

BEFORE THE COLORADO DIVISION OF INSURANCE

STATE OF COLORADO

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Order No O-11-064

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**IN THE MATTER OF THE PETITION FOR DECLARATORY JUDGMENT AND  
ORDER OF COVERCOLORADO**

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**FINAL AGENCY ORDER**

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THIS MATTER, having come before Commissioner of Insurance Marcy Morrison (the “Commissioner”) pursuant to the Petition for Declaratory Judgment filed by Paul D. Godec on behalf of CoverColorado (the “Petitioner”) on June 21, 2010, the Commissioner hereby finds and order as follows:

1. On or about June 21, 2010, pursuant to Division of Insurance regulation 1-1-3, 3 CCR 702-1, Petitioner filed a Petition for Declaratory Judgment seeking a determination of whether individuals covered by a Health Reimbursement Arrangement (“HRA”) are eligible individuals under CoverColorado.
2. The Petitioner is the State of Colorado’s designated entity to provide high risk individuals with health insurance pursuant to the provisions of Colorado Revised Statutes (C.R.S.), Title 10, Article 8, Part 5 and is the designated state alternative mechanism for health care coverage of federally eligible individuals under the Health Insurance Portability and Accountability Act (“HIPAA”).
3. The respondent is the Commissioner of Insurance and has authority pursuant to C.R.S. § 10-8-520 to issue rules and regulations to implement the statutory requirements for CoverColorado.
4. The Commissioner is ruling on the Petition pursuant to Rule 1-1-3.C.1 because it will remove uncertainties in the applicability of the statutory provisions governing CoverColorado concerning the eligibility of individuals covered by an HRA for coverage under CoverColorado.

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**Findings of Fact**

1. Petitioner has received several applications for coverage under CoverColorado from individuals whose employer sponsored group health insurance was terminated by the employer and replaced with an employer contribution to an HRA. The funds in the HRA may then be used by the individual to pay premiums for coverage under an individual policy or CoverColorado.

2. An HRA is an employee benefit plan established by an employer that must be funded solely by employer contributions under the Internal Revenue Code and is an employee welfare benefit plan under the Employee Retirement Income Security Act (“ERISA”), but is a unique type of pre-tax medical reimbursement plan because funds can be used to pay insurance premiums.
3. To be eligible for coverage under CoverColorado, an individual must satisfy the requirements of either C.R.S. § 10-8-513 for state eligibility, or C.R.S. § 10-8-513.5 as a federally eligible individual.
  - a. State Eligibility. To be eligible for CoverColorado under C.R.S. § 10-8-513, an individual must be a resident of the State for at least six months and provide evidence that the individual has:
    - i. applied to an insurance carrier for a health benefit plan and was rejected because of a medical condition, was accepted for coverage but at a premium rate exceeding the rate charged by CoverColorado, or the application was accepted but with a reduction or exclusion of coverage for a preexisting medical condition for a period exceeding six months, or
    - ii. a history of a medical or health condition that is on the presumptive list of conditions adopted by the CoverColorado Board, or
    - iii. coverage under a health benefit plan was involuntarily terminated by a carrier for any reason other than nonpayment of premium.
  - b. State Eligibility Exclusions. Excluded from eligibility are those individuals listed in C.R.S. §10-8-513(2), and the following categories of ineligible individuals relevant to this Petition:
    - i. Individuals eligible for any other health benefit plan, including any public program, that provides coverage for healthcare services, regardless of whether the other health benefit plan covers all health care services or categories or services, except for Medicare eligible individuals; see C.R.S. § 10-8-513(2)(e), or
    - ii. Individuals for whom the CoverColorado premiums are paid or reimbursed, directly or indirectly, under any public programs; by any federal, state, or local government agency or political subdivision; or by any private entity or person, including a health care professional, health care facility, other health care provider, or pharmaceutical company, if such payer could financially benefit from the coverage of an individual under CoverColorado. C.R.S. § 10-8-513(2)(f), emphasis added.
  - c. As used in the state eligibility exclusion provision in C.R.S. § 10-8-513(2)(e) above, the term “health benefit plan” is not specifically defined, but is defined in the Colorado insurance statutes at C.R.S. § 10-16-102(21) to include an insurance policy or contract subject to the jurisdiction of the Commissioner.
  - d. The Petition asserts that an employer sponsoring an HRA receives a financial benefit and cost savings by terminating its employer group health insurance policy, establishing an HRA for its employees to pay for CoverColorado premiums, and transferring its employees’ health insurance coverage to CoverColorado, within the meaning of C.R.S. § 10-8-513(2)(f).

