

January 19, 1994

The Honorable Dean L. Cameron  
Idaho State Senate  
**STATEHOUSE MAIL**  
Boise, ID 83720

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Small Employer Health Insurance Availability Act

Dear Senator Cameron:

The Attorney General has asked me to respond to your letter of November 23, 1993. Your letter presents two questions for review.

First, does the Small Employer Health Insurance Availability Act, chapter 47, title 41, Idaho Code, require the implementation of rules?

Second, do the basic and standard health insurance plans developed by the Health Benefit Plan Committee and approved by the Director of Insurance pursuant to Idaho Code § 41-4712 meet the definition of a rule as provided in the Administrative Procedure Act?

In addressing your questions, it is helpful to first look briefly at the history and intent of chapter 47, title 41, entitled "Small Employer Health Insurance Availability Act."

**1. History**

The Small Employer Health Insurance Availability Act (the Act), chapter 47, title 41, was passed by the Idaho Legislature in the 1993 legislative session. Its purpose is to "promote the availability of health insurance coverage to small employers regardless of their health status or claims experience . . . ." Idaho Code § 41-4702. The Act attempts to accomplish its stated purpose in the following manner.

The Act requires, as a condition of transacting business in the state, that all small employer insurance carriers ("carriers") offer to small employers at least two types of health benefit plans; a basic health benefit plan and a standard health benefit plan. Idaho Code § 41-4708.

Idaho Code § 41-4712 requires the Director of the Department of Insurance to appoint a health benefit plan committee and then provide two types of procedures for

approval of basic and standard health benefit plans. Under the first procedure, the health benefit plan committee designs a basic health benefit plan and a standard health benefit plan and submits them to the director for approval. Under the second procedure, the committee reviews alternative basic and standard health benefit plans submitted by the carriers themselves and makes recommendations to the Director of the Department of Insurance for approval or rejection of these individual plans. Once plans submitted by carriers are approved, those plans can be used rather than the plans designed by the committee.

The Act also establishes a small employer carrier reinsurance program which is to be supervised by an eight-member board appointed by the Director of the Department of Insurance. Idaho Code § 41-4711. The Act further requires the Department of Insurance to regulate the establishment of classes of business and premium rates by carriers. Idaho Code §§ 41-4705, 41-4706. In addition, the Act mandates renewability of small employer health insurance benefits unless the insurer meets one or more of the statutorily delineated exceptions for renewal. Idaho Code § 41-4707.

In sum, the Act provides a statutory framework for increasing the availability of small employer insurance coverage in the state. Your first question, in essence, asks whether the Act is self-enacting or whether rulemaking is required to carry out the intent of the legislature.

## **2. Necessity of Rulemaking**

The Administrative Procedure Act (APA) defines "rule" as follows:

[T]he whole or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes:

- (a) law or policy, or
- (b) the procedure or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule, but does not include:
  - (i) statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or
  - (ii) declaratory rulings issued pursuant to section 67-5232, Idaho Code; or
  - (iii) intra-agency memoranda; or

(iv) any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule.

(Idaho Code § 67-5201.) In the comments following Idaho Code § 67-5201 which refer to the definition of a "rule," it is noted that an agency may "promulgate a rule only by complying with the procedure set out in the Administrative Procedure Act." It is further noted that the imposition by an agency of legal obligations on a class of persons is a rule and, to impose such legal obligations, an agency must promulgate rules pursuant to the APA.

Idaho Code § 41-4715 requires the Director of the Department of Insurance to promulgate rules in accord with the APA, chapter 52, title 67, Idaho Code, for the implementation and administration of the small employer health coverage reform act. Thus, it is clear the legislature intended that the director promulgate regulations and a review of the Act provides a number of areas where rulemaking would be appropriate.

Idaho Code § 41-4705 allows a carrier to establish separate classes of businesses in certain limited situations. The Director of the Department of Insurance may wish to establish procedures for bringing small employer carriers into compliance with the requirements of Idaho Code § 41-4705 and further may wish to establish procedures approving classes of businesses. Establishment by an agency of procedure or practice requirements generally applicable to small employer carriers meets the definition of a rule and would also require rulemaking. Idaho Code § 67-5201(16)(b).

Idaho Code § 41-4706 provides restrictions and maximum levels of increase for premium rates on health benefit plans. The Director of the Department of Insurance may wish to establish procedures for small employers to demonstrate compliance with the provisions of this section. Establishing procedures for compliance by carriers meets the definition of a rule as provided in Idaho Code § 67-5201(16) and it was clearly contemplated by the legislature that regulations would be promulgated in this area. *See* Idaho Code § 41-4706(k).

