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DIRECTIVE NO. 5-2002

TO: ALL ACCIDENT AND HEALTH INSURERS, HEALTH MAINTENANCE ORGANIZATIONS, AND THIRD PARTY ADMINISTRATORS OF HEALTH PLANS

FROM: ARKANSAS INSURANCE DEPARTMENT

SUBJECT: CANCELLATION AND NON-RENEWAL STANDARDS FOR GROUP HEALTH PLANS UNDER AN EMPLOYEE LEASING ARRANGEMENT

EFFECTIVE DATE: DECEMBER 30, 2002

The purpose of this Directive is to explain the Department's position on cancellations and non-renewals of group health plans by health and accident insurers and health maintenance organizations, in which the group or health plan is sponsored by a client of an employee leasing firm as defined under Ark. Code Ann §23-92-302(3)(A) and consists of individuals managed or serviced under an employee leasing arrangement defined under Ark Code Ann. §23-92-302(2)(A).

There has developed the issue of whether employees performing services pursuant to an employee leasing arrangement, under the "Arkansas Employee Leasing Act," Ark. Code Ann. §23-92-301, et seq., should be treated as employees in a group health plan sponsored by a client of an employee leasing firm and thus subject to the "Arkansas Health Insurance Portability and Accountability Act" (hereafter, "HIPAA"), and specifically to Ark. Code Ann. §23-86-311(b)(3), and Small Employer group rating law restrictions in Ark. Code Ann. §23-86-201, et seq.

Ark. Code Ann. §23-92-302 speaks in terms of a dual employment as it provides that employees in such arrangements are to be considered employees of both the employee leasing firm, and the recipient of the services (referred to hereafter as "recipient" or "client");(2)(A) "Employee leasing arrangement" means an arrangement, under contract or otherwise, whereby one (1) person, the employee leasing firm, assigns employees to perform services for another person, the recipient, or client, whereby:

- (i) The arrangement is intended to be, or is, on-going rather than temporary in nature, and
- (ii) *Employer responsibilities, including the right of direction and control of the employees, are shared by the employee leasing firm and the recipient; (Emphasis Added)*

The Department takes the position that, for purposes of application of HIPAA and Small Employer group rating law to a group health plan sponsored by a client of an employee leasing firm,, an individual is presumed to be an employee of the client under Ark. Code Ann. §23-86-303(9) unless the right of direction and control in the employment is, in fact, not exercised by the client in the arrangement sufficient to show that a common law employer/employee relationship exists between the individual and the client. Accordingly, clients of the employee leasing firm may sponsor and maintain an employee welfare benefit plan for their employees under the Employee Retirement Income Security Act of 1974. Individuals that are assigned to separate clients of the employee leasing firm are considered employees of the individual client and have no relationship to each other for purposes of the special enrollment requirements of HIPAA.

The determination of whether the client has exercised the primary direction and control in the employment is a question of fact. The Department will consider (1) how the employment relationship is described by the parties; (2) the client's right to discharge the individual in the arrangement; (3) whether the hiring and firing of the individual is actually exercised in the arrangement, as opposed to being reserved as a right in a contract; (4) the client's right to direct the individual performing the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the

result is to be accomplished.

Unless there is no common law employer/employee relationship between the individual and the client, the Department maintains that with respect to all group health plans sponsored by clients in employee leasing arrangements, all health and accident insurers and health maintenance organizations in this state shall treat individuals in such arrangements as employees of the client, as opposed to the employee leasing firm, subject to HIPAA, and additionally subject to small employer group rating restrictions if the size requirements are otherwise met by the group.

MIKE PICKENS
INSURANCE COMMISSIONER
STATE OF ARKANSAS

DATE