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BULLETIN 09-26

Date: November 9, 2009

To: Insurers, Nonprofit Health Service Plans, and Health Maintenance Organizations ("Carriers") Participating in the Maryland Small Employer Market

Re: Small Employer Definition and Affiliated Companies

The purpose of this bulletin is to clarify a portion of the definition of small employer found in the Maryland Health Insurance Reform Act, Insurance Article, §15-1203, Annotated Code of Maryland. Two questions have been presented to the Maryland Insurance Administration regarding the portion of the small employer definition that describes *affiliated companies*. Section 15-1203(b)(3) reads in part:

> *"(3) In determining the group size specified under paragraph (1)(i) of this subsection:*
>
> *(i) companies that are affiliated companies or that are eligible to file a consolidated federal income tax return shall be considered one employer;"*

The first question that was raised was whether companies that want to be considered *affiliated companies* are required to be eligible to file a consolidated federal income tax return. The answer to this question is "No."

The second question was what are "affiliated companies"? Although the term "affiliated companies" is not defined in §15-1203 of the Insurance Article, the term "affiliate" is defined in other parts of the Insurance Article. Section 7-101(b) of the Insurance Article defines "affiliate" to mean "a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person." Similarly, the Court of Special Appeals has said that "affiliated entities" for the purposes of the Telephone Consumer Protection Act must be related by ownership or operational control. *Worsham v. Nationwide Ins. Co.*, 138 Md. App. 487, 506-07 (2001), *cert. denied*, 365 Md. 268 (2001). The MIA has utilized these definitions in reviewing whether companies are truly affiliated for the purposes of § 15-1203.

The Maryland Insurance Administration is concerned that some carriers may use the concept of *affiliated companies* to avoid the dictates of the Maryland Health Insurance Reform Act. While affiliated companies include companies that have common ownership, as described above, common ownership is only one factor to be considered. Before issuing one health benefit plan contract to cover more than one company's employees, a carrier is responsible for ensuring that the relationship among the companies satisfies the requirement that they be "affiliated companies;" that each company is related through common ownership or common control.

Example: The Maryland Insurance Administration took action against a regulated entity that illegally combined employer groups through an entity in order to avoid the mandates of the Maryland Health Insurance Reform Act among other violations. Instead of selling a small employer health benefit plan contract to each of the member companies, a non-small employer health benefit contract was issued to the entity covering the unrelated and unaffiliated member companies' employees, in violation of Maryland law.

Carriers should also be aware that illegally combining the risks of multiple employees through a multiple employer welfare arrangement, ("MEWA"), subjects the MEWA to state licensing requirements. In this regard, the MIA has consistently held that MEWA's are required to hold certificates of authority to operate in Maryland.

Also, for the purposes of counting employees, remember that when insuring Professional Employer Organizations (PEO) or employer leasing companies, carriers are required to count employees at the client employer level. Please refer to Bulletin 98-14, dated November 2, 1998 and §15-1201 of the Insurance Article.

Questions regarding this bulletin may be directed to the Life/Health Section of the Maryland Insurance Administration at 410-468-2170.

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Life/Health Section