

COMMONWEALTH OF VIRGINIA



SCOTT A. WHITE
COMMISSIONER OF INSURANCE
STATE CORPORATION COMMISSION
BUREAU OF INSURANCE

P.O. BOX 1157
RICHMOND, VIRGINIA 23218
1300 E. MAIN STREET
RICHMOND, VIRGINIA 23219
TELEPHONE: (804) 371-9741
www.scc.virginia.gov/boi

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Administrative Letter 2018-04

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To: All Health Carriers Licensed in Virginia in the Individual and Small Group Markets and All Interested Parties

**Re: Implementation and Enforcement of Senate Bill 672
§§ 38.2-3406.1 and 38.2-3431 of the Code of Virginia, as Amended**

The purpose of this Administrative Letter is to provide guidance to health carriers regarding the implementation and enforcement of the above-referenced statutes that were amended and reenacted by the 2018 Virginia General Assembly, and that will take effect on **July 1, 2018**.

The current law requires that a “small employer” employ at least one employee but no more than 50 employees on the first day of the plan year and on business days during the preceding calendar year.

The new law broadens the definition of “small employer” in §§ 38.2-3406.1 and 38.2-3431 of the Code of Virginia (“Code”) to include a “self-employed individual,”¹ and to allow a sole shareholder of a corporation or a sole member of a limited liability company (“LLC”), or an immediate family member of such sole shareholder or sole member, to count as an employee of the corporation or LLC, provided that the individual has performed a service for remuneration under a contract of hire.

The Bureau of Insurance (“Bureau”) has received several questions regarding the potential conflict between the provisions of SB 672 and the manner in which federal laws, rules and guidance define a small employer who is eligible to purchase health insurance

¹ The new law defines “self-employed individual” to mean, “An individual who derives a substantial portion of his income from a trade or business (i) operated by the individual as a sole proprietor, (ii) through which the individual has attempted to earn taxable income, and (iii) for which he has filed the appropriate Internal Revenue Service Form 1040, Schedule C or F, for the previous taxable year.”

For purposes of this Administrative Letter, the term “sole proprietor” will be used to describe all individuals that qualify as a small employer pursuant to Senate Bill 672.

coverage in the small group market. While the inclusion of sole proprietors in the definition of “small employer” does conflict with the definitions of “small employer” as administered by the Department of Health and Human Services, the Department of Labor, and the Internal Revenue Service, § 1321(d) of the Patient Protection and Affordable Care Act (“ACA”) specifically provides that federal law shall not be construed to preempt any state law that does not “prevent the application” of the ACA. This provision grants states the flexibility to enact laws and regulations that broaden the protections in the ACA, but that do not inhibit them. SB 672 does not prevent the application of the ACA in the sense that it broadens the definition of “small employer,” and does not limit it further than contemplated by the ACA.

In contrast, had SB 672 required that a small employer consist of at least two employees in addition to the employer, it would have prevented employers with just one employee from purchasing coverage in the small group market as permitted by the ACA, and would have clearly been preempted by federal law. Given the fact that SB 672 does not restrict application of the ACA, we find no federal preemption issue.

Additionally, Virginia is not the only state that has enacted a law that requires health carriers to treat a sole proprietor as a small employer group. Other states require carriers to comply with state laws similar to Virginia’s, and carriers in those states have managed to do so while also complying with federal rules pertaining to medical loss ratio (“MLR”) and risk adjustment.

In addition to these general questions regarding the feasibility and legality of enforcing SB 672, the Bureau has received several specific questions regarding its implementation. These questions, and the Bureau’s responses to such questions are as follows:

- 1. Would the Bureau consider limiting these signups to January 1, 2019 so as to allow those enrolled in an individual plan to finish their coverage year?** No. As stated above, these statutory changes take effect on July 1, 2018. Pursuant to §§ 38.2-3432.2, 38.2-3448, and 38.2-508 (2) of the Code, the Bureau is not permitted to create an enrollment period for sole proprietors that is separate and distinct from the enrollment period that is created for all small employers. To do so would be unfairly discriminatory.
- 2. Would the Bureau consider limiting the small group signups for these sole proprietors to once a year, ala an enrollment period similar to the individual market?** No. We understand that health carriers may want a limited enrollment period to prevent adverse selection. However, as described above, Virginia law does not allow the Bureau to provide a limited open enrollment period for a portion of the small group market but not the entire small group market. A carrier should administer enrollment of these sole proprietors and apply reinstatement provisions in the same manner as with other small groups. For example:
 - Open enrollment will occur only once per year and will be set by the employer;

- The employer will offer an initial enrollment period during the year to any new subscribers or dependents only when first eligible;
- Coverage for new subscribers or dependents who join the group during the year (not the initial enrolling sole proprietor) may be subject to a waiting period not to exceed 90 days; and
- Subscribers or dependents who did not enroll when first eligible may only enroll at the next open enrollment period, unless they qualify for a special enrollment based on a qualifying event.

