Glenn Pomeroy
Commissioner of Insurance

DEPARTMENT OF INSURANCE
STATE OF NORTH DAKOTA

BULLETIN 95-2

TO: SMALL EMPLOYER CARRIERS SERVING NORTH DAKOTA

FROM: GLENN POMEROY, COMMISSIONER

DATE: JUNE 7, 1995

SUBJECT: SMALL EMPLOYER/EMPLOYEE HEALTH INSURANCE LAW AND REGULATION UPDATE AND CLARIFICATION

The purpose of this bulletin is to provide small employer carriers information on changes the 1995 ND legislature has made to the small employer law, and to clarify several issues which have been raised by carriers.

I. LEGISLATIVE CHANGES

The definition of small employer has been clarified. It now clearly refers to groups of 3-25 FTE's. The rating section has been modified. The previous bands remain, however, ratios have been introduced and a limitation set on rating factors. On 1-1-96 gender rating will be prohibited. On 1-1-97 the highest and lowest rates must not vary more than 4:1. In addition, CHAMPUS, Indian Health Services or any other similar public program are now included as qualifying previous coverage with regard to portability.

II. IMPLEMENTATION ISSUES

Employer waiting periods. The rules implementing NDCC 26.1-36.3 state that a carrier may not require a waiting period, elimination period or other similar limitation of coverage with respect to a new entrant that is longer than 60 days [Administrative Rules 45-06-06.1-06(3)(b)]. Therefore, a carrier may not sell health plans to small employers who are not in compliance with this provision of the rules, which went into effect on August 1, 1994.

Given that this is the only provision in the rules which imposes a pre-requisite for availability of insurance on the employer and that employers report the most common waiting period is 90 days, we have revisited this issue. We believe a fair resolution would be to "grandfather" in employers who offered employee health coverage prior to the effective date of the rules. This "grandfathering" applies in respect to this issue only.

If they have not already done so, these employers should put their waiting period requirement in writing. Carriers selling coverage to employers with a waiting period of greater than 60 days will not be deemed in violation of the rules, provided that the employer's practice of requiring more than 60 days was occurring prior to August 1, 1994. Businesses which were not operating prior to August 1, 1994 or were not offering insurance prior to August 1, 1994 must adopt the 60 day maximum limit in order for a carrier to sell them coverage.

Late Entrants. The code states that carriers may exclude late enrollees for the greater of 18 months or for an 18 month pre-existing condition exclusion [NDCC 26.1-36.3-06(3)(c)]. If both are applicable, the combined period may not exceed 18 months from the date the individual enrolls for coverage under the health benefit plan. In this circumstance, the 18 months begins running from the date of application for enrollment.

Open Enrollment. The rules [45-06-06.1-06(4)(a)(1)] state that carriers must provide an opportunity to enroll in the current employer health plan to all eligible employees or dependents who were excluded from coverage or denied coverage by a carrier prior to the effective date of the availability of coverage section of the Act. In addition, carriers may require a signed letter from the individual stating that they sought coverage other than as a late enrollee and that coverage was not offered [45-06-06.1-06(4)(a)(2)].

Situations have occurred in which the person managing benefits for the small employer told employees not to apply during the initial enrollment period because they would be denied coverage due to a pre-existing health condition. No formal denial by the carrier was issued.

We interpret this section in light of the spirit of the law, which was to provide a 90-day open enrollment or amnesty period to allow those individuals previously not covered access to coverage. Therefore, individuals who were told by a person or party managing benefits for the small employer not to apply during the initial enrollment period because they would be denied coverage due to a pre-existing health condition were "excluded from coverage". Carriers may require them to sign a statement saying they sought coverage from their employer other than as a late enrollee and that coverage was not offered.

The rules required carriers to notify **each** small employer insured by them of this provision 45 days prior to the opportunity to enroll which was to run from September 1, 1994 through November 30, 1994 (45-06-06.1-06(4). Bulletin 94-3, dated June 23, 1994, highlighted this requirement and stated notices were to be sent by July 15, 1994. This requirement was reiterated in a September 9, 1994 Memorandum to carriers with a request to submit a copy of the notice. Few carriers complied according to responses received by our department.

The notice was to clearly describe the rights to enrollees and dependents and the process for enrollment under the health plan. Carriers which did not comply with with this provision are to extend the open enrollment period to those eligible enrollees and their dependents who did not receive the required notice. Open enrollment should commence from the date of proper notice and last a period of at least 3 months.

Eligible Employees. As previously noted in the September 9, 1994 memo, employers have the discretion to define which employees are eligible for coverage provided that they develop and consistently apply a written personnel policy that does not discriminate based on health or ylass. Employers should clarify what constitutes full-time, part-time, substitute or temporary workers. Seasonal workers may be considered "full-time and eligible" or "part-time/temporary and ineligible" depending on the employer's personnel policy.

CHAND. Carriers may not sell a group plan which carves out employees currently on CHAND coverage. Failure to offer coverage to these employees if eligible is a violation of the statute and may subject the carrier to administrative action by the department. Carriers, producers and employers may not coerce these employees to sign a waiver of coverage. This is also a violation of the statute, which may subject the carrier to administrative action by the department.

Individual Policies. As noted in the September 9, 1994, memo individual policies which were in force as of August 1, 1994 may remain in force. However, no new individual policies may be written for that employer. When a new employee is added the employer must switch to a group plan if he/she wishes to provide coverage to the new employee.