AN ORDER AMENDING A RULE.

Office of the Commissioner of Insurance

Agency 145 - Ch. INS 17.50, Wis. Admin. Code:

The Commissioner of Insurance amends s. Ins 17.50 (2) (e), (4) (L) and (m), (6) (title), (c) 1.; and creates s. Ins 17.50 (2) (am), (6) (c) (intro.) and (6m), Wis. Adm. Code, relating to self-insured plans covering health care providers subject to ch. 655, Wis. Stat., and affecting small business.

The statement of scope for this rule SS 057-15, was approved by the Governor on July 6, 2015, published in Register No. 715A3, on July 20, 2015, and approved by the Deputy Commissioner on August 11, 2015. The notice of hearing was published in Register No. 722A4 on February 22, 2016. The rule hearing was held on March 16, 2016 and the comment period closed March 22, 2016. The permanent rule was submitted to and approved by the Governor on April 7, 2016. The Legislative review period closed without action taken on June 30, 2016.

ANALYSIS PREPARED BY THE OFFICE OF THE COMMISSIONER OF INSURANCE (OCI)

1. Statutes interpreted:
ss. 655.001 (14), and 655.23, Wis. Stats.

2. Statutory authority:
ss. 601.41 (3), and 655.23, Wis. Stats.

3. Explanation of OCI's authority to promulgate the proposed rule:
The injured patients and families compensation fund ("fund") was established by and operated under Ch. 655, Wis. Stats. The commissioner of insurance was directed by the Governor in his veto message to 2013 Wis. Act 20 item 16, to "provide a definition of affiliated health care providers by administrative rule to better achieve the intent of the motion and eliminate the ambiguity regarding the affiliated health care providers who are affected by this provision." This proposed rule implements the portions of 2013 Wis. Act 20 sections 2267f and 2267g, and complies with the Governor's directive. Section 655.23 (3) (a), Wis. Stats., requires the commissioner to establish self-insurer qualifications and conditions for insuring for claims including claims arising from employees that are not fund participants. Further, s. 601.41 (3), Wis. Stats., provides that the commissioner shall have rule-making authority pursuant to s. 227.11 (2), Wis. Stats.

4. Related statutes or rules:
No additional statutes or rules than identified.

5. The plain language analysis:
The proposed rule defines "affiliated health care providers" to be two or more health care providers that are either legal entities or are employed by one or more legal entities over which operating control is exercised and whose incomes are consolidated with the controlling legal entity in audited financial statements under generally accepted accounting principles (GAAP). The term "provider" is amended to include, unless otherwise specified, both individual or affiliated health care providers. The rule modifies the initial filing and funding requirements for providers to reflect the submission of GAAP statements on a consolidated basis and the preclusion of affiliated health care provider's ability to use letters of credit for initial funding. The rule also creates a new provision specifically addressing the minimum funding level for affiliated health care providers as the greater of $2,000,000 or the amount of the actuarial estimate.

6. Summary of and comparison with any existing or proposed federal statutes and regulations:
To the fund board's and OCI's knowledge there is no existing or proposed federal regulation that is intended to address self-insuring for medical malpractice claims.

7. Comparison with rules in adjacent states:
To the fund board's and OCI's knowledge there are no similar rules in the adjacent states to compare this rule to as none of adjacent states have a fund created by statute where providers are required to participate in a fund and permitted to self-insure for claims.

8. A summary of the factual data and analytical methodologies that OCI used in support of the proposed rule:
None. This rule implements the statutory changes and updates the regulation to reflect changes in the business of health care. The impact is to facilitate the ability for larger entities that are under common control to self-insure thus potentially increasing the number of health care providers that elect to self-insure without constraining current providers that are self-insured.

9. Analysis and supporting documentation that OCI used in support of OCI's determination of the rule's effect on small business or in preparation of an economic impact analysis:
The proposed rule may have a potential positive impact on small businesses as the statutory and rule changes permit smaller entities to self-insure if that is desired by the entity that may be more cost effective for the entity. The proposed rule retains current levels for individual or single entity health care providers so they are not harmed or limited by this rule.

10. Effect on small business:
This rule will have little or no effect other than a positive impact on small businesses. With the proposed changes affiliated health care providers will more easily be able to self-insure without affecting the individual health care providers as provisions for non-affiliated providers are unchanged.

11. A copy of any comments and opinion prepared by the Board of Veterans Affairs under s. 45.03 (2m), Stats., for rules proposed by the Department of Veterans Affairs.
None.

12. Agency contact person:
A copy of the full text of the proposed rule changes, analysis and fiscal estimate may be obtained from the Web site at: http://oci.wi.gov/ocirules.htm

Or by contacting Julie E. Walsh, Senior Attorney, at:
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Mail: PO Box 7873, Madison, WI 53707-7873

13. Place where comments are to be submitted and deadline for submission:
The deadline for submitting comments is 4:00 p.m. on March 22, 2016.

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The rule changes are:

Section 1. Ins 17.50 (2) (am) is created to read:

Ins 17.50 (2) (am) "Affiliated health care providers" means two or more health care providers delivering services as described in s. 655.002 (1), Stats., and who satisfy all of the following:

1. The health care providers are either legal entities or are employed by one or more separate legal entities over which operating control is exercised by a common controlling legal entity. The controlling legal entity need not be a health care provider.

2. The incomes of the health care providers are consolidated with the controlling legal entity in audited financial statements prepared under generally accepted accounting principles.

Section 2. Ins 17.50 (2) (e) is amended to read:

Ins 17.50 (2) (e) "Provider," when used without modification, means a health care provider as defined in s. 655.001 (8), Stats., or affiliated health care providers as defined in par. (am), ~~that is~~ responsible for the establishment and operation of a self-insured plan.

Section 3. Ins 17.50 (4) (L) and (m) are amended to read:

Ins 17.50 (4) (L) The provider's most recent audited annual financial statement prepared under generally accepted accounting principles that includes, if applicable, all affiliated health care providers covered under the self-insured plan on a consolidated basis.

(m) A proposed draft of a letter of credit, if the provider intends to use one as part of the initial funding, except for affiliated health care providers who are prohibited from using a letter of credit for initial funding.

Section 4. Ins 17.50 (6) (title) is amended to read:

17.50 (6) FUNDING REQUIREMENTS FOR PROVIDERS: PROHIBITIONS.

Section 5. Ins 17.50 (6) (c) (intro.) is created to read:

17.50 (6) (c) For self-insured plans except a self-insured plan for affiliated health care providers, the provider shall provide all of the following:

Section 6. Ins 17.50 (6) (c) 1., is amended to read:

1. If the actuarial estimate under sub. (4) (d) is less than $2,000,000, the provider shall, before the self-insured plan begins operation, deposit in the trust cash equal to the first year's estimated liabilities plus a letter of credit equal to the difference between the cash funding and $2,000,000 except as provided under sub. (4) (m).

Section 7. Ins 17.50 (6m) is created to read:

17.50 (6m) FUNDING REQUIREMENTS FOR AFFILIATED HEALTH CARE PROVIDERS. The minimum initial funding required for a self-insured plan is the greater of $2,000,000 or the actuarial estimate under sub. (4) (d).

Section 8. These changes will take effect on the first day of the month after publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2) (intro.), Stats.