

December 2, 1997

The Honorable Kathryn S. Matayoshi
Director of Commerce and Consumer Affairs
State of Hawaii
1010 Richards Street
Honolulu, Hawaii 96813

Attention: Reynaldo D. Graulty, Esq.
Insurance Commissioner

Dear Ms. Matayoshi:

Re: Health Insurance Coverage for Reciprocal Beneficiaries

By letter dated July 14, 1997, Insurance Commissioner Reynaldo D. Graulty, Esq., asked seven questions concerning section 4 of Act 383, Session Laws of Hawaii 1997, relating to unmarried couples. Act 383 is referred to hereinafter as the reciprocal beneficiaries act or "RBA." Our Opinion No. 97-05, dated August 14, 1997, addressed questions numbered 4 and 5. This opinion addresses the questions numbered 1, 2, 3, 6, and 7, which are set forth below (as we have rephrased them) with our responses.

As a preliminary matter, we note that a number of major employers in this State filed an action in the United States District Court for the District of Hawaii. That suit is entitled Hawaiian Electric Industries, Inc. v. Lorraine H. Akiba, Civil No. 97-00913 DAE (D. Haw. filed July 11, 1997). Plaintiffs in that case requested that the federal court interpret the RBA and declare that RBA section 4 is preempted by the Employee Retirement Income Security Act and is therefore invalid. On September 30, 1997, the court approved a Consent Order which concluded, among other things, that RBA section 4 is intended to impose legal duties or obligations upon insurers; that it imposes no legal duties or obligations on Health Maintenance Organizations or Mutual Benefit Societies; and that it imposes no legal duties or obligations of any sort on private employers that have not contracted with insurers. None of the plaintiffs in that suit was a private employer that contracts with an insurer for employee benefits, and the court therefore did not address the question of duties or obligations, if any, of such a private employer.

RBA section 4 provides as follows:⁽¹⁾

SECTION 4. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to part 10A to read as follows:

"§431:10A- Reciprocal beneficiary family coverage defined; policyholder and employer responsibility for costs; availability. (a) Any other law to the contrary notwithstanding, reciprocal beneficiary family coverage, as defined in subsection (b), shall be made available to reciprocal beneficiaries, as defined in chapter , but only to the extent that family coverage, as defined in section 431:10A-103, is currently available to individuals who are not reciprocal beneficiaries.

(b) As used in this section, reciprocal beneficiary family coverage means a policy that insures, originally or upon subsequent amendment, a reciprocal beneficiary who shall be deemed the policyholder, the other party to the policyholder's reciprocal beneficiary relationship registered pursuant to chapter , dependent children or any child of any other person dependent upon either reciprocal beneficiary.

(c) If a reciprocal beneficiary policyholder incurs additional costs or premiums, if any, by electing reciprocal beneficiary family coverage under this section, the employer may pay additional costs or premiums."

Question 1. Section 431:10A-601 is added as a new part to the previously existing five parts of article 10A of the Insurance Code--individual accident and sickness policies; group and blanket disability insurance; medicare supplement policies; extended health insurance; and long-term care insurance. Does the new part of article 10A apply to all of the five above-described parts?

Response. RBA section 74 provides a specific mandate for narrow construction of the provisions of the RBA, as follows:

SECTION 74. Notwithstanding any other law to the contrary, the rights and benefits extended by this Act shall be narrowly interpreted and nothing in this Act shall be construed nor implied to create or extend rights or benefits not specifically provided herein.

The language of section 431:10A-601 requires that reciprocal beneficiary family coverage be made available "only to the extent that family coverage, as defined in section 431:10A-103, is currently available to individuals who are not reciprocal beneficiaries." In our opinion, the phrasing of this section requires that an insurer that issues a policy of insurance including "family coverage, as defined in section 431:10A-103," must also make reciprocal beneficiary family coverage available. To that extent, new section 431:10A-601 applies to all parts of article 10A if the category of policy under consideration includes family coverage, as defined in section 431:10A-103.

Question 2. Section 431:10A-601 also states that, "[a]ny other law to the contrary notwithstanding, reciprocal beneficiary family coverage as defined in subsection (b), shall be made available to reciprocal beneficiaries" (emphasis added). Does this language mean that insurers are required to offer reciprocal beneficiary family coverage as an option to employers, not that employers are required to provide the coverage?

