

Clearinghouse Rule 08-079

**State of Wisconsin
Department of Employee Trust Funds and
Group Insurance Board**

PROPOSED RULE to repeal and recreate s. ETF 40.01 regarding continued group health insurance coverage of an insured dependent after the death of the insured employee or annuitant.

Notice of Public Hearing

A public hearing on this proposed rule will be held on Tuesday, August 26, 2008, at 1:30 p.m. in Conference Room GA on the lower floor of the offices of the Department of Employee Trust Funds, 801 West Badger Road, Madison, Wisconsin. Persons wishing to attend should first come to the main reception area up the stairs, or elevator, from the building's main entrance.

Analysis Prepared by the Department of Employee Trust Funds

1. Statute interpreted:

Sections 40.02 (25) (b) 3. and 40.51 (1), Stats.

2. Statutory authority:

Sections 40.03 (2) (ig) and 227.11 (2) (a), Stats.

3. Explanation of agency authority:

Under s. 40.03 (2) (ig), Stats., the DETF Secretary, with the approval of the Group Insurance Board, may promulgate rules required for the administration of the group health insurance plan. As provided by s. 227.11 (2) (a), Stats., each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute.

4. Related statute or rule:

The existing s. ETF 40.01, Wis. Admin. Code, is repealed by this rule-making.

5. Plain language analysis:

Under s. 40.51, Stats., the Group Insurance Board provides group health insurance programs for eligible state employees and the eligible employees of local units of government in Wisconsin that elect to participate. Eligible Wisconsin Retirement System annuitants may also elect to be covered. The group health insurance plans are required to include provisions for continuation of coverage that, at a minimum, comply with s. 632.897, Stats.

Section 632.897 (b) 3., Stats., generally requires that if a member dies while covered by group health insurance, then the spouse or dependent who was also covered through the member must be permitted to continue coverage under the group policy, or convert to individual coverage. Under s. 632.897 (2) (d), Stats., the plan sponsor or group policyholder must give written notice to the insured surviving dependents of their right to continuation coverage within 5 days after learning of the death of the insured employee or annuitant. The notice must include the amount of the payment required and the manner, place and time for making payments. As provided by s. 632.897 (3) (a), Stats., each surviving insured dependent, or the parent in the case of a minor, then has 30 days from the date of the notice to apply for continuation coverage and make the initial required payment. If this application and payment are timely received, then the coverage continues without interruption. Continuation coverage may be terminated if the surviving dependent established residence outside Wisconsin, fails to make timely payment of a required premium or becomes eligible for similar coverage under another group policy. If no such events intervene, then a minimum of 18 months of continuation coverage must be allowed. After that, the insurer may compel the survivor to convert to an individual policy in order to continue coverage.

Under the current s. ETF 40.01 (1), Wis. Admin. Code, an application for health care coverage must be received from the surviving dependent within 90 days after the death of the insured employee (or annuitant) in order for the surviving dependent to continue his or her group health insurance coverage that was in effect prior to the death.

An exception to the 90-day deadline allows the surviving dependent at least 30 days to apply after the Department sends out the standard packet of materials relating to death benefits. This exception conforms to the intent of s. 632.897 (3) (a), Stats. The death benefit packet contains the "Survivor Eligibility to Continue Health Insurance" form (ET-6203) giving notice of the right, if any, to continue group coverage, the deadline for applying and premium payment options. A form ET-4701 schedule of premium rates, the Group Health Insurance brochure (ET-4112) and "Health Insurance Application," form (ET-2301) are all also included in the packet. The 30-day grace period assures that a delay in preparing and

mailing out a death benefit packet will not deprive the surviving insured dependent of the opportunity to continue coverage.

In an effort to avoid unintended termination of health insurance coverage, Department staff will often write and telephone surviving dependents to remind them of the need to apply for the coverage within the 90-day deadline. If the 90-day deadline passes and all previously received premiums have been exhausted, the surviving dependents' health insurance coverage is terminated.

Terminated surviving dependents often call or write Department staff to explain why they failed to timely apply and to attempt to obtain coverage. The Department staff estimate from anecdotal data that roughly 98% of surviving insured dependents wish to continue the health insurance coverage. The main reason for not wishing to continue coverage is likely to be that the surviving dependent is already covered under other health coverage which the surviving dependent prefers. This can occur, for example, when two spouses both work and each has family health insurance benefits through their separate employers.