Idaho Code § 41-4710 allows a carrier to apply with the Director of the Department of Insurance to become a risk-assuming carrier. The director may contemplate establishing procedures for the application and review by the department of the risk-assuming carrier applicants. Such procedures would also qualify as rules.

Idaho Code § 41-4711 requires that the small employer carrier reinsurance program board establish a plan of operation which includes, among other things, procedures for selecting an administering carrier, procedures for reinsuring risks in accord with the Act and procedures for collecting assessments from reinsuring carriers to fund claims. Idaho Code § 47-4711(7). The plan is to be submitted by the board and

approved by the director. However, since the plan imposes legal obligations on a class of people, it meets the definition of a rule and should be promulgated through the APA rulemaking process.

In conclusion, it is clear that there are numerous areas appropriate for rulemaking under the Small Employer Health Insurance Availability Act. However, the question remains as to whether the basic health benefit plan and the standard health benefit plan designed by the health benefit plan committee pursuant to § 41-4712 and approved by the Director of the Department of Insurance must go through a rulemaking process.

### **3. Health Benefit Plans as Rules**

As previously stated, Idaho Code § 41-4712 requires appointment of a health benefit plan committee charged with the responsibility of, among other things, designing two health care plans: a basic health benefit plan and a standard health benefit plan. The plans are to be consistent with benefit plans of health maintenance organizations and the statute recommends some cost containment features that the committee may include in the plans.

The committee is required within 180 days after its appointment to submit the plans to the director for approval. Currently, the committee has been appointed by the director, plans have been prepared and submitted, and the director has approved the plans. The plans are available for use by carriers unless the carriers prepare their own plans and submit them for approval to the Department of Insurance.

At issue is whether the two plans originally prepared and submitted by the committee to the Director of the Department of Insurance and ultimately approved by him must now go through rulemaking. To be a "rule" under the APA, the plans must meet the following criteria:

1. Be an agency statement of general applicability; *i.e.*, impose legal obligations on a class of people;
2. Implement, interpret, or prescribe law or policy or the procedures or practice requirements of the (agency); and
3. Be promulgated in compliance with the provisions of the APA.

For the reasons delineated below, the plans designed by the committee and approved by the director do not meet this definition.

First, Idaho Code § 41-4712 does not require that the plans drafted by the committee and approved by the director be the only plans available for use by small employer carriers. Rather, the statute provides that carriers may use alternative plans that

are submitted and approved by the director after review by the committee. Idaho Code § 41-4712(3)(b). Thus, the plans are not agency statements of general applicability imposing a legal obligation on a class of persons. The plans are merely available for use by any carrier if that carrier chooses.

The plans also do not implement, interpret, or prescribe law or policy or the procedure or practice requirements of the agency. Rather, the plans are the products of the committee's fulfillment of its statutory responsibility to create contracts of insurance available for use by small employer carriers. If § 41-4712 provided a limited procedural framework for the appointment of a committee and the development of the plans, it may be appropriate for the Department of Insurance to promulgate rules to interpret or prescribe a procedure for the committee. However, unlike other areas of the Small Employer Health Insurance Availability Act previously referenced, § 41-4712 provides a clear procedural process for the design and approval of the health benefit plans. As such, it does not appear necessary for the department to further interpret the law or develop procedures through promulgation of rules and to do so may be redundant.

## **Conclusion**

The Small Employer Health Insurance Availability Act requires the Department of Insurance to enact rules for the implementation and administration of the Act. There are areas within the Act where rulemaking would be appropriate in implementing the intent of the legislature and carrying out the administration of the Act. A number of those areas have been referred to in the analysis. Whenever the Department of Insurance wishes to impose legal obligations on a class of people in an effort to establish procedures or interpret the statutory provisions provided under the Act, the department must promulgate rules pursuant to the provisions of the Administrative Procedure Act.

However, with reference to the plans of insurance developed by the health benefit plan committee and approved by the Director of the Department of Insurance, it appears that a sufficient statutory procedure has been established by the legislature for the design and approval of the plans. Further, it appears that the plans developed by the committee and approved by the director do not meet the definition of a rule since the plans do not impose legal obligations on a class of people. As such, it would be unnecessary for the Department of Insurance to promulgate the plans in the form of a rule.

Very truly yours,

TERRY B. ANDERSON  
Chief, Business Regulation and  
State Finance Division