



August 15, 2014

ADVANCE NOTICE OF RE-ADOPTION OF EMERGENCY REGULATIONS

This notice is sent in accordance with Government Code Section 11346.1(a)(2), which requires that State of California agencies give a five working day advance notice of intent to file emergency regulations with the Office of Administrative Law (OAL). The California Health Benefit Exchange ("Exchange") intends to file a re-adoption of an Emergency Rulemaking package with the Office of Administrative Law (OAL) that establishes the appeals process for employers and employees participating in the Small Business Health Options Program (SHOP). As required by subdivisions (a)(2) and (b)(2) of Government Code Section 11346.1, this notice appends the following: (1) the specific language of the proposed regulation and (2) the Finding of Emergency, including specific facts demonstrating the need for immediate action, the authority and reference citations, the informative digest and policy statement overview, attached reports, and required determinations.

The Exchange plans to file the Emergency Rulemaking package with OAL at least five working days from the date of this notice. If you would like to make comments on the Finding of Emergency or the proposed regulations (also enclosed), they must be received by both the Exchange and the Office of Administrative Law within five calendar days of the Exchange's filing at OAL. Responding to these comments is strictly at the Exchange's discretion.

Comments should be sent simultaneously to:

California Health Benefit Exchange
Attn: Brandon Ross
1601 Exposition Blvd.
Sacramento, CA 95815

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Upon filing, OAL will have ten (10) calendar days within which to review and make a decision on the proposed emergency rule. If approved, OAL will file the regulations with the Secretary of State, and the emergency regulations will become effective for one ninety (90) days. Please note that this advance notice and comment period is not intended to replace the public's ability to comment once the emergency regulations are approved.

You may also view the proposed regulatory language and Finding of Emergency on the Exchange's website at the following address:
<https://www.coveredca.com/hbex/regulations/>.

If you have any questions concerning this Advance Notice, please contact Brandon Ross at (916) 228-8281.

FINDING OF EMERGENCY

The Director of the California Health Benefit Exchange finds an emergency exists and that this proposed emergency regulation is necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

This emergency rulemaking was previously re-adopted by OAL on June 3, 2014 and will expire on September 3, 2014. The Exchange now seeks a second re-adoption. The Exchange is in the process of making this rulemaking permanent and has proceeded with diligence to comply with the requirements in Government Code § 11346.1(e), and has made substantial progress in that regard. For example, the Exchange has been revising and finalizing regulation text based on stakeholder comments and feedback, which will be addressed in the Initial Statement of Reasons, which is currently in progress. The California Health Benefit Exchange finance department is analyzing the economic impact on the regulations to complete the Form 399 to publish the rulemaking to begin the permanent rulemaking process. We anticipate that the Initial Statement of Reasons and other necessary documents will be finalized and filed with OAL for publishing in the next several weeks.

This Finding of Emergency hereby incorporates by reference all documents in the original rulemaking file, which is file number 2013-1126-01 E.

DEEMED EMERGENCY

The Exchange may “Adopt rules and regulations, as necessary. Until January 1, 2016, any necessary rules and regulations may be adopted as emergency regulations in accordance with the Administrative Procedures Act. The adoption of these regulations shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare” (Gov. Code § 100504(a)(6)).

AUTHORITY AND REFERENCE

Authority: Government Code Section 100504.

Reference: Government Code Sections 100502, 100503, 100506; 45 CFR §§ 155.520, 155.530, 155.535, 155.540, 155.700, 155.705

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Documents to be incorporated by reference:

None

Summary of Existing Laws

Under the federal Patient Protection and Affordable Care Act (PPACA), each state is required, by January 1, 2014, to establish an American Health Benefit Exchange that makes available qualified health plans to qualified individuals and small employers. Existing state law, the California Patient Protection and Affordable Care Act, established the California Health Benefit Exchange within state government. (Gov. Code § 100500 et seq.) The Exchange is required to establish the Small Business Health Option Program (SHOP), separate from the activities of the board related to the individual market, to assist qualified small employers in facilitating the enrollment of their employees in qualified health plans offered through the Exchange. (Gov. Code § 100502(m).) The Exchange is also required to establish an appeals process for prospective and current enrollees of the Exchange that complies with all requirements of the federal act. (Gov. Code § 100506.)

