



2120 L Street, NW, Suite 700  
Washington, DC 20037

T 202.822.8282  
F 202.296.8834

HOBBSSTRAUS.COM

## MEMORANDUM

November 8, 2013

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker LLP

Re: *IHS Dear Tribal Leader Letter interpreting Section 402 authority for tribes to use federal funding to purchase health insurance coverage for beneficiaries*

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On October 24, 2013, Dr. Yvette Roubideaux, Director of the Indian Health Service (IHS), issued a Dear Tribal Leader letter updating tribes on the implementation of Section 402 of the Indian Health Care Improvement Act (IHCIA). Section 402, enacted through the Affordable Care Act of 2010 (ACA), authorizes tribes, tribal organizations, and urban Indian organizations to use funding received pursuant to the Indian Self-Determination and Education Assistance Act and Title V of the IHCIA to purchase health insurance coverage for IHS beneficiaries.

As noted in the October 24 Dear Tribal Leader letter, tribes, tribal organizations, and urban Indian organizations may use such ISDEAA and IHCIA funds to purchase insurance coverage, including coverage for services that would otherwise be provided as a contract health service, for IHS beneficiaries “in any manner, including: (1) a tribally owned and operated health care plan; (2) a State or locally authorized or licensed health care plan; (3) a health insurance provider or managed care organization; (4) a self-insured plan; or (5) a high deductible or health savings account plan.” The October 24 Letter also sets forth the IHS’s opinion that a tribe, tribal organization, or urban Indian organization’s contract or compact should reflect the choice to purchase such coverage.

Importantly, the October 24 Letter states that should a tribe, tribal organization, or urban Indian organization wish to sponsor insurance coverage for some but not all of its beneficiaries, “financial need is the only factor permitted by statute upon which to base coverage decisions.” In other words, the IHS letter asserts that tribes may not restrict the pool of beneficiaries for whom they sponsor coverage *except* on the basis of financial need.

We believe this statement is incorrect as a matter of law and not supported by the statute. Section 402, codified at 25 U.S.C. § 1642, provides that “[t]he purchase of coverage . . . by an Indian tribe, tribal organization, or urban Indian organization *may* be based on the financial needs of such beneficiaries (as determined by the 1 or more Indian

tribes being served based on a schedule of income levels developed or implemented by such 1 or more Indian tribes).” (Emphasis added.) The statutory language does not provide that financial need is the *only* factor that can be considered to limit the number of beneficiaries for whom coverage is purchased. Accordingly, we believe that the intent of Section 402 was simply to clarify that tribes are free to sponsor health insurance coverage for some but not all of their beneficiaries, on the basis of factors *including* financial need, and not only on financial need.

The narrow interpretation of Section 402 set forth in the IHS letter could have highly restrictive implications for tribes wishing to use ISDEAA funding to conduct limited or pilot insurance sponsorship programs. Due to these potential implications, tribal advocates are engaged in active discussions about the meaning of the letter, and are requesting further discussion and consultation with IHS.

If you would like any assistance or further information regarding the Section 402 authorization to purchase health insurance coverage for beneficiaries, please contact Elliott Milhollin at (202)822-8282 or [emilhollin@hobbsstrauss.com](mailto:emilhollin@hobbsstrauss.com); Geoff Strommer at (503)242-1745 or [gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com); or Caroline Mayhew at (202)822-8282 or [cmayhew@hobbsstrauss.com](mailto:cmayhew@hobbsstrauss.com).



OCT 24 2013

Indian Health Service  
Rockville MD 20852

Dear Tribal Leader:

I am writing to update you on implementation of Section 402 of the Indian Health Care Improvement Act. In 2010, President Obama signed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 935, and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, collectively known as the Affordable Care Act (ACA). Section 10221 of the Affordable Care Act incorporated and enacted S. 1790, the Indian Health Care Improvement Reauthorization and Extension Act of 2009 (IHCIREA), resulting in the addition of section 402 to the Indian Health Care Improvement Act (IHCIA). Section 402, now codified at 25 U.S.C. §1642, authorizes Tribes or Tribal Organizations carrying out programs under the Indian Self-Determination and Education Assistance Act (ISDEAA), or Urban Indian organizations carrying out a program under Title V of the IHCIA, to purchase health benefits coverage for Indian Health Service (IHS) beneficiaries.

In general, Tribes, Tribal Organizations, and Urban Indian organizations may use amounts made available under law for health benefits for IHS beneficiaries, to purchase health benefits coverage (including coverage for a service that would otherwise be provided as a contract health service) for such beneficiaries in any manner, including through:

- (1) a tribally owned and operated health care plan;
- (2) a State or locally authorized or licensed health care plan;
- (3) a health insurance provider or managed care organization;
- (4) a self-insured plan; or
- (5) a high deductible or health savings account plan.

In summary, a Tribe, Tribal Organization, or Urban Indian organization (T/TO/U) may use funds awarded under the ISDEAA or Title V of the IHCIA to buy health benefits coverage for IHS beneficiaries. To the extent that a T/TO/U seeks to purchase health benefits coverage for IHS beneficiaries, its contract or compact should reflect that activity.

In implementing health benefits coverage, a T/TO/U that wishes to limit the number of beneficiaries covered should be aware that financial need is the only factor permitted by statute upon which to base coverage decisions.

For ongoing updates about these activities and the many other activities that the IHS is working on as we continue to implement the IHCIA and ACA, please visit my Director's Blog at [www.ihs.gov](http://www.ihs.gov).

I continue to invite and encourage your input on implementing the IHCIA and ACA. You may provide input by e-mail to [consultation@ihs.gov](mailto:consultation@ihs.gov).

Sincerely,

/Yvette Roubideaux/

Yvette Roubideaux, M.D., M.P.H.  
Acting Director