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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 03-055

#### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 2002.]**

#### 1. Statutory Authority

a. According to s. 227.15 (1), Stats., an agency may not hold a public hearing on a proposed rule until after it has received a written report from the Legislative Council Rules Clearinghouse. The Office of Commissioner of Insurance (OCI) has scheduled a public hearing on July 11, 2003, which is before the statutory deadline for completion of the Clearinghouse Report. As a courtesy to OCI, the Rules Clearinghouse has expedited review of the rule and completed its report early so that the hearing may proceed as scheduled. In the future, please contact the Clearinghouse Director if OCI intends to schedule a public hearing prior to the date a Clearinghouse Report is due.

b. Section 635.10, Stats., provides that small employer insurers must use the uniform employee application form beginning no later than August 1, 2003. Section Ins 8.49 (1) (a) indicates that small employer insurers must use the form that is available beginning August 1, 2003, no later than the effective date of the rule. The effective date is stated in SECTION 2 as being the first day of the third month following publication.

First, given the public hearing process, the required submission of the proposed rule to the Legislature for committee review, and the subsequent submission to the Revisor of Statutes for publication, it seems extremely unlikely that the form will be available on August 1, 2003 as indicated in s. Ins 8.49 and in the analysis. Including this inaccurate date, or any date, in s. Ins 8.49 (1) (a) is not essential. It would appear to be advisable to simply indicate in s. Ins 8.49 (1)

(a) that small employer insurers must use the small employer uniform employee application form. (Also see Comment 2. a., below, for additional material to be inserted in s. Ins 8.49 (1) (a), further identifying the form.)

Second, there does not appear to be statutory authority to delay the effective date. As a practical matter, small employer insurers cannot use the form until it is published and they have had an adequate opportunity to convert their systems. While OCI may choose not to enforce the rule until insurers have had this opportunity, there does not appear to be statutory authority to delay the effective date beyond the first day of the month following publication.

c. Section Ins 8.49 (4) (a) requires a small employer insurer to state a premium within five business days from receipt of all pertinent information. Section 635.18 (6), Stats., permits a small employer insurer to deny an application, rather than providing a premium quotation. It appears that this alternative should be included, along with a requirement that the denial be in writing and state the reasons.

## **2. Form, Style and Placement in Administrative Code**

a. Sections 601.41 (8) (b) and 635.10, Stats., require OCI to develop a small employer uniform employee application form by rule. This means that the content of the form should be included in the administrative code. This also means that future changes to the form are subject to rule-making. The form should be included as an appendix to ch. Ins 8 or as a subsection in s. Ins 8.49. A cross-reference to whichever method is selected should be included in s. Ins 8.49 (1) (a) to identify the form. Nonetheless, it is not inappropriate to include the note following s. Ins 8.49 (1) indicating where a copy of the form may be obtained and giving the web address for individuals who wish to download it. In addition, the note should specify that the form may be obtained “at no charge.” [See s. 1.09 (2), Manual.]

b. The application form is replete with slashed alternatives. These create ambiguity and should not be used. [See s. 1.01 (9), Manual.] For example, in the fifth reason for waiver under Section II. of the application form, the reference to “and/or” should be changed to the appropriate conjunction because it is unclear if what is intended is that the total premium contribution for the employee plus spouse plus children would exceed 10% of earnings or if the premium contribution for each should be separately compared to 10% of gross earnings. The entire application form, including the two authorizations, should be reviewed for the use of slashed alternatives, and appropriate corrections should be made.

c. In Section VIII. of the application form, the first sentence of the third paragraph uses the slashed alternative “he/she.” This should be changed to “the person”. [See s. 1.01 (3), Manual.] A similar comment refers to the last line of the application form.

## **3. Conflict With or Duplication of Existing Rules**

a. Section Ins 8.60 (1) prohibits a small employer insurer from issuing a policy unless all eligible employees and dependents are covered, unless coverage is declined by an employee

for certain reasons. One of those reasons is set forth in s. Ins 8.60 (1) (a) and is a declination because the individual has other coverage--if the small employer insurer determines that the other coverage provides benefits similar to or exceeding benefits provided under the basic health plan. It does not appear that the first, third, and fourth reasons for waiver under Section II. of the application form require that information about the other coverage be submitted in order to make the comparison of coverage. Were these provisions intended to be consistent with s. Ins 8.60 (1) (a)? [See also ss. Ins 8.60 (2) and 8.65.]

b. In Section II. of the application form, it is not clear why coverage under the health insurance risk-sharing plan (HIRSP) is not included as a reason for waiver inasmuch as it is included in s. Ins 8.60 (1) (e). Was the omission intentional?

### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. In the second paragraph of the analysis, the semicolon should be changed to a colon. Also, “permits” should be changed to “to permit”.

b. In the second sentence of the third paragraph of the analysis, “regulations establishes” should be changed to “regulations establish”. Also, the structure of the third item listed should be changed to be consistent with the introductory clause. For example, it could be changed to “small employer insurers are required to share...”. In addition, the comma following “and” should be deleted.

c. The last paragraph of the analysis refers to a 60-day grace period. Was this intended to reflect the rule’s taking effect on the first day of the third month following publication? If so, this may not be exactly 60 days. (However, see Comment 1. b., above.)

d. The first sentence of s. Ins 8.49 (2) (a) is confusing. It may be clearer if it indicated that a small employer insurer must consider information in an application form to be current if the form is received by the small employer insurer within 30 days after the date the form was completed, unless the form has been superseded by a more recently completed form or unless the insurer accepts additional or modified information that has subsequently been submitted.

e. The last sentence of s. Ins 8.49 (2) (a) confusingly refers to “information than was contained.” Also, the sentence seems cumbersome. It appears that it could be reworded simply to state: “A small employer insurer may accept and use information provided by an employee subsequent to the date the employee signed the application form if the employee is providing additional or modified information.”

f. In s. Ins 8.49 (2) (b) (intro.), “the small employer” should be changed to “a small employer”. Also, “to complete” should be changed to “to submit” in order to avoid the suggestion that the employer completes the employee application forms. Also, “occur” should be changed to “occurs” for subject and verb agreement.

g. In s. Ins 8.49 (3) (a), small employer insurers are required to forward “photocopies” of applications after receiving a request to forward “a copy”. Was the limitation to photocopies,

as opposed to electronic copies, intentional? Also, as this potentially may involve many pieces of paper, is the small employer insurer permitted to charge the employer for complying with the request? In the last sentence of s. Ins 8.49 (3) (a), the reference to “it” should be changed to “the insurer”. Also, “has requested information be sent” should be changed to “has requested that information be sent”.

h. In the first sentence of s. Ins 8.49 (3) (b), the phrase “If the small employer” should be changed to “If a small employer”. Also, at the end of the first sentence, “each small employer insurer” should be changed to “each identified small employer insurer” to avoid the implication that all small employer insurers are to receive the application. Also, in the last sentence, it appears that “insurer’s authorized representative” should be changed to “insurer’s authorized intermediary” to be consistent with the prior sentence, or vice versa.

i. In s. Ins 8.49 (4) (a), it appears that the word “materials” is unnecessary.

j. Section Ins 8.49 (4) (b) requires small employer insurers to make a reasonable effort to obtain the required information described in s. Ins 8.49 (4) (a), that is, all pertinent information required for underwriting. Is this intended to require that small employer insurers make a reasonable effort to obtain any additional information required for underwriting that was not submitted with the employer’s application? Also, should there be a requirement that the insurers make an effort to obtain the information promptly? If so, it appears that s. Ins 8.49 (4) (b) could be redrafted to something such as: “If the small employer’s application for group health insurance, including the uniform employee applications submitted with it, are insufficient to make an underwriting decision, a small employer insurer shall make a reasonable effort to promptly obtain all additional information required to make an underwriting decision.”

k. On the uniform employee application form, the introductory section and the “ref” section at the top of the first page should refer to “Wis. Stats.” rather than “Wis. Stat.”

l. In Section I. 2. a. of the form, “county and state” could be changed to “county and state, or country” to deal with marriages that did not occur in the United States.

m. In Section II. of the form, the first, third, and fourth reasons for waiver are that the employee, spouse, or dependent children are covered or “will be covered” under another plan that is not sponsored by the employer. A requirement is included that the identification card for the other plan be attached. However, if the person “will be covered,” rather than being presently covered, it is not clear how an identification card could be attached. If the reason for waiver is that the person “will be covered,” it may be preferable to require that the employee attach a statement explaining the other coverage and when the other coverage will take effect.