The proposed regulations will establish the Exchange's appeals policies and procedures for the SHOP. The proposed regulations will provide the public with clear standards for exercising their right to due process through the SHOP appeals process, including the requirements for SHOP appeals, informal resolutions, dismissal requirements, hearing requirements, the expedited appeal process and appeals decisions.

After an evaluation of current regulations, the Exchange has determined that these proposed regulations are not inconsistent or incompatible with any existing regulations.

JUSTIFICATION FOR DUPLICATION

These proposed regulations were developed with significant stakeholder engagement to implement and clarify the SHOP appeals process separate from the individual marketplace appeals process. While these regulations duplicate some federal regulations regarding employer and employee rights to appeal, this duplication is necessary to establish a complete and robust appeals process for the SHOP in California.

MATTERS PRESCRIBED BY STATUTE APPLICABLE TO THE AGENCY OR TO ANY SPECIFIC REGULATION OR CLASS OF REGULATIONS

None

LOCAL MANDATE

The Executive Director of the California Health Benefit Exchange has determined that this proposed regulatory action does not impose a mandate on local agencies or school districts.

FISCAL IMPACT ESTIMATES (Attached Form 399)

This proposal does not impose costs on any local agency or school district for which reimbursement would be required pursuant to Section 7 (commencing with Section

17500) of Division 4 of the Government Code. This proposal does not impose other nondiscretionary cost or savings on local agencies.

**COSTS OR SAVINGS TO STATE AGENCIES AND TO FEDERAL FUNDING
(Attached Form 399)**

The proposal results in additional costs to the California Health Benefit Exchange, which is currently funded by federal grant money and will become financially self-sufficient in 2015. The proposal does not result in any costs or savings to any other state agency.

Adopt Article 6, Sections 6540, 6542, 6544, 6546, 6548, 6550, and 6552 which is all new regulation text to be added, to read:

SECTION 6540: DEFINITIONS FOR THE SMALL BUSINESS HEALTH OPTIONS PROGRAM (SHOP) APPEALS PROCESS

In addition to the definitions in Section 6410 of Article 2 of this chapter, for purposes of the SHOP Appeals Process, the following terms shall mean:

Appeal record: The appeal decision, all papers and requests filed in the proceeding, and, if a hearing was held, the transcript or recording of hearing testimony or an official report containing the substance of what happened at the hearing and any exhibits introduced at the hearing.

Appeals Representative: an authorized representative, an agent or broker of the employer, legal counsel, a relative, a friend, an employer filing for its employees or another spokesperson designated by the appellant.

Appeal request: A clear expression, either orally or in writing, by an applicant, enrollee, employer, or small business employer or employee to have any SHOP eligibility determinations or redeterminations reviewed by an appeals entity.

Appeals entity: A body designated to conduct appeals hearings of any SHOP eligibility determinations. The California Department of Social Services shall be the designated appeals entity for the SHOP.

Appellant: The applicant or enrollee, the employer, or the small business employer or employee who is requesting an appeal.

De novo review: A review of an appeal without deference to prior decisions in the case.

Eligibility determination: A determination that an applicant, enrollee, employer, small business employer, or employee is eligible for enrollment in a QHP, or for any enrollment periods, in accordance with Sections 6522, and 6524.

Evidentiary hearing: A hearing conducted where evidence may be presented.

Statement of Position: A writing that describes the SHOP's positions regarding an appeal, as specified in Section 10952.5 of the Welfare and Institutions Code.

Vacate: To set aside a previous action.

