

SHOP “Exceptional Circumstance” SEP Recommendation

Error, misrepresentation, misconduct, or inaction on the part of a SHOP employer acting without a broker.

June 29, 2017

Problem: SHOP employees harmed by an error, misrepresentation, misconduct or inaction on the part of a SHOP employer that elects not to use a broker.

SHOP employees may be unable to enroll in coverage or be enrolled in incorrect coverage due to a mistake on the part of the SHOP employer. Generally SHOP employers use a broker, but this is not required and some employers elect to enroll their group in coverage without the assistance of an authorized broker.

- 1) Under 45 CFR §155.420(d)(4), an individual “whose enrollment or non-enrollment in a QHP is in unintentional, inadvertent, or erroneous, and is the result of the error, misrepresentation, misconduct, or inaction of ... a non-Exchange entity providing enrollment assistance or conducting enrollment activities” will have a special enrollment period to correct the harm. This provision extends to SHOP enrollee through 45 CFR §155.725(j). Generally this provision is available to consumer where they have experienced harm as the result of a non-exchange entity providing enrollment assistance, such as a broker, Navigator, assister, or CAC. Consequently, in SHOP, when an employer uses a broker, an employee who experiences a harm related to his or her enrollment would have access to a SEP to correct the harm.
- 2) However, where a SHOP employer elects not to use a broker, their employees may not have the ability to correct the harm. Under these rules, SHOP employer is generally not considered a non-Exchange entity and therefore, errors resulting from SHOP employer actions would not create a SEP right for their employees. The SHOP team has found that in these cases the employer is frequently essentially working as its own broker, and the employees rely on the employer in the same manner that they might rely on a broker.
- 3) The SHOP team has encountered cases where an employer is essentially acting as its own broker and inadvertently provides misinformation, fails to act timely, or otherwise acts in a manner that creates an error that results in an enrollment harm for one or more employee. In many of these cases, the exact same error, if committed by a broker or an assister would create a SEP right for the impacted employee. However, under the current regulatory scheme, the employees harmed by employer conduct do not have the same right to correct the error.

Recommended Solution:

The staff recommends creating a new “exceptional circumstance” to allow SHOP employees who are employed by a SHOP employer that does not work with an insurance broker to have the

ability to correct an enrollment harm that results from the error, misrepresentation, misconduct, or inaction on the part of the SHOP employer who does not have a broker of record.

SEP Language:

- 13) A qualified employee's enrollment or non-enrollment in a QHP is unintentional, inadvertent, or erroneous and is the result of the error, misrepresentation, misconduct, or inaction of a SHOP employer acting without a broker of record.