Response. The placement of section 431:10A-601 in article 10A, regulating the content of insurance contracts, makes clear that the legislative intent was to mandate the benefits that must be made available by insurers that write contracts of insurance providing family coverage. Moreover, the statute specifies that the coverage be made available to reciprocal beneficiaries, not to employers. If an employer wished to contract with an insurer for coverage options to be made available to employees and the employer desired to include family coverage for individuals who are not reciprocal beneficiaries but did not wish to make reciprocal beneficiary family coverage available to reciprocal beneficiaries, the coverage would not be available for reciprocal beneficiaries. Since the statute places the burden of making such coverage available to reciprocal beneficiaries on the insurer, to meet its obligation under section 431:10A-601 the insurer would be obliged either to offer the coverage to those employees desiring it, at the employees' cost, or decline to offer any family coverage through that employer.

An employer who offers family coverage but who wishes not to offer reciprocal beneficiary family coverage has the option of self-funding or, as we concluded in our Opinion No. 97-05, of using mutual benefit societies or health maintenance organizations, which are not bound by section 431:10A-601.

Question 3. Under section 431:10A-601(c), if the employer chooses not to pay additional costs incurred by an employee's election for reciprocal beneficiary coverage, will the employee be responsible for paying the additional costs?

Response. The employer is not required to pay the additional cost. ⁽²⁾ Section 431:10A-601(b) states that "reciprocal beneficiary family coverage means a policy that insures, originally or upon subsequent

amendment, a reciprocal beneficiary who shall be deemed the policyholder" (emphasis added). Section 431:10A-601(c) then provides that if the policyholder incurs additional costs or premiums by electing reciprocal beneficiary family coverage, "the employer may pay" (emphasis added) those additional expenses. The focus again is on the insurance contract and the policyholder and recognizes that the reciprocal beneficiary, as policyholder, is the one who incurs the cost. The added provision referring to the employer merely makes clear that where the policyholder obtains reciprocal beneficiary family coverage as a result of an employment relationship, the employer may pay any additional cost.

The permissive reading of this provision is also consistent with accepted rules of statutory construction.

Where both mandatory and directory verbs are used in the same statute, especially where "shall" and "may" are used in close juxtaposition, we infer that the legislature realized the difference in meaning and intended that the verbs used should carry with them their ordinary meanings. 2A C. Sands, [Sutherland on Statutory Construction (4th ed. 1973)] § 57.11, at 429.

In re Fasi, 63 Haw. 624, 626-27, 634 P.2d 98, 101 (1981). The new section 431:10A-601 clearly uses "shall" in a mandatory sense, and thus, conversely, its use of the word "may" conveys permissive or discretionary action.

Question 6. The Division is not certain whether the RBA allows an employer to offer both family coverage and reciprocal beneficiary family coverage under two separate policies. If an employer elects to obtain the two types of policies, will this result in a violation of the RBA? If the employer offers both, is the employer in violation if the employer elects to pay for family coverage, but not reciprocal beneficiary family coverage?

Response. As indicated in the responses to questions numbered 2 and 3 above, we conclude that the RBA focuses on the insurer and the insurer's contract with a reciprocal beneficiary "who shall be deemed the policyholder." Accordingly, it is the insurer who must make reciprocal beneficiary family coverage available to the extent that family coverage is made available.

There is nothing in the RBA that would prevent an insurer from making reciprocal beneficiary family coverage available in a policy separate from the policy it uses to make regular family coverage available. Whether or not the range of benefits and other policy features must be the same under both policies is an issue beyond the scope of your question.

As provided by new section 431:10A-601(c), an employer does not violate the RBA if it chooses not to pay any additional cost or premium incurred by the employee in electing reciprocal beneficiary family coverage. Whether or not such an employer would be violating any other law is beyond the scope of your question.

Question 7. The Division assumes that it will be responsible for the enforcement of the health insurance provisions of the RBA. Against whom can the Division enforce the provisions of the RBA since the Division's regulatory authority only extends to insurers? Also, is there any private right of action for individuals to enforce the provisions of the RBA?

Response. We conclude that the Division will be responsible for enforcement of the health insurance provisions of the RBA. This is so because those provisions are placed within the Insurance Code and, therefore, are within the Commissioner's enforcement responsibility under section 431:2-201(b), Hawaii Revised Statutes. Those provisions can only be enforced against insurers, not employers.

The RBA does not expressly create any private right of action. However, to the extent that it does impose obligations on insurers, it may provide a basis for affected persons to seek relief by, for example, seeking declaratory relief under HRS chapter 632.

Very truly yours,

David A. Webber
Deputy Attorney General

APPROVED:

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Attorney General

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1. The literal phrasing of RBA section 4 directs that chapter 431 be amended "by adding a new section to part 10A." The reference is clearly to article 10A, as there is no "part" 10A in chapter 431. The Revisor of Statutes has tentatively designated the new section as section 431:10A-601, which will be codified as part VI of article 10A.

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2. We do not here address the requirements, if any, under chapter 393, Hawaii Revised Statutes, the Hawaii Prepaid Health Care Act.

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