SECTION 6542: GENERAL ELIGIBILITY APPEALS REQUIREMENTS FOR SHOP

(a) An employer shall have the right to appeal:

- (1) An eligibility determination for enrollment of the SHOP pursuant to Sections 6522 and 6524, or failure to make such a determination; and
- (2) A failure of the SHOP to provide written notice to an employer of the SHOP's eligibility determination as provided in Section 6524(c) within 15 calendar days of receiving an application from an employer;

(b) An employee shall have the right to appeal:

- (1) An eligibility determination for enrollment of the SHOP pursuant to Sections 6522 and 6524, or failure to make such a determination; and
- (1) A failure of the SHOP to provide written notice to an employee of the SHOP's eligibility determination as provided in Section 6524(d) within 15 calendar days of receiving an application from an employee.

(c) Notices of the right to appeal an eligibility determination required pursuant to Section 6524(c) or (d) must include:

- (1) The reason for the eligibility determination, including a citation to the applicable regulations; and
- (2) The procedure by which the employer or employee may request an appeal of an eligibility determination.

(d) The SHOP and appeals entity must:

- (1) Allow an employer or employee to request an appeal within 90 days from the date of the notice of the eligibility determination, from the enrollment decision, or from the failure to make such determination or decision as provided in subdivisions (a) and (b) unless the appeals entity determines that there is good cause, as defined in Section 10951(b)(2) of the Welfare and Institution Code, for filing the appeals request beyond the 90-day period. For purposes of this paragraph, if the last day of the filing period falls on a Saturday, Sunday, or holiday, as defined in Government Code Section 6700, the filing period shall be extended to the next business day, in accordance with Government Code Section 6707;
- (2) Accept appeal requests submitted in person or through an appeals representative, via telephone, facsimile, mail, electronic mail or the SHOP's Internet Web Site;

- (3) Comply with the accessibility requirements specified in 45 CFR 155.205(c);
 - (4) Assist the employer or employee with the submission and processing of the appeal request, if requested, and must not limit or interfere with the employer's or employee's right to request an appeal; and
 - (5) Consider an appeal request valid if it is submitted in accordance with subdivision (d)(1) of this section.
- (e) Upon receipt of an appeal request pursuant to this section, the SHOP shall transmit via secure electronic interface to the appeals entity:
- (1) The appeal request, if the appeal request was initially made to the SHOP; and
 - (2) The appellant's eligibility record.
- (f) The appeals entity must confirm receipt of records transmitted pursuant to subdivision (e) of this section within three (3) business days of receipt of the records.
- (g) The appeals entity shall conduct all appeals on behalf of the SHOP pursuant to this Article.
- (h) For purposes of this Article, an Administrative Law Judge designated by the appeals entity shall determine, on a case-by-case basis, the validity of all appeals requests, including whether good cause exists as provided in subdivision (d)(1).
- (i) Upon receipt of a valid appeal request, the appeals entity must send written acknowledgment to the appellant, or the employer and employee if the employee is the appellant within five (5) business days from the date on which the valid appeal request is received. The written acknowledgment must include:
- (1) An explanation of the appeals process; and
 - (2) Instructions for submitting additional evidence for consideration.
- (j) Upon receipt of an invalid appeal request, the appeals entity must:
- (1) Within five (5) business days from the date on which the invalid appeal request is received, send written notice to the appellant informing him or her:
 - (A) That the appeal request has not been accepted;
 - (B) Of the nature of the defect in the appeal request; and

(C) An explanation that the appellant may cure the defect and resubmit the appeal request if it meets the timeliness requirements of subdivision (d)(1), or within 10 calendar days from the date on which the invalid appeal request is received.

(2) Treat as valid an amended appeal request that meets the requirements of this section.

(k) The appellant has the right to be represented by an Appeals Representative, in accordance with Section 6540.

(l) An appellant may seek judicial review to the extent it is available by law.

(m) The appeals entity shall ensure that all data exchanges that are part of the appeals process, comply with the Federal and State privacy and security standards specified in 45 CFR Section 155.260 and the Information Practices Act of 1977 (Cal. Civ. Code, § 1798 et seq.) and in an electronic format that is consistent with 45 CFR Section 155.270.