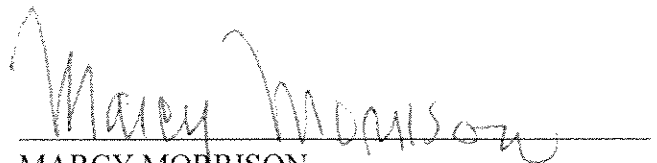
4. Federally Eligible Individuals. Pursuant to C.R.S. § 10-8-513.5, certain “federally eligible individuals”, as defined by reference to the federal HIPAA statutes and C.R.S. § 10-16-105.5(1), are also eligible under CoverColorado, if such an individual satisfies the following requirements:
  - a. has eighteen or more months of creditable coverage under a “group health plan” which is an employee benefit plan under ERISA to the extent the plan provides health care services, including items and services paid for as health care services to employees directly or through insurance reimbursement or otherwise. A group health plan also includes a governmental or church plan exempt from ERISA, or
  - b. is not eligible for coverage under a “group health benefit plan”, Medicare or Medicaid and does not have other “health benefit plan” coverage, or
  - c. whose most recent coverage was not terminated as a result of nonpayment of premium or fraud, or
  - b. did not turn down continuation coverage if it was offered and exhausted the period of continuation coverage.
5. As used in the federal eligibility exclusion in (b) above, the term “group health benefit plan” is not defined, but the term “health benefit plan” is defined in C.R.S. §§ 10-8-503(7.5) and 10-16-102(21) as an insurance policy subject to the jurisdiction of the Commissioner.

### **Conclusions of Law**

1. Status of HRAs. HRAs are not a “health benefit plan” or an insurance policy under the Colorado insurance statutes such as C.R.S. §§ 10-8-513(2)(e), 10-16-105.5(1)(b), 10-8-503(7.5) and 10-16-102(21). HRAs are an employee welfare benefit plan under ERISA. IRS Notice 2002-45, Section VIII. An HRA is an employer sponsored employee benefit plan funded only by employer contributions. ERISA broadly preempts, with certain exceptions, “any and all state laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA. 29 U.S.C. § 1144(a). Not preempted are state laws which regulate insurance, banking and securities. 29 U.S.C. § 1144(b)(2)(A). Self-funded employee benefit plans sponsored by a private company such as an HRA, are employee benefit plans under ERISA and are not subject to the jurisdiction of the Commissioner.
2. State Exclusions. Individuals covered by an HRA are not excluded from CoverColorado State eligibility under C.R.S. 10-8-513(2)(e) due to coverage under a “health benefit plan” because an HRA is not a health benefit plan under the Colorado insurance statutes. However, individuals covered by an HRA may be excluded from eligibility under CoverColorado pursuant to C.R.S. §10-8-513(2)(f) if CoverColorado determines that an employer sponsored HRA is used to pay or reimburse an employee for CoverColorado premiums. If the individual’s employer funds the HRA and receives a financial benefit from transferring employee coverage to CoverColorado, then such an individual is not eligible for CoverColorado under C.R.S. §10-8-513(2)(f). The HRA is an ERISA employee benefit plan and therefore a “private entity or person” and the employer sponsoring the HRA is a “payer that could financially benefit from the coverage of the individual” under CoverColorado. However, CoverColorado must determine that the employer sponsoring the HRA will financially benefit from covering the employee under CoverColorado.

3. Federal Exclusions. Individuals who were covered by an employer sponsored employee benefit plan prior to the date their employer terminated such coverage, may have the creditable coverage required by C.R.S. § 10-16-105.5(1)(a) to qualify for coverage under CoverColorado because such an employer sponsored employee benefit plan is a group health plan under HIPAA required to credit such coverage. Such individuals cannot be excluded from federal eligibility for CoverColorado under C.R.S. § 10-16-105.5(1)(b), due to coverage under an HRA because an HRA is not a “health benefit plan” under C.R.S. § 10-16-102(21).
4. ERISA Preemption and State Insurance Laws. The Commissioner is hereby clarifying the complex interrelationship of state and federal laws and responding to issues raised in paragraphs 10 and 17 of the Petition. DOI Bulletin B-4.32 concludes that “health benefit plans” purchased by using amounts contributed by an employer to an HRA are subject to the requirements of C.R.S. § 10-16-105. A “health benefit plan” is defined by C.R.S. § 10-16-102(21) as a policy, contract or similar health contract subject to the jurisdiction of the Commissioner. Any small group or large group insurance policy or contract purchased with HRA employer contributions is a “health benefit plan” subject to the jurisdiction of the Commissioner. Thus, an insurance agent offering a small group policy to an employer that sponsors an HRA must comply with C.R.S. § 10-16-105. Similarly, an individual policy paid for by an employee covered by an HRA or paid from any other source of funds must comply with the state insurance requirements for individual insurance policies. However, the HRA itself is not an insurance policy, nor a “health benefit plan” subject to jurisdiction by the Commissioner. Rather, it is a self-funded employee welfare benefit plan under ERISA and is not subject to the jurisdiction of the Commissioner.

DONE AND ORDERED this 16<sup>th</sup> day of November, 2010.

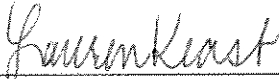
  
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MARCY MORRISON  
COMMISSIONER, DIVISION OF INSURANCE

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within FINAL AGENCY ORDER upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 16<sup>th</sup> day of November, 2010, addressed as follows:

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