

Expanded Definition of Small Employer and Transition to Single Market

The traditional definition of small employer has been 2-50: an employer and one employee (2) to no more than 50 employees (including the employer, if on the plan). The ACA changed this definition to no more than 100 employees (but allowing a state to delay the change until plan year 2016). The Health Benefit Exchange Authority needs to determine how to move forward for plan year 2016 when the definition of small employer changes.

Analysis

District HBX law presently defines small employer as not more than 50 employees. Federal law defines small employer as not more than 100 employees, but delays the expansion to 100 for states that choose to delay until plan year beginning January 1, 2016. (Recent amendments to the insurance code adopt the federal definition. *See* p. 4). The federal definition of small employer will preempt the District non-conforming definition in DC HBX Code starting with the 2016 plan year, at least for certain purposes.

Federal law provides that “[t]he SHOP must permit qualified employers to purchase coverage for qualified employees through the SHOP.” Therefore, DC Health Link must accept any qualified small employer, including 51-100, applying for coverage. District law (Better, Better, Better Act amendment) states that beginning January 1, 2015, all small group health plans shall be offered or renewed solely through the exchange. Thus, since the definition will be no more than 100 employees for the 2016 plan year, groups in the 51-100 range will be defined as small employers for the 2016 plan year. Under this interpretation, those employers must purchase their coverage through the exchange.

An equally plausible alternative interpretation is available. It is clear that the Better, Better, Better Act amendment regarding the transition to a single market was drafted and passed with the definition of small employer as no more than 50 employees. Both an Executive Director Report and a Board Resolution state that “[t]he addition of this [expanded small group] market segment should be addressed in subsequent years.” The Better, Better, Better Act amendment dictates **how** carriers can sell small group health benefit plans, and does **not** address the **definition** of small employer. “Small group health benefit plans,” the terminology in the Better, Better, Better Act amendment, is undefined. The Better, Better, Better Act amendment was aimed at the small group market that existed at the time of its adoption. The federal preemption can be read narrowly to apply strictly to the **definition of small employer** to fulfill the requirements of federal law (that all qualified small employers, of any size, be allowed to purchase coverage through the exchange), and not apply to the required distribution channel (DC Health Link) of **small group health benefit plans** for groups of no more than 50 employees. This interpretation does not “prevent the application” of federal law, the preemption standard.

History

From the Executive Director's Exchange Market Transition Recommendations, March 6, 2013:

“Future Considerations

Beginning in CY2016, the small group market will expand to include businesses with 51 to 100 employees. The addition of this market segment should be addressed in subsequent years (assuming there are no related amendments to the ACA).” Page 4

From Executive Board Market Transition Resolution March 13, 2013:

“Beginning in 2016, the small group market will expand to include businesses with 51 to 100 employees. The addition of this market segment should be addressed in subsequent years (assuming there are no related amendments to the ACA).”

Federal Provisions

ACA Section 1311(b)(1)

“Each state shall . . . establish an American Health Benefits Exchange for the State that –
(B) provides for the establishment of a [SHOP] that is designed to assist qualified employers in the State who are small employers in facilitating the enrollment of their employees in qualified health plans offered in the small group market in the State. . . .

45 CFR §155.20 Definitions.

“*Qualified employee* means an individual employed by a qualified employer who has been offered health insurance coverage by such qualified employer through the SHOP.

“*Qualified employer* means a **small employer** that elects to make, at a minimum, all full-time employees of such employer eligible for one or more QHPs in the small group market offered through a SHOP. Beginning in 2017, if a State allows large employers to purchase coverage through the SHOP, the term “qualified employer” shall include a large employer that elects to make all full-time employees of such employer eligible for one or more QHPs in the large group market offered through the SHOP.

“*Small 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 1 but not more than 100 employees** on business days during the preceding calendar year and who employs at least 1 employee on the first day of the plan year. In the case of plan years beginning before January 1, 2016, a State may elect to define small employer by substituting “50 employees” for “100 employees.”

§155.700 Standards for the establishment of a SHOP.

(a) *General requirement.* An Exchange must provide for the establishment of a SHOP that meets the requirements of this subpart and is designed to assist qualified employers and facilitate the enrollment of qualified employees into qualified health plans.

§155.710 Eligibility standards for SHOP.

(a) *General requirement.* The SHOP **must permit qualified employers to purchase coverage for qualified employees through the SHOP.**

(b) *Employer eligibility requirements.* An employer is a qualified employer eligible to purchase coverage through a SHOP if such employer—

(1) Is a small employer;

(2) Elects to offer, at a minimum, all full-time employees coverage in a QHP through a SHOP; and

(3) Either—

(i) Has its principal business address in the Exchange service area and offers coverage to all its full-time employees through that SHOP; or

(ii) Offers coverage to each eligible employee through the SHOP serving that employee's primary worksite.

(c) *Participating in multiple SHOPS.* If an employer meets the criteria in paragraph (b) of this section and makes the election described in (b)(3)(ii) of this section, a SHOP shall allow the employer to offer coverage to those employees whose primary worksite is in the SHOP's service area.

(d) *Continuing eligibility.* The SHOP must treat a qualified employer which ceases to be a small employer solely by reason of an increase in the number of employees of such employer as a qualified employer until the qualified employer otherwise fails to meet the eligibility criteria of this section or elects to no longer purchase coverage for qualified employees through the SHOP.

(e) *Employee eligibility requirements.* An employee is a qualified employee eligible to enroll in coverage through a SHOP if such employee receives an offer of coverage from a qualified employer.

