, the State law would be preempted. This same limitation was included in the implementing regulations of the PHS Act amendments made by the ACA.

Mississippi Statutes

Title 83 Chapter 63 of the Mississippi Code, Mississippi Code Section 83-63-1 *et seq.*, applies to any health benefit plan that provides coverage to employees of a small employer in Mississippi and a portion of the premium or benefits is paid by or on behalf of the small employer. This Chapter details what employees may be counted when determining whether an entity is a small employer. Specifically, Mississippi Code Section 83-63-3

provides: that a "small employer" is determined by counting the number of its eligible employees, that an "eligible employee" is restricted to those employees who work on a full-time basis and have a normal work week of thirty-two (32) or more hours, and that an employee cannot be eligible if he or she works on a part-time, temporary or substitute basis.

IV. Interpretation and Enforcement

(1) For purposes of determining an employer's group size for rating purposes, is the term "employee" defined according to Federal or Mississippi law?

- It is MID's position that the Federal definition of "employee" under the PHS Act, and as defined in ERISA, must be used when determining group size for rating purposes. Therefore, carriers should calculate the average total number of employees for the employer, without regard to the number of hours the employee works, when determining group size for rating purposes (i.e. the ATNE method). MID believes that Mississippi's current statute, which defines what employees may be counted when determining whether an entity is a small employer (i.e. the EE method), conflicts with Federal law. Because the ACA did not change the ERISA definition of "employee," it is MID's position that previous interpretations of that term (i.e. the Federal Guidance released by CMS) may still be relied on to the extent the interpretation has not been superseded by other agency declarations or rule making. MID has not found any superseding declarations or rule making.

(2) What time period does an employer use to determine the number of employees that it employs?

- It is MID's position that the average total number of employees an employer employed on business days during the preceding calendar year must be used when determining an employer's group size. The applicable Federal definitions of a small and large employer clearly require the preceding calendar year to be the time period used when determining an employer's group size, as opposed to the present calendar year.

Please direct any questions to the Life and Health Actuarial Division at 601-359-2012.

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