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Bulletin 436

Revised Counting Methodology for the Group Health Insurance Market

(Supersedes Bulletin 409)

Both the Maine Insurance Code and the federal Affordable Care Act (ACA) require carriers in the small group market to offer coverage to all employers with 1 to 50 employees.[1] However, whether a particular employer is considered "large" or "small" could depend on the counting methodology that is used. This Bulletin withdraws previous guidance issued under Bulletin 409 and reinstates the "head count" methodology formerly used in Maine, except where expressly preempted by federal law.

Maine's small group health plan law applies, by its terms, to all employers with 50 or fewer eligible employees.[2] By contrast, regulations promulgated under the ACA by the Centers for Medicare and Medicaid Services (CMS) require carriers offering small group health plans on the Small Business Health Options (SHOP) Exchange to determine eligibility by using a full-time equivalent (FTE) counting methodology for part-time employees.[3] Thus, if a business has a significant number of employees, but only a few of them work enough hours to be eligible for coverage, it would be a "small" employer under pre-ACA Maine law, but would be ineligible to participate in the SHOP Exchange because it is a "large" employer under the ACA regulation.

For example, if an employer has 10 full-time employees and 75 employees working 20 hours per week, it has 10 eligible employees but has 60 or more FTE employees.[4] Use of the FTE methodology means that this employer is ineligible for community rated small group coverage and must be individually rated, even if there can never be more than 10 covered employees on the plan. It is unfair to both the employer and the carrier to require experience rating when the employer's risk pool is too small to generate any credible loss history. This is not merely a hypothetical example. Employers, producers, and carriers have all expressed their concerns to the Bureau in a number of instances when employers have been caught in this situation.

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[1] 24-A M.R.S.A. § 2808-B; Pub. Health Serv. Act §§ 2702(a) & 2791(e)(4), as amended by PACE Act, P.L. 114-60.

[2] 24-A M.R.S. § 2808-B(1)(D).

[3] 45 CFR § 155.20 (definition of "small employer," incorporating by reference the Internal Revenue Code definition of "applicable large employer," 26 U.S.C. § 4980H(c)(2)).

[4] How much more will vary from month to month, because equivalence is calculated by comparing the work month to 120 hours. That equals a 30-hour week in months that have only 20 weekdays, the minimum possible.

The FTE methodology was originally incorporated into the ACA for a completely different purpose: to determine when a business was large enough to be subject to the "shared responsibility" requirement to provide group health coverage or pay a fee, and to prevent employers from evading this responsibility by reducing the work week below the full-time threshold. The relevant provision enacted by the ACA expressly provides that the FTE counting methodology is required "Solely for purposes of determining whether an employer is an applicable large employer under this paragraph."[5] CMS subsequently extended this methodology to the SHOP Exchange, facilitating a single consistent calculation of employer size for ACA purposes, but advised states that they could continue to use any reasonable method for determining group size for coverage issued off the SHOP Exchange, provided that it accounts for part-time employees.

In 2015, the Bureau adopted the federal methodology out of concerns that using inconsistent methodologies on and off the Exchange would be confusing and would risk creating an unlevel playing field. However, experience has demonstrated that it has been more confusing to require employers with only a handful of eligible employees to be experience rated, and the SHOP Exchange has too small a market presence for the level playing field to be a significant consideration. The pre-ACA methodology set forth in the Maine Insurance Code accounts for part-time employees by including them if and only if they are eligible for coverage under the group health insurance policy. I have concluded that this is the most reasonable method for counting part-time employees for rating purposes, and I am therefore reinstating its use in Maine for off-Exchange group coverage, effective immediately.

All employers with in-force policies are entitled to maintain that coverage until the end of the current policy term, if they choose, and carriers may honor all outstanding offers of small or large group coverage. Except for employers with offers of new or renewal coverage outstanding or in process, or employers applying for coverage through the SHOP Exchange, carriers should transition at the earliest feasible date, and no later than September 1, 2019, to consistent application of the "eligible employee" counting methodology for purposes of access to community-rated coverage under Maine's small group health plan law.[6]

July 23, 2019

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[5] 26 U.S.C. § 4980H(c)(2)(E), *enacted by* ACA § 1513(a).

[6] CMS has cautioned that there may be other areas where state counting methodologies could be preempted by federal law; for example, the determination of employer size for purposes of 45 CFR § 147.104(b)(1)(i)(B), which generally permits carriers to restrict the availability of coverage to a one-month annual enrollment period for small employers that cannot comply with the carrier's minimum employer contribution or group participation rules.