This rule-making is intended to address both customer service and Department work-load issues. The first goal is to reduce or eliminate interruptions in coverage for surviving dependents who wish to continue health coverage. Secondly, the Department would like to reduce staff time spent soliciting applications, reminding surviving dependents of the application deadline and handling telephone calls and correspondence with health care providers and surviving dependents concerning health coverage that was involuntarily terminated due to inaction by the surviving dependent.

This rule-making provides that health insurance coverage for surviving insured dependents will automatically continue despite the death of the insured employee or annuitant who had family health insurance coverage in effect. This is accomplished by having the family coverage remain in effect despite the death. Generally, only those persons actually covered under the family coverage when the insured employee or annuitant died will be covered and no new dependents may be added to the coverage. However, a provision in the rule allows the Group Insurance Board to identify, in the group health insurance contract, certain other persons who may be added to the continuing family coverage. The Board may allow coverage for certain persons the Board identifies who also fall into one of the following two broad categories:

- Persons previously insured under the group insurance board health insurance contract as dependents of the deceased insured employee, who would have been eligible to resume such coverage if the insured

employee had lived. This category might include a child who took a break from school after age 19 and thereby lost coverage, but then became a full-time student while under age 25.

- A child of the deceased insured employee who first became eligible for coverage under the group insurance board health insurance contract after the death of the insured employee. This category might include a child who was born after the insured employee died.

The rule designates who will be responsible for making decisions about the health insurance coverage following the insured employee's death. Generally this will be the deceased employee's or annuitant's surviving spouse, even if other surviving dependents are not children of, or otherwise dependent upon, the surviving spouse. Absent a surviving spouse, the responsible person will be the oldest of the deceased employee's or annuitant's surviving insured dependents, or that person's guardian. The responsible person will have control over the health insurance coverage and will make the annual dual choice decisions and decide if and when to convert the coverage from family to single coverage or back again.

The duration of coverage for a surviving insured dependent other than a spouse is to be established by the terms of the group health insurance contract. A person may outgrow the status of dependent, or no longer qualify by ceasing to be a full-time student or by recovering from disability, for example. On the other hand, a surviving spouse is entitled to insurance coverage under this rule for life, unless the surviving spouse sooner cancels the coverage voluntarily or coverage is cancelled for non-payment of premiums.

To avoid permanent loss of coverage due to voluntary cancellation, a special provision in the rule protects surviving insured dependents who have other comparable health insurance coverage and inherited the deceased insured employee's balance of accumulated sick leave conversion credits. Under s. 40.05 (4) (b) or (be), Stats., surviving insured dependents may elect to delay using the deceased employee's or annuitant's accumulated sick leave conversion credits to pay for the group insurance board's insurance and instead rely on their other comparable health insurance coverage. Under this rule, such a decision is treated as a temporary suspension of the continued coverage under this rule, rather than as a voluntary termination of coverage that would bar any future coverage.

Since family coverage will continue beyond the death of the insured employee or annuitant, the rule also provides for payment of the insurance premiums. First, any remaining advance payments are used. Next, any

unused accumulated sick leave conversion credits are applied. Then a deduction is made from any Wisconsin Retirement System annuity being paid to the surviving spouse or the responsible person. If there is no annuity, or it is too small to cover the premiums due, then the surviving spouse or responsible party must pay the premiums directly. Failure to do so will result in cancellation for non-payment.

One effect of this rule-making is that the death of an employee will no longer result in termination of insurance coverage for the surviving insured spouse or dependents. Therefore, the death will not trigger rights to continuation coverage under other state or federal law. However, it is not the purpose of this rule-making to deprive anyone of legal rights to continuation coverage. Therefore, to avoid any unintended consequences, a provision has been included in the rule protecting a person's eligibility and right to apply under applicable state or federal health insurance continuation law.

6. Summary of, and comparison with, existing or proposed federal regulations:

A federal requirement for group health plans to offer continuation coverage to certain individuals whose coverage might otherwise end was enacted in the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). COBRA amended the federal tax code, the Employee Retirement Income Security Act (ERISA) and the Public Health Service Act to require continuation coverage. Governmental plans are exempt from ERISA and the regulations of the U.S. Department of Labor regulations based on that Act. See 29 U.S.C. §1003(b)(1). The U. S. Treasury regulations on COBRA continuation coverage expressly except state and local group health plans from the regulations. See 26 CFR 26 C.F.R. § 54.4980B-2 A-4(b)(3).

