

FEDERATION OF REGULATORY COUNSEL, INC.

**NEW HAMPSHIRE EXTRA-TERRITORIAL AND EXPANDED
APPLICATION OF GROUP HEALTH MANDATES**

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The New Hampshire Insurance Law provides the basic framework for the Department's authority. The Insurance Law provides that no accident or health policy may be issued in New Hampshire until the policy form and rates have been filed with and approved by the Commissioner of Insurance. ¹The Commissioner has broad authority to disapprove filings that he determines to be inconsistent with the Insurance Law. Specifically, the Commissioner may disapprove any form if he finds that: (1) the benefits are unreasonable in relation to the premium charged; (2) it contains a provision or provisions which are unjust, unfair, inequitable, misleading, deceptive or encourage misrepresentation; or (3) it does not comply with the requirements of law. ²All accident and health policy forms, regardless of coverage, must meet certain requirements and include certain provisions. ³ Within the confines of these broad grants of power, however, the Department has significant discretion to determine the scope of its authority.

I. Accident, Travel and Other "Limited Benefit" Policies

New Hampshire Insurance Law requires the Commissioner of Insurance to establish minimum standards for benefits for accident and health policies, including accident only and limited benefits policies. ⁴ The Commissioner has adopted regulations that provide minimum standards for each type of policy. ⁵ An "accident only" policy is one that "provides coverage, singly or in combination, for death, dismemberment, disability or hospital and medical care caused by accident." ⁶ A "limited benefits" policy is one that provides coverage, other than specified disease coverage, whose minimum benefits are less than that provided by any other medical benefits coverage described in the regulation. ⁷ The minimum benefits regulation does not provide a standard for "travel insurance," but "travel insurance" has historically been regarded as a particular type of accident coverage. ⁸ These limited coverages are distinguished from more comprehensive medical coverages, such as basic medical or hospital, major medical, etc.

Notwithstanding the seemingly clear distinctions made in the regulation between accident policies, limited benefit policies, etc. and more comprehensive coverage, the Department has begun taking stances that blur the lines between these different coverages and, in some cases, erase the distinctions altogether. For example, the Department has taken the position that various types of accident-only coverage must include all of the mandates and benefits for comprehensive group coverage. This position appears to be inconsistent with the nature of accident-only coverage, which provides coverage for medical expenses only incidentally (i.e., coverage is provided only to the extent expenses are the result of an accident covered by the policy). Similarly, the Department has repeatedly denied that insurers have the authority to offer a medical benefits policy that offers less coverage than other basic or comprehensive policies, despite what appears to be express authority for this type of coverage in the insurance regulations.

These regulatory trends have potentially far-reaching consequences for New Hampshire insurers. If the Department continues to take the position that any policy containing medical benefits must include the group health mandates, it may be more difficult for insurers to get traditional non-medical policies approved or to get them approved without accepting significant new coverage burdens. In addition, this development could

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limit the flexibility of insurers to offer new types of policies in New Hampshire. Furthermore, the Department could theoretically take the position that existing policy forms, (i.e. travel, sports policies) need to be amended to include the required mandates. It is still unclear the extent to which the Department will impose the mandates, and to what degree the facts and circumstances of a specific case will be relevant; however, these changes could radically alter the landscape for these types of insurance in New Hampshire.

II. Extraterritorial Application of New Hampshire Insurance Laws

Group medical insurance policies often provide coverage to residents of more than one state. For example: (1) an employer with a place of business in one state employs individuals who reside in another state; (2) an employer who has offices in multiple states purchases a single group medical policy covering all of its employees, wherever located; or (3) an association obtains a group master health insurance policy that is available to the association's employer members and their employees, wherever located. Regulation of such policies by a state or states other than the one in which the policy was issued may impose various practical problems (e.g. competing, inconsistent requirements) on insurers and employers.

For many years, the Department did not seek to enforce New Hampshire group health insurance laws in any of the situations identified above. However, the Department has recently indicated its intent to begin applying the group health rules to policies issued in other states that insure New Hampshire residents whose principal place of business is also in New Hampshire. If the Department does in fact take this step, it will represent a significant change in enforcement policy. Because this represents a significant change, it seems unlikely that the Department would punish past conduct; but compliance in the future would be required.

The Department's authority to apply its rules extraterritorially stems largely from several statutory provisions. For example, RSA 415:18, which dictates the provisions that must be included in a group health insurance policy, provides as follows:

No policy of group or blanket accident or health insurance, or accident and health insurance affecting a resident of New Hampshire, whether such policy is delivered or issued for delivery in this state or any other state, and no certificate thereunder shall . . . be delivered or issued for delivery in this state unless the policy or certificate contains in substance each and all of the provisions set forth in the following subparagraphs or provisions which in the opinion of the commissioner are more favorable to the holders of such certificates or not less favorable to the holders of such certificates and more favorable to policyholders.

The italicized language above suggests that this provision applies to policies wherever issued so long as they "affect" a New Hampshire resident. This interpretation is supported by the legislative history, which indicates that this language was added to resolve any doubts regarding the Department's authority to regulate out-of-state group health policies. ⁹ Several provisions mandating certain types of coverage in group health policies also suggest authority for extraterritorial application; by indicating that the coverage shall be provided to the portion of any group that consists of New Hampshire residents principally employed in New Hampshire. ¹⁰

Although there is at least one provision of the New Hampshire Insurance Law that appears to undermine the authority of the Department to apply its rules extraterritorially¹¹, the caselaw in New Hampshire generally supports the application of New Hampshire law to out-of-state policies where there is some connection to New Hampshire. Specifically, in two cases decided on the same day, the New Hampshire Supreme Court upheld the application of New Hampshire's mental health parity law to policies issued in other states. ¹² In addition, the New Hampshire Supreme Court has held more generally that an agency interpretation of an ambiguous statute that the agency is charged with interpreting is entitled to substantial deference. ¹³ As such, the Department would be entitled to deference in interpreting its authority under the Insurance Law.