DC HBX Provisions

§ 31-3171.04. Authority duties and powers

(a) The Authority shall:

(2) Establish a SHOP Exchange through which qualified employers may access coverage for their employees and shall enable any qualified employer to specify a level of coverage so that any of its employees may enroll in any qualified health plan offered through the SHOP Exchange at the specified level of coverage;

§ 31-3171.01. Definitions

For the purposes of this chapter, the term:

(11) "Qualified employer" means a small employer that elects to make its full-time employees eligible for one or more qualified health plans offered through the Small Business Health Options Program Exchange ("SHOP Exchange"), and, at the option of the employer, some or all of its part-time employees; provided, that the employer:

(A) Has its principal place of business in the District and elects to provide coverage through the SHOP Exchange to all of its eligible employees, wherever employed; or

(B) Elects to provide coverage through the SHOP Exchange to all of its eligible employees who are principally employed in the District.

(16) (A) "Small employer" means a single employer that employed an average of not more than 50 employees during the preceding calendar year.

New section 10a from Better Prices, Better Quality, Better Choices for Health Coverage Amendment Act of 2013, sub (a)(4)

“[O]n or after January 1, 2015, all small group health benefit plans shall be offered and issued or renewed solely through the District’s American Health Benefit Exchange.

DC Insurance Code Provisions (newly-adopted in late 2014)

“Sec. 102. Section 2 of the Drug Abuse, Alcohol Abuse, and Mental Illness Insurance Coverage Act of 1986, effective February 28, 1987 (D.C. Law 6-195; D.C. Official Code § 31-3101), is amended as follows:

(a) Paragraph (10A) is amended to read as follows:

"(10A)(A)(i) Except as provided in sub-subparagraph (ii) of this subparagraph,

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

"(ii) Beginning in calendar year 2016 and for each succeeding year, "large employer" means, in connection with a group health plan with respect to a calendar year and a plan year, a single employer that employed an average of at least 101 employees on business days during the preceding calendar year and at least 2 employees on the first day of the plan year.

"(B) For the purposes of this paragraph:

"(i) All persons treated as a single employer under section 414(b), (c), (m), or (o) of the Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2085; 26 U.S.C. § 414(b), (c), (m), or (o)), shall be treated as a single employer;

"(ii) An employer and any predecessor employer shall be treated as a single employer;

"(iii) All employees shall be counted, including part-time employees and employees who are not eligible for health benefit coverage through the employer; and

"(iv) If an employer was not in existence throughout the preceding calendar year, the determination of whether that employer is a large employer shall be based on the average number of employees that the employer is reasonably expected to employ in the current calendar year."

(b) Paragraph (19A) is amended to read as follows:

"(19A)(A)(i) Except as provided in sub-subparagraph (ii) of this subparagraph, "small employer" means a single employer that employed an average of not more than 50 employees during the preceding calendar year.

"(ii) Beginning in calendar year 2016 and for each succeeding year, "small employer" means a single employer that employed an average of not more than 100 employees during the preceding calendar year.

"(B) For the purposes of this paragraph:

"(i) All persons treated as a single employer under section 414(b), (c), (m), or (o) of the Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2085; 26 U.S.C. § 414(b), (c), (m), or (o)), shall be treated as a single employer;

"(ii) An employer and any predecessor employer shall be treated as a single employer;

"(iii) All employees shall be counted, including part-time employees and employees who are not eligible for health benefit coverage through the employer;

"(iv) If an employer was not in existence throughout the preceding calendar year, the determination of whether that employer is a small employer shall be based on the average number of employees that the employer is reasonably expected to employ in the current calendar year."

CCIIO

On March 6, 2014, CCIIO issued "Insurance Standards Bulletin Series – Extension of Transitional Policy through October 1, 2016, whose subject is "Extended Transition to Affordable Care Act-Compliant Policies." One of the policies addressed in the bulletin is transitional policy relief for "large businesses that currently purchase insurance in the large group market but that, for policy years beginning on or after January 1, 2016, will be redefined as small businesses purchasing insurance in the small group market."

The response to the bulletin prompted CCIIO to issue "**Subject: Frequently Asked Questions on Health Insurance Market Reforms and Marketplace Standards,**" on May 16, 2014.¹ Below is an excerpt from that document:

Transitional Policy Extensions

CMS has received a number of questions from States and issuers about the Extended Transition to Affordable Care Act-Compliant Policies bulletin, released March 5, 2014. The extended transitional policy specified that no Federal enforcement actions would be

¹ Located [here](#).

taken with respect to issuers that elect to continue to offer certain coverage that would otherwise have to be cancelled as non-compliant with specified 2014 market reform requirements. The bulletin also encouraged States to adopt a similar non-enforcement policy. Under this policy, the coverage at issue would not be treated as out of compliance with the specified market reforms if certain specific conditions are met.

(4) See Insurance Transitional Bulletin Series-Extension of Transitional Policy through October 1, 2016 at <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf>.

Like the March 5, 2014 bulletin, these FAQs are specifically applicable to the individual and small group markets, and large employers who renew insurance in the large group market for policy years beginning on or after January 1, 2016, and who will be redefined as of January 1, 2016 as small employers (those employers with 51-100 employees).

7. Would a large employer with 51-100 employees who is a large group policyholder be covered by the March 5, 2014 bulletin with respect to a renewal of its 2013 plan at its 2014 renewal date if the policy is not compliant with the provisions of the ACA that apply to the large group market? No. The extended transitional policy for eligible large group plans applies only to plans that an employer renews for a plan year beginning on or after January 1, 2016 and on or before October 1, 2016 – the year in which the law applies small group market rules to employers with 51 to 100 employees. Prior to January 1, 2016, all insurance coverage sold to large employers, whether they have 51-100 employees or greater than 100 employees must meet all applicable ACA requirements (note that few new requirements went into effect for such employers in 2014). The extended transitional policy is effective as of January 1, 2016 for eligible large employers with 51-100 employees that originally purchased the insurance in the large group market.