However, as the IRS expressly noted in 26 CFR 26 C.F.R. § 54.4980B-2 A-4(d), group health plans maintained by state or local governments are generally subject to parallel continuation coverage requirements that COBRA added to the Public Health Services Act. These COBRA continuation provisions apply to states that receive funds under the Public Health Service Act, as well as to their political subdivisions and to agencies or instrumentalities of such states and their political subdivisions. See the Notice published by the U.S. Department of Health and Human Services, 52 FR 604 (January 7, 1987).

The U.S. Department of Health and Human Services has not issued regulations concerning COBRA continuation coverage for the group health plans of state and local governments. If regulations are issued on continuation coverage requirements for state and local governments, then

the H&HS regulations must conform to the similar regulations issued by the Treasury and the Department of Labor. See the final rules notice published by the Department of Labor, 69 FR 30084 (May 26, 2004), footnote 4, citing House Conference Report No. 99-453 at 563 (1985). The Department of Labor COBRA continuation regulations begin at 29 CFR §2590.606-1 and the related Treasury regulations begin at 26 CFR § 54.4980B-1.

Meanwhile, the COBRA continuation provisions of the Public Health Services Act are codified beginning at 42 U.S.C. §300bb-1. Under 42 USC § 300bb-3(1), the death of a covered employee is a “qualifying event” giving rise to continuation rights for the surviving spouse and dependent children insured under the employee’s coverage if the coverage would terminate because of the death. The term “covered employee,” as defined by 42 USC § 300bb-8 (2), includes retired employees. Within 30 days, the employer is required to notify the plan administrator of the employee’s death and within 14 days after notification, the plan administrator must send notice of COBRA continuation rights to the affected surviving spouses or dependent children who were covered under the plan. See 42 U.S.C.A. § 300bb-6(2) and (4)(A).

During the “election period” the surviving spouse or dependent child who would otherwise lose coverage under the plan because of the employee’s death, is entitled to elect continuation coverage. For this purpose, the “election period” is defined by 42 USC §300bb-5 to be a period of 60 days, beginning on the later of (a) the date of the notice provided to the surviving spouse (or dependent child), or (b) the date coverage would end as a result of the employee’s death.

7. Comparison with rules in adjacent states:

A check on WestLaw for rules pertaining to health insurance and surviving dependents found no similar rules in Illinois, Iowa, Michigan or Minnesota except the following:

Illinois

Illinois Admin. Code title 80 § 2160.130 is part of the administrative code pertaining to employee benefits for public officials and employees. The rule relates specifically to the local government health plan. This rule defines the term “survivor” to mean a person who is a surviving dependent of a person who satisfies the definition of “employee” or “annuitant.” A survivor is included within the definition of the term “member.” The term survivor appears again in Ill. Admin. Code title 80 § 2160.310, concerning enrollment in the local government health plan. Section 2160.310 a) provides that local units of government may offer coverage under the plan

to survivors, as well as employees, annuitants and dependents.

Iowa

Iowa Admin. Code r. 11-60.1(8A) 60.1(3) d. and e. include provisions of a 1992 early retirement incentive program that applied to persons 59 and over at termination, with 20 years of service in the Iowa Public Employees' Retirement System or the Public Safety Peace Officers' Retirement, Accident, and Disability System, who were also participating in one of the state's group health or dental insurance plans at the time of termination. Both provisions concern the state's payment of a share of premiums and the effect of a permitted switching between family and single coverage, and back again. Upon the death of a program participant before age 65, state's share of health or dental premium, or both, continues to be paid for the benefit of the surviving insured dependents until the end of the month before the deceased participant's 65th birthday. The dependents could then purchase a conversion policy. Changes in the contract from family to single, and back, are permitted. However, the state's share of premiums will be reduced to the single rate upon a change from family to single coverage and will thereafter be capped at the single rate even if the contract is subsequently changed to family coverage.

Michigan

No similar rule.

Minnesota

Minn. R. 2740.0100 subp. 25 is part of a rule of the Minnesota Department of Commerce related to the Minnesota Comprehensive Health Insurance Act of 1976. It defines the term "individual insured" to include the surviving spouse or surviving dependent of a covered employee. The rule references Minnesota Statutes, section 62A.17, subdivision 6, a provision related to continuation coverage. The term "individual insured" does not appear elsewhere in the rule on comprehensive health insurance.

