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January 2, 2008

OPINION COMMITTEE

FILE # ML-45498-08
I.D. # 45498

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

RQ-0662-GA

Dear General Abbott:

Please accept this letter as a request for an opinion from your office concerning the applicability of Chapter 1501, Insurance Code, to certain cafeteria plans sponsored by employers and the collateral effect the application of Chapter 1501 to certain cafeteria plans has on individuals' eligibility to participate in the Texas Health Insurance Risk Pool. Specifically, I am requesting an opinion as to whether the payment of individual health benefit plan premiums through certain cafeteria plans offered by employers "creates" a small or large employer health benefit plan for the purposes of Chapter 1501, Insurance Code, and what impact, if any, applying Chapter 1501 to those cafeteria plans has on certain individuals' eligibility to participate in the Texas Health Insurance Risk Pool under Chapter 1506.

Chapter 1501 of the Insurance Code governs the operation of small and large employer health benefit plans in this state. Sections 1501.003 and 1501.004, Insurance Code, describe the circumstances under which a health benefit plan, for the purposes of Chapter 1501, is considered a small or large employer health benefit plan. Both Sections 1501.003 and 1501.004 provide, in part, that an individual or group health benefit plan is considered a small or large employer health benefit plan, as applicable, if the health benefit plan "provides health care benefits . . . and . . . is an employee welfare benefit plan under 29 C.F.R. Section 2510.3-1(j)." Neither Section 1501.003 nor Section 1501.004 specifically addresses under what circumstances a cafeteria plan funded by pre-tax deductions from employer paid salaries is a small or large employer health benefit plan.

While Chapter 1501, Insurance Code, does not specifically address the applicability of that chapter to a cafeteria plan funded by pre-tax deductions from employer paid salaries, Commissioner's Bulletin #B-0028-06, issued by the Texas Department of Insurance on August 1, 2006, concludes that this type of cafeteria plan is subject to Chapter 1501. The bulletin provides:

If an employer . . . allows pre-tax deductions from employer paid salaries through a cafeteria plan, the arrangement is an employee welfare benefit plan

Under TIC §§1501.003(3) and 1501.004(3), if a health benefit plan is an employee welfare benefit plan under 29 C.F.R. Section 2510.3-1(j), the plan is subject to the group health provisions of TIC Chapter 1501.

Accordingly, the payment of individual health benefit plan premiums through . . . a cafeteria plan . . . creates a small or large employer health benefit plan subject to the provisions of TIC Chapter 1501

The Texas Department of Insurance's conclusion, as expressed in Commissioner's Bulletin #B-0028-06, seems to be premised on classifying a cafeteria plan funded by pre-tax deductions from employer paid salaries as an "employee welfare benefit plan under 29 C.F.R. Section 2510.3-1(j)." That section of the C.F.R. provides that the term "employee welfare benefit plan" does not include certain group or group-type insurance programs offered by an insurer to an employer's employees under which:

- (1) [n]o contributions are made by an employer . . . ;
- (2) [p]articipation the program is completely voluntary for employees . . . ;
- (3) [t]he sole functions of the employer . . . with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees . . . , to collect premiums through payroll deductions . . . and to remit them to the insurer; and
- (4) [t]he employer . . . receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions

Because Chapter 1501, Insurance Code, provides that a health benefit plan is considered a small or large employer health benefit plan if the health benefit plan "provides health care benefits . . . and . . . is an employee welfare benefit plan under 29 C.F.R. Section 2510.3-1(j)" and 29 C.F.R. Section 2510.3-1(j) specifies only what may not be considered an employee welfare benefit plan, I request that your office answer the following question:

For the purposes of Chapter 1501, Insurance Code, does the payment of individual health benefit plan premiums through a cafeteria plan that is funded entirely by pre-tax deductions from employer paid salaries create a small or large employer health benefit plan if the individual health benefit plan is not offered or endorsed by the employer?

If your office answers the preceding question in the affirmative, I request that you also answer the following question:

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December 20, 2007
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If a cafeteria plan that is funded entirely by pre-tax deductions from employer paid salaries is classified as a small or large employer health benefit plan, what effect, if any, does that classification have on the eligibility of an individual to participate in the Texas Health Insurance Risk Pool under Chapter 1506, Insurance Code, if that individual is eligible to participate in the cafeteria plan?

Thank you for your time and attention to this matter. If you have any questions or require further information, please contact Trent Townsend at 463-0110. Your assistance in this matter is greatly appreciated.

Sincerely,

A handwritten signature in cursive script that reads "Kim Brimer". The signature is written in dark ink and is positioned above the printed name.

Kim Brimer