The carrier may require any of the above information to be included in application materials as may be done currently for small groups.

- 3. Does the Bureau envision a change in MLR calculations to account for the sole proprietors added to the small group risk pool?** Although the Bureau neither directs the MLR process nor its calculations, the Bureau understands from the Centers for Medicare and Medicaid Services ("CMS") that sole proprietors and other individuals newly eligible for coverage in the small group market pursuant to changes to §§ 38.2-3406.1 and 38.2-3431 of the Code should be included in the MLR calculations for the risk pool in which they are enrolled.
- 4. How does the Bureau plan on calculating risk adjustment under the new rule?** Although the Bureau neither directs the risk adjustment process nor its calculations, the Bureau understands from CMS that sole proprietors and other individuals newly eligible for coverage in the small group market pursuant to changes to §§ 38.2-3406.1 and 38.2-3431 of the Code should be included in the risk adjustment calculations for the risk pool in which they are enrolled.
- 5. Does the bill violate guaranteed availability statutes at either the state or federal level?** No. This new law will require a carrier that offers any health plan in the small group market to offer that plan to a sole proprietor, pursuant to § 38.2-3448 of the Code. Likewise, any carrier that offers coverage in the individual market must offer coverage to a sole proprietor as an eligible individual. The only exception is for the Federally-facilitated Small Business Health Options Program ("FF-SHOP"). Federal rules do not permit a sole proprietor to obtain coverage through the FF-SHOP.
- 6. Would plans be allowed to request a sole proprietor's W-2 for the purposes of employment verification?** A W-2 cannot be required for a sole proprietor since the more relevant documentation is the tax documentation cited in the definition of "self-employed individual" in § 38.2-3431 of the Code.²

² The Bureau acknowledges that the new law does not require equivalent documentation for a sole shareholder of a corporation or a sole member of an LLC, but the Bureau will permit carriers to require appropriate tax documentation from the previous calendar year for such a sole shareholder or sole member as well as the immediate family member of such sole shareholder or sole member.

- 7. If the Bureau directs plans to allow immediate enrollment on July 1st, will plans be permitted to update their rates in both the individual and small group markets?** No, not for July 1, 2018. Pursuant to 45 CFR § 156.80(d)(4)(i) and (ii), a carrier may not establish the index rate and make market-wide adjustments more frequently than annually, except for the small group market rates, which may be adjusted quarterly. Thus, while federal law prohibits a carrier from adjusting rates in the individual market for 2018, an adjustment can be filed for the small group rates effective October 1, 2018. The timeframe to adjust small group rates for July 1, 2018, has passed. A rate revision may also be filed for the 2019 individual and small group market rates, as applicable, based on valid actuarially-sound assumptions.
- 8. Does the bill permit plans to enroll joint owners of a “mom-and-pop” business in small group coverage?** No. If they are both owners of the corporation or both partners in an LLC, there is no sole shareholder or sole member, and thus, no employees under the new law. If, however, either of the owners is the sole shareholder of the corporation or sole member of the LLC, then that owner and an immediate family member of that owner would qualify as employees and coverage could be obtained in the small group market.

Given the short timeframe for carriers to implement these changes, it will not be necessary for carriers to refile forms and coverage documents for the 2018 plan year to include the new small employer definition. However, forms filed for the 2019 plan year must not conflict with the new definition for small group coverage outside of the FF-SHOP. If a carrier determines that forms for the 2018 plan year will need to be revised for purposes of managing enrollment as described in #2 above, the carrier should contact the Bureau immediately to discuss any necessary changes and the best method for accomplishing such changes.

Cordially,



Scott A. White
Commissioner of Insurance

SAW/jsb

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**The responses to questions
3 and 4 were amended to reflect
new information received by the
Bureau.**