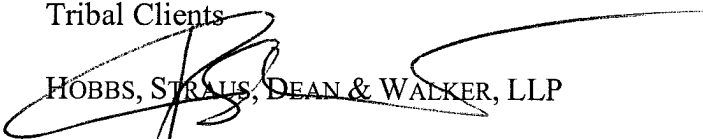


MEMORANDUM

January 31, 2012

TO: Tribal Clients
FROM:  HOBBS, STRAUS, DEAN & WALKER, LLP
RE: ***Office of Personnel Management Teleconference on Federal Employee Health Benefits Program***

The Office of Personnel Management (OPM) hosted a teleconference on January 27, 2012 for tribes and tribal organizations to ask questions about the Federal Employee Health Benefits (FEHB) program and the upcoming deadline of February 1, 2012 to notify OPM of intent to participate in program.¹ Many of the questions discussed during the teleconference were similar to those we discussed in previous correspondence with you, such as our January 10, 2012 memorandum. Some new questions did arise, though, and the OPM provided reminders about critical information for participation in the FEHB program. We summarize these points from the teleconference below.

Discussion

Initial Participation Deadlines. OPM urged tribes and tribal organizations wishing to participate in the FEHB for their employees with a May 1, 2012 effective date of coverage to notify the OPM in writing of such intent at tribalprograms@opm.gov. The notice to OPM is intended to be informal, to provide the information necessary for OPM to mail out an application package to the tribe or tribal organization. Providing this notice does not thereafter obligate the tribe or tribal organization to participate in the FEHB program. The application package will include a written agreement to formally sign-up for the FEHB program, a handbook for tribal employers and the guidance OPM has prepared for tribal employees. The application will need to be submitted by March 1, 2012. Once the application is submitted, OPM will make additional training and materials available relative to employee enrollment and other details of the FEHB program, with coverage set to begin on May 1.

Subsequent Participation Deadlines. Tribes who wish to participate in the FEHB program, but cannot or do not wish to do so for May 1 coverage, can give written notice

¹ The discussion during the teleconference centered on the FEHB. Coverage under the Federal Employees' Group Life Insurance (FEGLI) program was not discussed in any detail, except that OPM said a tribe which purchases health coverage through FEHB is not obligated to purchase life insurance through FEGLI. Tribes can choose to participate in one or the other, or both.

to the OPM at any time, but not later than three months before the date on which effective coverage should begin. For example, if a tribe's existing insurance expires on October 1 and they wish to transition to FEHB as of that date, notice of intent to participate in the FEHB program should be provided to OPM by July 1 and the application thereafter filed with OPM by August 1.

Training. OPM plans to send out a training calendar as soon as possible and make it available on the OPM website. Some of the training will provide general information about the FEHB program and OPM is planning to be on the agenda of several upcoming conferences. Most of the formal "nuts and bolts" training sessions will take place after a tribe signs an agreement for the FEHB program.

Premiums. There continued to be several questions about premiums. OPM explained the following:

- The minimum amount of the premium that must be covered by the employer is 72% of the program-wide weighted average.
- A tribe or tribal organization could choose to cover more than 72% of the premium (even up to 100%) if they wish to do so.
- Tribal employers must pay the same percentage of the premium for all employees.² The employer's contributions must be at the same percentage regardless of the plan in which an employee enrolls; a tribe cannot make different contributions toward the premiums for different plans.
- If an employee elects to have family coverage, then the employer is responsible for paying 72% of that employee's premium, meaning the employer covers the premium for dependents. OPM is still considering whether tribes can pay a different percentage for employees with only one dependent versus those with a family.
- *See also* our January 10, 2012 report, Nos. 2-4 on pages 5-6.

Employee Coverage. A tribe or tribal organization does not need to have a minimum number of employees to participate in the FEHB program – a tribe with one employee can participate. OPM reiterated a number of times during the call that coverage under the FEHB is available only to persons who meet the Internal Revenue Service (IRS) definition of "common law employee." The FEHB is not available to tribal members or tribal council members who are not also employee's of the tribe. Seasonal employees are eligible for FEHB so long as they work six (6) months out of the year (does not have to be continuous). Part-time employees are also eligible for FEHB coverage, but the employer can pro-rate the premiums based on a percentage of the 40-

² One participant in the teleconference asked if the tribe could pay a flat amount that would be no less than the 72% required, but pay that flat amount for all employees no matter which plan they enroll in. This would mean the tribe would pay different percentages for different employees. The OPM did not have an answer to that question, but promised to look into that and follow up at a later time.

hour workweek worked (under a formula set by OPM to determine what the premium would be). For those persons who do not meet the standards to be considered “employees,” the tribe or tribal organization can secure separate health insurance coverage for those persons.