(n) Both the SHOP and the appeals entity shall provide the appellant with the opportunity to review his or her entire eligibility file, including all papers, requests, documents, and relevant information in the SHOP's possession at any time from the date on which an appeal request is filed to the date on which the appeal decision is issued.

NOTE: Authority: Section 100504, Government Code. Reference: Sections 100502 and 100503; 45 CFR §§ 155.520, 155.700, 155.705.

SECTION 6544: INFORMAL RESOLUTION

- (a) An appellant shall have an opportunity for informal resolution prior to a hearing in accordance with the requirements of this section.
- (b) Upon receipt of a valid appeal request or upon receipt of the notice under Section 6544, the SHOP shall:
 - (1) Contact the appellant to attempt to informally resolve the appeal; and
 - (2) Provide the appellant the opportunity to submit relevant evidence to assist in the informal resolution of the appeal.
- (c) An appellant's right to a hearing shall be preserved in any case notwithstanding the outcome of the informal resolution process unless the appellant withdraws his or her appeal request prior to the hearing date, in accordance with the procedure set forth in Section 6546(a).
- (d) If the appeal advances to hearing :
 - (1) The appellant shall not be asked to provide duplicative information or documentation that he or she previously provided during the application or informal resolution process.
 - (2) The SHOP will issue a Statement of Position and transmit via secure electronic interface the Statement of Position and all papers, requests, and documents, including printouts from an appeal record, which SHOP obtained during the informal resolution process to the appeals entity no less than two business days before the date of the hearing.
 - (3) The SHOP will make the Statement of Position available to the appellant no less than two business days before the date of the hearing.
- (e) If the appellant is satisfied with the outcome of the informal resolution process and withdraws his or her appeal request, in accordance with Section 6546(a) and the appeal does not advance to hearing:
 - (1) The SHOP shall, within five business days from the date of the outcome of the informal resolution, send the appellant notice, which shall:
 - (A) State the outcome of the informal resolution, including a plain language description of the effect of such outcome on the appellant's appeal and eligibility;
 - (B) State the effective date of such outcome, if applicable; and

(C) Within three business days from the date of the outcome of the informal resolution, send notice of the informal resolution outcome to the appeals entity via secure electronic interface.

(f) The appeals entity shall provide written notice to the appellant with instructions on submitting any withdrawal agreement to the appeals entity, in accordance with the procedure set forth in Section 6546.

NOTE: Authority: Section 100504, Government Code. Reference: Sections 100503 and 100506, Government Code. 45 CFR §155.535.

SECTION 6546: DISMISSALS OF APPEALS

- (a) The appeals entity will dismiss an appeal if the appellant:
- (1) Withdraws the request in writing prior to the hearing date; or
 - (2) Fails to submit an appeal request meeting the standards specified in subdivision (d) of Section 6542;
 - (3) Fails to appear at a scheduled hearing without good cause, as determined in accordance with Section 6542(d)(1).
- (b) If an appeal is dismissed, the appeals entity shall within fifteen business days from the date of the dismissal, provide written notice to the appellant including the reason for the dismissal.
- (c) The appeals entity may vacate a dismissal and proceed with the appeal if the appellant makes a written request within 30 calendar days of the date of the notice of the dismissal showing good cause why the dismissal should be vacated.

NOTE: Authority: Section 100504, Government Code. Reference: Sections 100503 and 100506, Government Code. 45 CFR §155.530.

