



PUBLIC PROTECTION CABINET

Andy Beshear
Governor

Department of Insurance

Kerry B. Harvey
Secretary

Ray A. Perry
Deputy Secretary

P.O. Box 517
Frankfort, Kentucky 40602-0517
1-800-595-6053
<http://insurance.ky.gov>

Sharon P. Clark
Commissioner

ADVISORY OPINION
2020-006

The following Advisory Opinion is to advise the reader of the current position of the Kentucky Department of Insurance on the specified issue. The Advisory Opinion is not legally binding on either the Department or the reader.

TO: ALL HEALTH INSURERS AUTHORIZED TO OFFER HEALTH BENEFIT PLANS IN THE COMMONWEALTH OF KENTUCKY, INCLUDING SELF-INSURERS

FROM: SHARON P. CLARK, COMMISSIONER
KENTUCKY DEPARTMENT OF INSURANCE

RE: INTERNAL AND EXTERNAL REVIEW PROCESS FOR SELF-FUNDED NON-ERISA PLANS

DATE: OCTOBER 13, 2020

The Department has become aware that health benefit plans issued by self-funded non-ERISA plans are not complying with Kentucky's internal appeal and external review process. This advisory opinion clarifies that health benefit plans issued by self-funded non-ERISA plans shall comply with the internal appeal and external review process found in KRS 304.17A-617, KRS 304.17A-619 and KRS 304.17A-623. This Advisory Opinion replaces Advisory Opinion 2015-01.

45 CFR 147.136(b) and (c) addresses the internal claims and appeals and external review processes for self-funded non-ERISA plans. If the plan is self-insured and not preempted by ERISA, "then the issuer must comply with the applicable State external review process and is not required to comply with the Federal external review process ..." See 45 CFR 147.136(c)(1).

Further, pursuant to KRS 304.11-045, if a health care benefits provider cannot show that it is subject to another jurisdiction, then Kentucky will assume jurisdiction over the provider. KRS

304.17A-005(29) includes in the definition of insurer any "...self-insurer, including a multiple employer welfare arrangement not exempt from state regulation by ERISA ..." Moreover, the definition of health benefit plan encompasses a plan issued by a self-funded non-ERISA plan. See KRS 304.17A-005(22). Therefore, such a health benefits plan would be subject to all the requirements of Chapter 304, Subtitle 17A. This would include the coverage denial review, internal appeal, and external review process set forth in KRS 304.17A-617, KRS 304.17A-619, and KRS 304.17A-623, as well as the requirements set forth in 806 KAR 17:280 and 806 KAR 17:290. For that reason, self-funded non-ERISA plans must include Kentucky's coverage denial review, internal appeal, and external review process in its summary plan description documents.

Please be aware that any self-funded non ERISA plan administering the independent external review program, referenced in KRS 304.17A-621, must set up an eServices account; otherwise, the plan may designate the TPA to administer the appeals process, in which case the TPA would set up the eServices account and request the review.

Please contact the Department's Health and Life Division at (502) 564-6088 with any questions about this Advisory Opinion.



Sharon P. Clark, Commissioner
Kentucky Department of Insurance
On this 13th day of October 2020