n. In Section II. of the form, the second reason for waiver is a statement by the employee that the employee does not have a risk characteristic or other attribute that would be the sole cause for the small employer insurer to make a decision with respect to premiums or eligibility for a policy that is adverse to the small employer. While this may be permitted as a reason for declining coverage under s. Ins 8.60 (1) (c), it is not clear how an employee would have the requisite information to make this statement. Also, if it continues to apply, should it

pertain solely to the employee, or should it also more clearly apply to the employee's spouse and dependent children?

o. In Section II. of the form, the fourth reason for waiver refers to "our identification card for their plan." It appears that "our" should be changed to "your" or "the".

p. In Section II. of the form, the fifth reason for waiver indicates that the annualized premium contribution to be paid by the employee "on behalf of myself or my dependent spouse and/or child(ren) would exceed 10% of my annualized gross earnings." Because the application form is being completed to request information about premiums, it is not clear how the employee would know that the premium contribution would necessarily exceed 10% of earnings. Also, according to s. Ins 8.60 (1) (d), the phrase "from the small employer" should be added so that income from other employers or other sources is not considered.

q. In Section II. of the form, the next-to-last paragraph indicates that the person has declined to enroll in coverage "as indicated above." No alternative is given for waiver if the person declines enrollment for any other reason, for example, because the premium contribution would be 9% of the person's gross earnings and the employee does not want to make the contribution or because there are religious reasons for rejecting health insurance coverage. An employee may be able to waive coverage for other reasons, even though, according to s. Ins 8.60 (1) (intro.), such a waiver would preclude the insurer from issuing a policy. It appears that the form should provide a space for the employee to state other reasons for waiver.

In the third sentence of this paragraph, "nor" should be changed to "or". Also, to be consistent with s. Ins 8.64, the phrase "I was not pressured nor forced" could be changed to "I was not pressured, forced, or unfairly induced". Also in that sentence, "waiving/declining" should be changed to one or the other, but not both. [See s. 1.01 (9), Manual.]

r. In Section IV. (a) of the form, the first sentence refers to listing "all dependents, spouse, and child(ren) applying for insurance." It is not clear what "dependents" means in this sentence.

s. In Section IV. (b) of the form, should the question with respect to dependent children who are full-time students apply to those who are 18 years of age or older? Also, does a small employer insurer need to know if 50% of support is provided for a grandchild who is, for example, three years old and is not a full-time student? If so, this question would not solicit the information. If a child does not live with both natural or adoptive parents, for example, following a divorce, is it necessary to get information about the percent of support as, presumably, either parent could cover the child as a dependent? If it is necessary, why should it matter if a minor child is a full-time student? Also, the introductory language states: "If required by the insurer...". How would the person completing the application know if it is required by the insurer? It appears that, if it is retained, the last sentence should be rephrased "If not, for which dependents do you not provide at least 50% support?"

t. In Section V. of the form, a person can truthfully answer "No" to the first question if he or she has Medicare Part A only coverage because the conjunction is "and." Is this the

intended result? If not, it may be more appropriate to simply ask if the person is “covered by Medicare” without designating the parts under that first question.

u. In the last sentence of the introductory paragraph of Section VI. of the form, it would be less confusing and more grammatically correct to change the phrase “prior to your receipt from your employer’s that there has been” to “prior to your employer’s notifying you that there has been”.

v. In Section VI. C. of the form, the phrase “tobacco or smokeless tobacco” should be changed to “tobacco, including smokeless tobacco,”.

w. In Section VI. D. 1. of the form, the conjunction “or” following each semicolon should be deleted. In addition, a semicolon should be inserted immediately preceding the phrase “or been advised”.

x. In Section VI. of the form, items D., E., and F. refer to either the “past” or “last” 10 years or 5 years. Is this 5 or 10 years from the exact date the form is completed or calendar years? It is assumed that it is the former, but consideration could be given to clarifying this.

y. In Section VI. E. of the form, the question mark following 1. (f) should be deleted. Also, the phrase “please check all that apply” in the introduction is unclear; when a person can check “yes” or “no” all of the choices apply.

z. In Section VI. F. of the form, the phrase “application to be covered by this insurance” could be changed to “application”. This would be consistent with Section VI. E. and eliminate unnecessary wording.

aa. In Section VI. F. of the form, a space is provided after the question to list details of answers “yes” to questions A. through F. It would be less confusing if this were item G. This would necessitate renumbering a previous cross-reference and changing the subsequent section to item H. Also, it appears that the phrase “any of the” should be inserted before the phrase “questions A through F.”