Employee Choice. OPM reasserted that employees must be free to choose which plan they wish to enroll in under the FEHB. An employer cannot mandate which plan must be chosen. For information about available plans, OPM directed individuals to go to www.opm.gov/FEHBcompare, which brings up a comparison tool. Under that tool, one can type in a zip code and the tool will show the plans available for that zip code.

Tribal Departments and Enterprises, Union Employees. There continues to be some confusion about how the FEHB rule – that an employer must provide FEHB to all employees equally and cannot have more than one employer-sponsored coverage program (making FEHB the exclusive program for participating employers) – applies to tribal departments and enterprises. OPM made it clear that if a person is a common law employee of the tribe, then FEHB benefits would have to be provided to that employee. For example, if a tribe wishes to provide FEHB coverage to its governmental employees but not to its casino employees, but the casino is legally structured such that the casino employees are common law employees of the tribe, FEHB would have to be provided to the casino employees as well. It will depend on how the tribal enterprise is structured. Note this is a separate question from use of tribal identifiers for purposes of billing from OPM – see our January 10, 2012 memorandum, No. 6 on page 3.

Related to the requirements that all employees must participate in the FEHB and that FEHB be the exclusive employer-provided coverage for health benefits (see information about dental and vision benefits below), participants asked about providing separate coverage for unionized employees. For example, a tribal gaming facility has some unionized employees and some non-union employees across different departments, where the unionized employees have contractual guarantees of specific health coverage. Could a tribe in such a situation participate in the FEHB for all employees and then provide secondary coverage to union employees to make up any coverage that is not included in the FEHB plan? The OPM had not considered this issue before and did not have an answer, but promised to look into that and provide more information in the near future.

Dental and Vision Benefits. OPM has previously explained that vision and dental benefits will not be available to tribal employees through the FEHB program. See our January 10, 2012 memorandum, No. 8 on page 3. OPM indicated that tribes can offer supplemental dental and vision plans to its employees who are covered by FEHB benefits, since dental and vision are not included.

Employee Options to Change. Once an employee is enrolled in FEHB, there are different variables that relate to when the employee can make changes to the plan in

which he or she enrolled and/or leave the program. For example, if the person participates in the FEHB program under “premium conversion” (which we understand relates to IRS rules for pre-tax treatment of premiums), the person can usually only make changes at a qualifying event (such as change in job status) or during the FEHB “open season,” which generally runs from mid-November to mid-December. A person that does not participate in premium conversion usually has more flexibility to make changes outside of the open season period. Information about changes to a plan from year to year are typically available on the OPM website by the end of October in advance of the open season period, so that enrollees can look up information about any changes to the plan in which they are enrolled and make an informed decision about whether to stay with that plan or choose a different one.

Premium Billing. OPM will be billing the participating tribal employers on a monthly basis through a contractor. Collection of premium payments from the employers will be done through ACH transfer by the U.S. Department of Treasury from the employer’s bank account, and then OPM pays the carrier.

Referrals from Tribal Clinics. One participant asked whether the tribes could use their own tribal health clinic providers as the preferred providers for making referrals. OPM said that would be allowable with respect to employees who have chosen a fee-for-service plan. However, for those under a Health Maintenance Organization (HMO), OPM explained its view that the tribal providers would have to join the network/HMO to make referrals for the HMO patient – if the tribal providers are not part of the network/HMO, then they could not make the referrals.

Follow-Up and Contacts

The OPM announced that it plans to hold these question-and-answer sessions on a monthly basis for the foreseeable future, tentatively the last Friday of every month. Questions or comments for OPM about the FEHB program or FEGLI coverage can be directed to 202-606-2530 or tribalprograms@opm.gov.

If you have any questions about this report, please contact Geoff Strommer (at gstrommer@hobbsstrauss.com) or Starla Roels (at sroels@hobbsstrauss.com). Both Geoff and Starla can also be reached at 503-242-1745.