8. Summary of factual data and analytical methodologies:

In the most recent six month period, from January through June 2008, the Department processed 2,445 annuitant deaths, or an average of 360 per month. In 312 of those 2,445 cases, (or 52 cases per month on average) the annuitant was survived by individuals who had been covered under the annuitant's ch. 40 group health insurance. These figures are consistent with the same period in 2007. About 95% of surviving insured dependents make an effort to keep the health insurance coverage in effect after the annuitant's death.

The proposed rule will directly affect the surviving insured dependents of insured employees and annuitants with family health insurance coverage, when the date of the employee's or annuitant's death occurs after the effective date of the rule.

The rule-making will also affect the administration of coverage under the group health insurance programs by Department of Employee Trust Funds staff, the third-party administrative contractor and the private Health Maintenance Organizations and similar insurers who agree to participate in the group health insurance program.

9. Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:

The Group Insurance Board's authority with respect to group health insurance for employees of the state and participating local governments is stated in ss. 40.51, 40.52 and 40.53, Stats. The group health insurance provided under this authority does not cover employees in the private sector.

10. Anticipated costs incurred by private sector:

None.

11. Effect on small business:

No effect.

12. Agency contact person:

Please direct any questions about the proposed rule to Bonnie Cyganek, Director, Benefit Services Bureau, Division of Retirement Services, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707. Telephone: (608) 267-9037. E-mail address: bonnie.cyganek@etf.state.wi.us.

13. Place where comments are to be submitted and deadline for submission:

Written comments on the proposed rule may be submitted to Robert Weber, Chief Counsel, Department of Employee Trust Funds, 801 W. Badger Road, P.O. Box 7931, Madison, WI 53707-7931. Written comments must be received at the Department of Employee Trust Funds no later than 4:30 PM on Wednesday, August 27, 2008.

Initial Regulatory Flexibility Analysis:

The proposed rule has no effect on small businesses.

Fiscal Estimate:

This rule-making has no fiscal impact.

Free Copies of Proposed Rule:

Copies of the proposed rule are available without cost from the Office of the Secretary, Department of Employee Trust Funds, P.O. Box 7931, Madison WI 53707-7931, telephone (608) 266-1071.

Text of Proposed Rule

SECTION 1. ETF 40.01 is repealed and recreated to read:

ETF 40.01 Coverage of an insured surviving dependent.

(1) DEATH OF INSURED EMPLOYEE DOES NOT TERMINATE COVERAGE FOR SURVIVING INSURED DEPENDENTS. (a) *Scope.* This section applies only when an insured employee had family health insurance coverage under s. 40.51, Stats., in effect at the time of his or her death and was survived by persons who were insured under that family coverage at the time of the death.

Note: The term “insured employee” is defined by s. 40.02 (39), Stats.

(b) *Family coverage of all surviving insured dependents continues.* The family coverage as in effect at the time of the death of the insured employee will continue in effect, covering the dependents who were duly insured under that coverage at the time of that death.

Note: The term “dependent” is defined for group health insurance purposes by s. ETF 10.01 (2) (b).

(c) *Other continuation coverage rights preserved.* Nothing in this section shall be construed to interfere with any person’s right to apply or eligibility for continued health insurance coverage under the terms and conditions of the group health insurance contract as expressly mandated by s. 40.51 (3), (4) or (5), Stats., referencing s. 632.897 (2) (b) 3., Stats., or under 42 USC 300bb-1 and federal regulations prescribed thereunder.

Note: Section 632.897 (2) (b) 3. is a statute enforced by the Office of the Commissioner of Insurance. It provides that the spouse or dependent of a group member, who died while covered by a group policy,

may elect to continue coverage under the group policy or convert to individual coverage, provided the person had been continuously covered under the group policy for at least three months before the death. Under 42 USC 300bb-1, a provision of the federal Public Health Service Act, the Secretary of the U.S. Department of Health and Human Services may prescribe regulations concerning continuation coverage for individuals under group health plans maintained by certain states or political subdivisions thereof, or an agency or instrumentality of certain states or political subdivisions thereof.

(2) COVERAGE LIMITED TO SURVIVING INSURED DEPENDENTS;
EXCEPTION. (a) Except as provided in par. (b), no new dependents may be added to the family coverage in effect under this section and single coverage under this section may not be changed to family coverage to cover anyone except surviving insured dependents of the deceased insured employee.