SECTION 6548: HEARING REQUIREMENTS

- (a) An appellant shall have an opportunity for a hearing in accordance with the requirements of this section.
- (b) The appeals entity must send written notice to the appellant of the date, time, and location or format of the hearing no later than 15 days prior to the hearing date.
- (c) The hearing shall be conducted:
 - (1) After notice of the hearing, pursuant to subdivision (b) of this section;
 - (2) As an evidentiary hearing, consistent with subdivision (e) of this section;
 - (3) By an Administrative Law Judge not directly involved in the employee eligibility or enrollment determination implicated in the appeal;
 - (4) By telephone, video conference, or in person, in accordance with the California Department of Social Services' Manual of Policies and Procedures Section 22-045.1.
- (d) The appeals entity shall provide the appellant with the opportunity to:
 - (1) Review his or her appeal record, including all documents and records to be used by the appeals entity at the hearing, at least two business days before the date of the hearing as well as during the hearing;
 - (2) Bring witnesses to testify;
 - (3) Establish all relevant facts and circumstances;
 - (4) Present an argument without undue interference;
 - (5) Question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses; and
 - (6) Be represented by an appeals representative.
- (e) The appeals entity shall consider the information used to determine the appellant's eligibility as well as any additional relevant evidence presented during the course of the appeals process, including at the hearing.
- (f) The appeals entity shall review the appeal de novo and shall consider all relevant facts and evidence presented during the appeal process.

(g) Postponements and continuances shall be conducted in accordance with the California Department of Social Services' Manual of Policies and Procedures Section 22-053.

NOTE: Authority: Section 100504, Government Code. Reference: Sections 100503 and 100506, Government Code. 45 CFR §155.535.

SECTION 6550: EXPEDITED APPEAL PROCESS

- (a) An appellant shall have the right to request an expedited appeals process from the appeals entity where there is an immediate need for health services because a standard appeal could jeopardize the appellant's life or health or ability to attain, maintain, or regain maximum function.
- (b) If the appeals entity denies a request for an expedited appeal, it shall:
- (1) Handle the appeal request under the standard appeals process and issue the appeal decision in accordance with Section 6542(d)(1); and
 - (2) Inform the appellant, within three business days from the date of the denial of a request for an expedited appeal, through electronic or oral notification, if possible, of the denial and, if notification is oral, follow up with the appellant by written notice within five business days of the denial. Written notice of the denial shall include:
 - (A) The reason for the denial;
 - (B) An explanation that the appeal request will be administered pursuant to the standard appeals process; and
 - (C) An explanation of the appellant's rights under the standard appeals process.
- (c) If the appeals entity grants a request for an expedited appeal, it shall:
- (1) Ensure a hearing date is set on an expedited basis;
 - (2) Provide the appellant with written notice within 10 calendar days from the date on which the appellant's request for an expedited appeal is granted, informing the appellant:
 - (A) That his or her request for an expedited appeal is granted; and
 - (B) About the date, time, and type of the hearing that will be convened;
 - (3) Within three business days from the date on which the appellant's request for an expedited appeal is granted, provide notice via secure electronic interface to the SHOP, specifying that the appellant's request for an expedited appeal is granted and a hearing will be set on an expedited basis.

NOTE: Authority: Section 100504, Government Code. Reference: Sections 100503 and 100506, Government Code. 45 CFR §155.540.

SECTION 6552: APPEAL DECISIONS

(a) The appeals decisions must:

- (1) Be based solely on the evidence referenced in this Chapter and the eligibility requirements for SHOP enrollment as specified in Sections 6520 and 6522.
- (2) Be issued to the appellant within 90 days of the date on which a valid appeal request received, unless the 90-day timeline is extended due to good cause, as provided in Section 6542(d)(1), in which case, the notice of the appeal decision shall be within the applicable extended timeline;
- (3) State the decision, including a plain language description of the effect of the decision on the appellant's eligibility;
- (4) Identify the legal basis, including the regulations that support the decision;
- (5) Summarize the facts relevant to the appeal; and
- (6) Be effective retroactive to the date the incorrect eligibility determination was made if the decision finds the appellant eligible, or effective as of the date of the notice of the appeal decision, if eligibility is denied;

(b) Upon issuance of a final decision that determines the appellant eligible the appeal decision shall be:

- (1) Implemented retroactively to the date the incorrect eligibility determination was made if the decision finds the appellant eligible;
- (2) Effective as of the date of the notice of the appeal decision, if eligibility is denied; or
- (3) Prospectively to the 1st of the month following the decision.

NOTE: Authority: Section 100504, Government Code. Reference: Sections 100503 and 100506, Government Code. 45 CFR §155.540.