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Despite the Department's apparent authority to apply its rules to out-of-state policies, the Department has not sought to apply the group health rules extraterritorially for at least a decade, and probably longer.¹⁴ As noted above, this then represents a significant shift in Department policy. This change could potentially have a significant impact on employers and associations who purchase a single policy to cover employees working in New Hampshire and other states, because those groups will now have to comply with the insurance laws in at least two states. The impact will likely be greater now than a decade ago, as single policies covering workers in multiple states have become more common. Furthermore, there is reason to believe that other states in the region might follow New Hampshire's lead. ¹⁵ Although the Department has yet to set forth a clear policy statement on this issue, there is no question that any change in this regard will present insurers with new challenges and will change the way in which employers insure employees who are employed both in New Hampshire and other states.

III. New Hampshire's Civil Union Law

The New Hampshire Legislature passed, and the Governor signed, the New Hampshire civil union law in 2007, which became effective on January 1, 2008. ¹⁶ The law allows same sex couples to enter into civil unions that confer the same rights and obligations on them as married couples. Although the statute itself is not detailed, the fact that it confers the same rights on civil unions as marriages has far-reaching consequences. One sphere that is affected is the insurance market, particularly health insurance.

As of the effective date of the law, all insurance policies were automatically amended to comply with the civil union law by providing the same benefits to partners in a civil union as to those that are married. ¹⁷ In other words, any policy that provides benefits to a spouse must now also provide the same benefits to a partner in a civil union. In addition, all new policy forms and all renewals must be amended to provide such equal benefits.¹⁸ COBRA coverage is also available to civil union partners on the same basis as married couples, and a partner terminating a civil union is entitled to the same benefits under law as a divorced spouse. ¹⁹ Civil union partners are allowed to enroll on a special basis, within 30 days of entering into the civil union.²⁰ These requirements do not apply to self-insured ERISA plans, but they do apply to civil unions entered into in other states as long as they comply with the New Hampshire civil union law. ²¹

Although the civil union law does not represent a regulatory shift at the Department level, it constitutes a significant regulatory expansion nonetheless. The law also incorporates some of the same themes as the first two categories discussed. First, the law requires insurers to include coverage that they were not previously required to offer. Second, the law requires New Hampshire insurers to recognize civil unions entered into in other states (and presumably would be interpreted to require out-of-state insurers offering policies or covering subscribers in New Hampshire to recognize New Hampshire civil unions). As such, the civil union law constitutes another example of the expanding regulatory role of the Department.

IV. Conclusion

The ultimate impact of the changes discussed above remains to be seen. With the exception of the civil union law, which imposes an express statutory mandate, much is dependent on the regulatory path that the Department chooses to follow. The Department has provided little, if any, guidance on how it interprets its authority in these areas or what insurers can expect in the future. Given the absence of Bulletins or other formal policy statements on these issues, it is not inconceivable that the Department could backtrack or reverse course entirely without notice. Even in the context of the civil union law, where a Bulletin has been issued, there remain questions about how some aspects of the law will be implemented (e.g., the application to out-of-state policies insuring New Hampshire residents).

However, notwithstanding the lack of guidance, in practice the Department has clearly demonstrated its intent to expand the scope of its regulatory authority in the ways discussed above. Therefore, barring indications

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from the Department to the contrary, insurers must prepare for the consequences of operating within this new regulatory framework.

Endnotes

1. N.H. Rev. Stat. Ann. ("RSA") § 415:1.
2. RSA § 415:2.
3. RSA §§ 415:5; 415:6.
4. RSA 415-A:3.
5. N.H. Code Admin R. Ann. Ins 1900 ("Ins 1900").
6. *Id.* at 1901.06(i).
7. *Id.* at 1901.06(l).
8. Couch on Insurance § 1:47 (3rd Ed.).
9. See Hearing on HB 361 Before the S. Comm. on Insurance, pg. 2 (1986) (indicating that the new language was added to clarify that the Department has the authority to regulate out-of-state policies to the extent they cover New Hampshire residents).
10. See, e.g., N.H. Rev. Stat. Ann. §§ 415:18-a; 415:18-c; 415:18-d (similar language is used in the corresponding HMO provisions).
11. RSA 415:23, I provides that any insurer doing business in New Hampshire is presumed to be subject to the jurisdiction of the Department unless it can show that while providing the services in question it is subject to the jurisdiction of another agency of New Hampshire, another state or the federal government (e.g., an insurer subject to the jurisdiction of a foreign state where the policy is issued).
12. *Metropolitan Life Ins. Co. v. Whaland*, 119 N.H. 894 (1979); *New Hampshire-Vermont Health Service v. Whaland*, 119 N.H. 886 (1979).
13. See, e.g., *In re Weaver*, 150 N.H. 254, 256 (2003); *New Hampshire Dep't of Rev. Admin. v. Public Employee Labor Relations Bd.*, 117 N.H. 976, 977 (1977).
14. The last concerted effort by the Department to do so was in the late 1970's and early 1980's when it sought to apply the mental health parity mandates extraterritorially, as evidenced in the *Metropolitan Life* and *New Hampshire-Vermont Health Service* cases at Note 12.
15. There is some evidence that Massachusetts is beginning to apply its insurance laws more broadly to out-of-state policies. In addition, other states may feel pressure to do so, even if not otherwise so inclined, in response to such a trend in a neighboring state.
16. RSA 457-A.

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17. Insurance Department Bulletin, Docket No.: INS 07-088-AB.
18. Id.
19. Id.
20. Id.
21. Id.