(b) Notwithstanding par. (a), the group insurance board may provide by contract that some or all of the following persons may also be covered by the family coverage under this section.

1. Persons previously insured under the group insurance board health insurance contract as dependents of the deceased insured employee, who would have been eligible to resume such coverage if the insured employee had lived.

2. A child of the deceased insured employee who first became eligible for coverage under the group insurance board health insurance contract after the death of the insured employee.

Note: A copy of the applicable group health insurance contract may be obtained upon request to the Department of Employee Trust Funds, Division of Insurance Services, 801 W. Badger Road, P.O. Box 7931, Madison WI 53707-7931.

(2m) RESPONSIBLE PERSON. (a) *Multiple surviving insured dependents, with surviving spouse.* If the deceased insured employee is survived by a spouse and other dependents of the deceased insured employee, then the family coverage shall continue in effect and the surviving spouse shall be the responsible person and have the same control and responsibilities with respect to the insurance coverage of the insured surviving dependents as the insured employee had while living.

(b) *Multiple surviving insured dependents, without surviving spouse.* If the deceased insured employee is not survived by a spouse but by more than one insured dependents, then the family coverage will continue in

effect. The oldest surviving insured dependent, or that person's guardian, shall be the responsible person and have the same rights and responsibilities with respect to the insurance coverage of the insured surviving dependents as the insured employee had while living. Upon request, the department may designate another surviving insured dependent, or that person's guardian, as the responsible person.

(3) DURATION OF CONTINUING COVERAGE. (a) *Surviving spouse.* A surviving spouse entitled to insurance coverage under this section and s. 40.02 (25) (b) 3., Stats., is entitled to continuous coverage under this section for life, unless sooner cancelled voluntarily or for non-payment of premiums. A suspension of coverage because of the operation of s. 40.05 (4) (b) or (be), Stats., does not affect this entitlement. The surviving spouse may not add new dependents to this coverage.

Note: Section 40.02 (25) (b) 3. defines the surviving spouse of an employee, or retired employee, as an "eligible employee" having, under rules to be promulgated by this department, the same right to health insurance coverage as the deceased employee or retired employee except without any state contribution. Section 40.05 (4) (b) and (be) concern the accumulated sick leave conversion credit benefit plan. It permits a surviving insured dependent to delay deductions from a deceased employee's accumulated sick leave conversion credits to pay for group health insurance under ch. 40 because the surviving insured dependent is covered by a health insurance plan or policy comparable to the standard plan during the period deductions are delayed. Health insurance coverage under ch. 40 is, in effect, suspended unless and until the dependant elects to reinstate coverage and resume the deductions from accumulate sick leave conversion credits.

(b) *Other surviving insured dependents.* The duration of coverage for other surviving insured dependents shall be established by the terms of the group health insurance contract approved by the group insurance board.

(4) PREMIUM PAYMENTS , CANCELLATION OF COVERAGE AND REFUNDS. (a) *Premium payments.* Premiums for insurance coverage under this section shall be paid from the following sources in the following order:

1. Advance premiums payments received from the insured employee by payroll deduction, annuity deduction or direct payment for periods after the end of the month in which the insured employee died, minus any such amounts refunded to the employer.

2. After any advance premium payments have been exhausted, from the remaining balance of any converted sick leave credits under ss. 40.05 (4) (b) or 40.90.

3. From an annuity being paid from the Wisconsin retirement system to the responsible person.

4. If a responsible person is not receiving a monthly annuity from the Wisconsin retirement system, or the annuity is insufficient to pay the monthly premium due, then the responsible person must arrange to make direct and timely payments of the premium from other personal resources or the insurance coverage under this section may be cancelled for non-payment of premiums.

(b) *Cancellation of coverage.* A responsible person may cancel coverage for which the person is responsible. Such cancellations are effective after the end of the month in which received, unless a different effective date is expressly provided in the group health insurance contract approved by the group insurance board.

(end of rule text)

Proposed Effective Date:

This rule shall take effect on the first day of the month commencing after the date of publication as provided by s. 227.22 (2), Stats., and shall apply with respect to deaths occurring on and after that effective date.

Approved for Publication:

This proposed rule is approved for publication in the Administrative Register.

Dated this _____ day of July, 2008

David A. Stella, Secretary
Department of Employee Trust Funds