

NEW JERSEY SIMPLIFIES ITS PRODUCER LICENSING LAWS, OR DOES IT?

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Introduction

New Jersey's insurance producer licensing laws are comprehensive, and insurers and producers alike have been shackled by numerous and oft times confusing statutes and regulations regarding licensure. The State prohibits an unlicensed individual from acting as an insurance producer, and those acts which may require licensure include some of the routine functions performed by a salaried employee. Traditionally, engaging in a single act has been deemed sufficient proof of engaging in the business of an insurance producer in New Jersey, creating a trap for the unwary.¹

The New Jersey Insurance Producer Licensing Act of 2001 ("Act") was adopted, effective November 4, 2002, in order to meet the deadline of the Gramm-Leach-Bliley Financial Services Modernization Act of 1999 ("GLB").² The Act, which is applicable to both resident and nonresident licensees, is designed to recognize and accept the nonresident producer licensing procedures of other states on a reciprocal basis, and to simplify and improve the State's producer licensing system. The impact of the Act varies. For nonresident producers, the amendments streamline the application process. However, for both resident and nonresident producers, the question whether the Act simplifies and improves the State's regulation of insurance producers remains open.

Who Must Be Licensed As An Insurance Producer?

Generally, it is the activities in which an individual is involved which will determine whether he or she is required to be licensed as an insurance producer. Prior to November 4, 2002, any individual engaged in the "solicitation, negotiation and effectuation" of insurance in New Jersey was required to obtain a producer's license. The reach of the law was so all-encompassing that detailed regulations were adopted by the New Jersey Commissioner of Banking and Insurance ("Commissioner") in order to provide necessary guidance of what the "solicitation, negotiation and effectuation" of insurance included and what it did not.

The Act revises the definition of the term "insurance producer" to include those individuals "required to be licensed under the laws of this State to sell, solicit or negotiate insurance," and provides that an unlicensed person "shall not sell, solicit or negotiate insurance."³ The Act thus replaces the activities which require licensure of "soliciting," "negotiating" and "effectuating" with "selling," "soliciting" and "negotiating," consistent with the National Association of Insurance Commissioners ("NAIC") Model Act, in order to meet the GLB's nonresident producer reciprocity provisions.

What Constitutes "Selling," "Soliciting" and "Negotiating"?

"Sell," for purposes of the Act, is defined as the exchange of a contract or policy of insurance by any means, for money or its equivalent, on behalf of an insurer.⁴ "Solicit" is defined as "attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular insurer."⁵ "Negotiate" is defined as:

the act of conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract or policy of insurance concerning any of the substantive benefits, terms or conditions of the contract or policy, provided that the person engaged in that act either: sells insurance or obtains insurance from insurers for purchasers.⁶

Despite the legislative declaration that the Act constitutes a simplification of the law, the Commissioner's implementing regulations do not simplify what activities require licensure and what activities do not. Rather, the revised regulations merely substitute the phrase "solicit, negotiate or effect" with the phrase "solicit, negotiate or sell." The comprehensive examples of what constitutes prohibited activity by an unlicensed individual remain virtually unchanged: Licensure is required to discuss the effect of age, health, or other risk-related conditions of the

prospective policyholder; to urge or advise a prospective purchaser to buy any particular policy or to insure with any particular company; to initiate sales over the telephone or otherwise; to complete and sign applications; to disseminate information as to coverages in general; and to disseminate information as to rates in general, among other things.⁷

New Jersey also requires officers, directors and employees of insurers and insurance producers to be licensed, depending upon their degree of contact with the public and whether they are involved directly with the sale, solicitation or negotiation of insurance. Indeed, direct writers who use salaried employees are not exempt from the requirements of the Act merely because of their status as direct writers.

When Is An Individual Not Required To Be Licensed?

Officers, directors and employees of insurers and insurance producers whose participation in the solicitation, negotiation or sale of insurance is incidental to their employment duties and whose compensation is not directly related to sales are not required to be licensed as insurance producers.⁸ Moreover, the Act specifically exempts from licensure the following individuals.

- (1) An officer, director or employee of an insurer or of an insurance producer, provided that the officer, director or employee does not receive any commission on contracts or policies written or sold to insure risks residing, located or to be performed in this State and:
 - (a) The officer's, director's or employee's activities are executive, administrative, managerial, clerical or a combination of these, and are only indirectly related to the sale, solicitation or negotiation of insurance; or
 - (b) The officer's, director's or employee's function relates to underwriting, loss control, inspection or the processing, adjusting, investigating or settling of a claim on a contract or policy of insurance; or
 - (c) The officer, director or employee is acting in the capacity of a special agency or agency supervisor assisting insurance producers and those activities are limited to providing technical advice and assistance to licensed insurance producers and do not include the sale, solicitation or negotiation of insurance;
- (2) A person who secures and furnishes information for the purpose of group life insurance, group property and casualty insurance, group annuities, group or blanket accident and health insurance; or for the purpose of enrolling individuals under insurance plans, issuing certificates under insurance plans or otherwise assisting in administering insurance plans; or performs administrative services related to mass marketed property and casualty insurance, where no commission is paid to the person for the service;
- (3) An employer or association or its officers, directors, employees, or the trustees of an employee trust plan, to the extent that the employers, officers, employees, directors or trustees are engaged in the administration or operation of a program of employee benefits for the employer's or association's own employees or the employees of its subsidiaries or affiliates, which program involves the use of insurance issued by an insurer, as long as the employers, associations, officers, directors, employees or trustees are not in any manner compensated directly or indirectly, by the insurer issuing the contracts or policies;
- (4) Employees of insurers or organizations employed by insurers who are engaging in the inspection, rating or classification of risks, or in the supervision of the training of insurance producers and who are not individually engaged in the sale, solicitation or negotiation of insurance;
- (5) A person whose activities in this State are limited to advertising without the intent to solicit insurance in this State through communications in printed publications or other forms of electronic mass media whose

distribution is not limited to residents of this State, provided that the person does not sell, solicit or negotiate insurance that would insure risks residing, located or to be performed in this State;

