**02 DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION**

**031 BUREAU OF INSURANCE**

**Chapter 135: EMPLOYEE BENEFIT EXCESS INSURANCE**

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**Section 1. Purpose**

The purpose of this rule is to set forth standards for employee benefit excess insurance providing coverage for employers maintaining group health plans.

**Section 2. Authority**

The Superintendent adopts this rule pursuant to 24-A M.R.S. §§ 212 and 707(3).

**Section 3. Scope**

This rule applies to all insurers offering or renewing employee benefit excess insurance policies covering group health plans in this State on or after the effective date of this rule. The Superintendent by written order may waive or modify some or all of the provisions of this rule, for good cause shown, for a policy offered to a retiree-only group health plan.

**Section 4. Definitions**

For purposes of this rule:

1. “Actuarial certification” means a written statement by a member in good standing of the American Academy of Actuaries, or other qualified individual acceptable to the Superintendent, that to the best of the actuary’s knowledge and judgment, the insurer is in compliance with the applicable laws of the State of Maine and provisions of this rule, based upon an examination by the certifying individual and including a review of the appropriate records and the actuarial assumptions and methods used by the insurer in establishing attachment points and other applicable determinations.

2. “Attachment point” means the claims amount incurred by an insured group beyond which the insurer incurs a liability for payment.

3. “Eligible employee” has the same meaning as provided in 24-A M.R.S. §2808-B, subject to any applicable standards under the federal *Affordable Care Act*.

4. “Employee benefit excess insurance” means insurance protecting an employer against higher than expected obligations under an employee benefit plan, at retention levels that do not have the effect of making the plan an insured plan. Reinsurance provided to employers that self-insure their workers’ compensation exposures pursuant to 39-A M.R.S. §403 does not constitute employee benefit excess insurance. The transaction of employee benefit excess insurance does not constitute the conduct of the business of reinsurance.

5. “Expected claims” means the amount of claims that, in the absence of an employee benefit excess insurance policy or other insurance, is projected to be incurred by an insured group through its health plan.

6. “Group health plan” has the same meaning as provided in Paragraph 2791(a)(1) of the federal *Public Health Service Act*, but does not include a plan that provides only excepted benefits as described in Subsection 2791(c) of the federal *Public Health Service Act*.

7. “Small employer” means an employer eligible for a small group health plan under 24‑A M.R.S. §2808-B or under the federal *Affordable Care Act*.

**Section 5. Employee Benefit Excess Insurance Standards**

1. An employee benefit excess insurance policy may not:

A. Have an annual attachment point that is less than $28,700 for health benefit claims incurred per individual;

B. Have an annual aggregate attachment point for health benefits that is less than 120 percent of expected claims, determined net of any specific excess coverage that might be provided by the policy, and verified by the insurer using reasonable and accepted actuarial principles; or

C, Provide direct coverage to individual plan participants or beneficiaries.

2. An insurer may not offer or renew an employee benefit excess insurance policy to a group with ten or fewer employees enrolled in the group health plan, with the exception of a policy that was in force on the effective date of this rule, covering a group with ten or fewer enrolled employees.

3. If the applicant or policyholder is a small employer, the insurer may not offer or renew an employee benefit excess insurance policy that excludes or restricts coverage for claims made by any individual who is covered by the underlying benefit plan, or for claims arising out of any medical condition that is covered by the underlying benefit plan.

4. If an insurer offers or renews an employee benefit excess insurance policy that has an annual limit on coverage, or an exclusion applying to claims that are covered by the employer’s benefit plan, the insurer must provide the employer with a disclosure notice explaining that the employer has unlimited responsibility for paying any claims that are above the annual limit of the excess insurance policy or are excluded from reimbursement by the excess policy.

5. Pursuant to 24-A M.R.S. §2452(1), an employee benefit excess insurance policy may not discriminate unfairly among or against beneficiaries of the underlying benefit plan, or treat conditions related to the Human Immunodeficiency Virus, or HIV, more restrictively than other sicknesses or disabling conditions.

6. Pursuant to 24-A M.R.S. §2849-B(7), an insurer may only offer or renew an employee benefit excess insurance policy when the underlying benefit plan meets the requirements of continuity of coverage in Title 24-A, Chapter 36.

7. At the time an employee benefit excess insurance policy is issued or renewed, an insurer must make tail coverage available with a run-out period of at least six months. An insurer may issue or renew an employee benefit excess insurance policy that does not include this tail coverage only if:

A. The employer requests that the policy does not include this tail coverage;

B. The insurer provides the employer with a disclosure notice, approved by the Superintendent, advising the employer that the policy does not include this tail coverage and explaining any risk associated with declining the coverage; and

C. The insurer obtains written acknowledgment from the employer that the employer declines this tail coverage.

8. An insurer must pay the claims for which it is liable under an employee benefit excess insurance policy even if the employer is insolvent or otherwise fails to pay valid claims within the self-insured retention.

A. Notwithstanding paragraph 1(C) of this section, claims paid under this section shall be paid for the benefit of plan participants as directed by a bankruptcy trustee or court of competent jurisdiction or as agreed between the insurer and the plan’s administrator or fiduciary.

B. This subsection does not require an insurer to drop down and pay claims within the self-insured retention.

C. This subsection does not prohibit the insurer from cancelling the policy for nonpayment of premiums or other good cause as permitted by law with timely advance notice, but cancellation does not extinguish the insurer’s liability with respect to health care services provided before the effective date of the cancellation.

**Section 6. Actuarial Certification**

An insurer that has issued or renewed an employee benefit excess insurance policy subject to this rule at any time during a calendar year must file with the Superintendent on or before April 1st of the following year an actuarial certification in a form specified by the Superintendent, certifying that the insurer is in compliance with this rule. The insurer shall retain a copy of the certification at its principal place of business.

**Section 7. Reporting**

An insurer that has issued or renewed an employee benefit excess insurance policy in this State at any time during a calendar year must report the following information to the Superintendent about its excess insurance business in Maine, on or before April 1st of the following year, in an electronic format prescribed by the Superintendent. The insurer shall identify any information it considers to be a trade secret or otherwise protected from disclosure as a public record.

1. The total number of employers in Maine covered during the calendar year;

2. The total number of small employers in Maine covered during the calendar year;

3. The number of eligible employees and the number of enrolled employees in each small group; and

4. The attachment point(s) for each small group.

**Section 8. Severability**

If any section, term, or provision of this rule is deemed invalid for any reason, any remaining section, term, or provision shall remain in full force and effect.

**Section 9. Effective Date**

This rule is effective September 18, 2019.

STATUTORY AUTHORITY:

24 M.R.S. §§ 212, 707(3)

EFFECTIVE DATE:

September 18, 2019 – filing 2019-164

NON-SUBSTANTIVE CORRECTION:

August 12, 2021 – Section 5(7)(D) changed to 5(7)(B)