

# **Operational Policy Letter #40**

**Department of Health & Human Services**

**Health Care Financing Administration**

**Medicare Managed Care**

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## **CHANGES IN TITLE XIII REGULATIONS FOR FQHMOs: (1) THE EMPLOYER CONTRIBUTION TO HMOs REGULATION AND (2) THE SUNSET OF DUAL CHOICE**

### **Issue:**

What are the requirements which prohibit employers offering a federally qualified HMO (FQHMO) from financially discriminating against employees who select the FQHMO option? Also, can FQHMOs still use the "dual choice" provisions in order to require employers to offer them?

### **Background:**

As part of the 1988 HMO Amendments, Congress amended Section 1310 of the Public Health Service Act imposing a statutory requirement that employers offering a FQHMO cannot financially discriminate against employees who select the FQHMO option. The regulation implementing this non-discrimination requirements for employers offering a FQHMO was published in the Federal Register on Friday May 31, 1996, Vol. 61, No. 106 and was effective on July 1, 1996.

Also as part of the 1988 HMO Amendments, the Congress repealed effective October 24, 1995, the dual choice statutory authority contained in the Public Health Service Act. The regulations implementing dual choice at 42 CFR subsection E had allowed FQHMOs under certain circumstances to mandate and thereby require an employer to include a FQHMO among the health plans the employer offered its employees. Since October 24, 1995, inclusion of the FQHMO alternative in an employer's health benefits plans is optional.

### **Changes in the title XIII Regulations for FQHMOs:**

The repeal of dual choice and the implementation of the employer contribution regulation have required changes to the regulations at 42 CFR subpart E sections 417.150-159. These changes include the removal of sections 417.152 and 417.154 which implemented

dual choice and revision of sections 417.153 and 417.157. In addition, the regulations at sections 417.155 and 417.156 which describe how and when the employer must offer a FQHMO will be removed through a pending technical regulation.

### **Who The new Employer Contribution Regulation Applies to:**

This regulation applies to employers and States or political subdivisions of States which: (1) offer a FQHMO to their employees, (2) have 25 or more employees during a calendar year and (3) are subject to the minimum wage requirements of the Fair Labor Standards Act.

Collective bargaining agreements between employers and employees which establish a contribution methodology are exempted from the requirements of this regulation.

### **What the Employer Contribution Regulation Requires:**

The regulation prohibits an employer's contribution methodology for health benefits from financially discriminating against those employees who select the FQHMO option. An employer's contribution methodology does not financially discriminate if the method of determining the contribution on behalf of all employees is reasonable and is designed to assure employees a fair choice among health benefits plans. The regulation also provides examples of five contribution approaches, summarized below, which if followed by the employer would be considered acceptable under this regulation.

### **Five Examples of Acceptable Employer Contribution Methods:**

- 1. Equal dollar contribution method** - The employer may contribute to the FQHMO the same amount it contributes to the principal non-FQHMO alternative.
- 2. Contribution by class** - An employer's contributions may vary for different classes of enrollees established on the basis of attributes, such as age, or family status that are reasonable predictors of utilization, experience, costs or risk.
- 3. Minimum Contribution** - If the employer's policy is that all employees contribute to their health benefits plan, an employer may require employees to make a reasonable minimum contribution to the FQHMO not to exceed 50% of the employee contribution to the principal non-HMO alternative health plan.
- 4. Equal percentage contribution** - The employer's contribution may be the same percentage of the premium of each alternative the employer offers.
- 5. Employer and HMO Agreement** - In addition employers and FQHMOs can negotiate a contribution method as long as the method does not financially discriminate against those employees who select the FQHMO option.

### **Alternative Contribution Approaches:**

In addition to the examples provided above an employer can develop its own contribution method as long as the approach does not financially discriminate against the employees who select the FQHMO option.

In the event a complaint is received which requires HCFA to review an employer's contribution methodology, the initial focus of the review will be on the cost that the employer's contribution method requires of those employees who select the FQHMO option. If the cost to the employees selecting the FQHMO option is not substantially greater than it would be for the principal non-FQHMO alternative health plan, HCFA will generally consider the method acceptable.

However, if the cost to employees joining the FQHMO option is substantially greater than the employee cost for the principal alternative non-FQHMO health plan, HCFA will verify whether the employer's contribution methodology has a reasonable basis. If HCFA determines that the methodology has a reasonable basis the contribution methodology will be found to be acceptable.

Alternatively, if HCFA finds that the employer's contribution methodology is arbitrary or is intended to discourage enrollment in the FQHMO, this would be a violation of the regulatory requirement that the employer cannot financially discriminate against employees who select the HMO option. Employers who knowingly do not comply with this regulation may be subject to a civil money penalty of not more than \$10,000 for each thirty day period they are in non-compliance.

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