(6) A person who is not a resident of this State who sells, solicits or negotiates a contract or policy of insurance for commercial property and casualty risks to an insured with risks in more than one state insured under that contract or policy, so long as that person is otherwise licensed as an insurance producer to sell, solicit or negotiate that insurance in the state in which the insured maintains its principal place of business and the contract or policy of insurance insures risks located in that state; or

(7) A salaried full-time employee who counsels or advises his employer relative to the insurance interests of the employer or of the subsidiaries or business affiliates of the employer if the employee does not sell or solicit insurance or receive a commission.⁹

Clerical duties performed under the supervision and control of an insurer or insurance producer as well as procedures performed relating to loss control, inspection, or the processing, adjusting, investigation or settling of claims do not require licensure.¹⁰ Examples of activities that are considered “clerical” by the Commissioner include: receiving requests for coverage; mailing billings; scheduling appointments with licensed producers; office filing; receiving and recording information from an applicant or policyholder for an insurance producer’s review; opening mail; taking factual information relative to a claim; and providing applications in response to a specific request, among others.¹¹

Who May Be Paid Commissions Or Fees Under The Act?

“Commissions” are “any payment from an insurer that is contingent upon the sale of a policy, contract or certificate of insurance, or is based on the total premiums produced by the producer or written by the insurer.”¹² The payment of any consideration, including commissions, salaries or fees, to any unlicensed individual for services rendered as an insurance producer is strictly prohibited.¹³ Insurers and insurance producers also are prohibited from splitting commissions or otherwise rebating premium charged for any insurance policy as an inducement to encourage the purchase of that policy.¹⁴ Further, insurance producers may not offer, pay or give, or permit to be offered, paid or given, to any person, directly or indirectly, anything of value in return for that person’s agreement not to purchase insurance from another producer, or because the producer is unable to offer a comparable or better insurance program at less cost, whether or not a contract of insurance is ultimately effected.¹⁵

Insurers or producers interested in expanding their customer base frequently request whether the purchase of customer or employee lists or the payment of referral fees to unlicensed individuals for providing the names of purchasers of insurable interests in the State are permissible under New Jersey law. The Act expressly permits the payment of such monies to an unlicensed individual, so long as the individual does not “sell,” “solicit” or “negotiate” policies of insurance, and such payment is not otherwise in violation of New Jersey law.¹⁶ A specific example of a permissible payment endorsed by the Commissioner is to an employee of a bank, who is not a licensed producer and refers a bank customer to a licensed producer for the sale of annuities. Again, so long as the employee does not sell, solicit or negotiate the sale, the employee may receive a fee where the referral results in a sale.¹⁷

Therefore, an unlicensed individual may receive a portion of the commission paid to a licensed insurance producer as a referral fee, unless that individual becomes too actively involved in the solicitation of insurance, by advocating the purchase of a particular kind of insurance from a particular insurer.

Conclusion

New Jersey has streamlined its nonresident producer licensing procedures and revised the Act in order to comply with the reciprocity requirements of GLB. However, the Commissioner has not relaxed or even substantially modified the circumstances for which licensure is required for those individuals involved in the sale, solicitation or negotiation of insurance. The question whether an individual must be licensed ultimately is one of degree. Significantly, the Act now permits payments to unlicensed individuals, so long as such payments are not made for engaging in any activities which require licensure, expanding and encouraging cooperative marketing opportunities for producers and

insurers alike.

Endnotes

1. *See N.J.S.A. 17:22A-3* (repealed, effective November 4, 2002, by the New Jersey Insurance Producer Licensing Act of 2001); *N.J.A.C. 11:17A-1.3(c)*. *See also, Stahl v. Teaneck Tp.*, 162 F.Supp. 661 (D.N.J. 1958).
2. *N.J.S.A. 17:22A-26 et seq.* The Act became effective upon the adoption of implementing regulations by the New Jersey Commissioner of Banking and Insurance, or no later than November 12, 2002, the deadline set forth by GLB.
3. *N.J.S.A. 17:22A-28 and -29.*
4. *N.J.S.A. 17:22A-28.*
5. *Id.*
6. *Id.*
7. *N.J.A.C. 11:17A-1.4.*
8. *N.J.A.C. 11:17A-1.3(e)*.
9. *N.J.S.A. 17:22A-30b.*
10. *N.J.A.C. 11:17A-1.2 and -1.3.*
11. *N.J.A.C. 11:17A-1.2.*
12. *N.J.A.C. 11:17B-1.3.*
13. *N.J.S.A. 17:22A-41a; N.J.A.C. 11:17B-2.1(a)*.
14. *See N.J.S.A. 17:29A-15* (prohibiting rebates on property and casualty insurance); *17:29AA-14* (prohibiting rebates for commercial lines insurance); *17:29B-4* (defining unfair methods of competition and unfair and deceptive acts or practices); *17:46A-5* (prohibiting rebates on mortgage guaranty insurance); *17:46B-34* (defining permissible payments for title insurance), *17:46B-35* (prohibiting rebates on title insurance); and *17B:30-13* (prohibiting rebates and special inducements on annuity, life or health insurance). *See also, N.J.A.C. 11:17B-2.1(d)*.
15. *N.J.A.C. 11:17A-2.3.*
16. *N.J.S.A. 17:22A-41d; N.J.A.C. 11:17B-2.1(e)*.
17. *34 New Jersey Register 3843-44* (November 4, 2002).