bb. Section VI. G. of the form specifies that if anyone named in the application “is taking, has had prescribed or recommended, medication” then information must be provided. The form does not make clear which time period the phrase “has had prescribed or recommended” applies to. This could be interpreted as applying to a medication taken at any time during the person’s life. Is this the intended result? This should be clarified. Also, “or” should be inserted preceding “has”.

cc. Section VII. of the form is to be completed only if the insurance requires the selection of a network, primary care provider, dentist, or clinic. The grid form to be completed suggests that if the choice is between various networks, each covered person in a family could select a different network. Is this the intention?

dd. In Section VIII. of the form, the fifth sentence of the second paragraph refers to “other information provided to myself”. The word “myself” should be changed to “me”. Also in

that sentence, it is not clear who “them” refers to in the phrase “written document provided to them”.

ee. The following comments apply to the “AUTHORIZATION TO OBTAIN MEDICAL INFORMATION” form:

(1) In the first sentence of the first paragraph, it appears that “knowledge of me, my spouse, or my minor or dependent children’s health and health care” should be changed to “knowledge of my, my spouse’s, or my minor or dependent children’s health and health care”. Otherwise, the form authorizes any organization or institution to release any record or “knowledge” about an employee and the employee’s spouse, not just health and health care records. Unless that result was intended, this should be amended.

(2) The first paragraph indicates that “psychotherapy notes” are excluded from the authorization to release health or health care records. However, the second paragraph further authorizes the release of information or records pertaining to “mental illness diagnosis or treatment,” and “psychotherapy notes” are not excluded in the second paragraph. Since there is a separate form for authorization to disclose psychotherapy notes, it appears that psychotherapy notes should also be excluded from the second paragraph.

(3) It appears that the last sentence of the first paragraph should be changed to state that “The Companies to which information may be released are:”. Otherwise, the “includes” language could be interpreted as not limiting disclosure to the specified companies and would result in an inconsistency with s. Ins 8.49 (3) (b).

(4) In the second paragraph, “organization, institution that” should be changed to “organization, or institution that”.

(5) In the third paragraph, “by the Company, or to” should be changed to “by the Company to.”

(6) In the third paragraph, does the exception that permits providing information to the “plan sponsor” mean, for example, that records about a person’s diseases, alcoholism, or mental illness could be disclosed to the individual’s employer? Is there any prohibition on redisclosure if records are authorized to be released under the third paragraph?

(7) The first few sentences of the fifth paragraph refer to “I” and “my.” However, the last two sentences refer to “you” and “your” as if the signator were being addressed in the second person instead of actually being the first person. This inconsistency is confusing and should be remedied.

(8) This authorization is to be signed by the applicant and the applicant’s spouse. It is not clear that this authorization is valid for disclosure of information about a dependent child who is not a minor.

ff. The following comments apply to the “AUTHORIZATION PSYCHOTHERAPY NOTES” form:

(1) It appears that the form should be titled "AUTHORIZATION TO OBTAIN PSYCHOTHERAPY NOTES" since that is the stated title of the form in the fifth paragraph.

(2) In the first paragraph, "knowledge of me, my spouse, or my minor or dependent children's psychotherapy notes or information" should be changed to "knowledge of my, my spouse's, or my minor or dependent children's psychotherapy notes or information". (See Comment ee. (1), above.)

(3) In the first paragraph, "authorize any licensed physician...may release" should be changed to "authorize any licensed physician...to release".

(4) In the second paragraph, the comma should be deleted in the phrase "by the Company, to any person".

(5) In the second paragraph, does the exception that permits providing information to the "plan sponsor" mean that psychotherapy notes could be disclosed to the individual's employer? Also, is there any prohibition on their redisclosure if records are authorized to be released under the second paragraph?

(6) In the fourth paragraph, the last two sentences switch from the first person to the second person "you" or "your." This inconsistency should be remedied.

(7) This authorization includes a signature line for a "Minor or Dependent Child, (if treatment was received without parental consent, in accordance with state law)". First, the comma should be deleted. Second, is it possible that some states require the signature of a minor or dependent child even if the treatment were received with parental consent? Also, does "dependent child" mean a child who is age 18 or over, or does it have some other meaning? This should be clarified.