Prohibiting Discrimination under the Affordable Care Act- Federal and State Roles and Responsibilities

National Academy for State Health Policy
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Call-in # 1-877-717-9270

Presented with support from PhRMA
Conversation on Non-Discrimination

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Principal, Groom Law Group

**Tammy Killion**  
Principal, Groom Law Group

**Wayne Turner**  
Staff Attorney, National Health Law Program

**Mila Kofman**  
Executive Director, DC Health Benefit Exchange Authority
What are the anti-discrimination requirements of the ACA?

David Cusano, Georgetown University Health Policy Institute
Nondiscrimination Provisions – EHB

• Issuers are required to cover essential health benefits in the individual and small group markets and are prohibited from discriminating based on:

<table>
<thead>
<tr>
<th>Age</th>
<th>Race</th>
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<tbody>
<tr>
<td>Expected length of life</td>
<td>Color</td>
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<tr>
<td>Present or predicted disability</td>
<td>National origin</td>
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<tr>
<td>Degree of medical dependency</td>
<td>Sex</td>
</tr>
<tr>
<td>Quality of life</td>
<td>Gender identity</td>
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<tr>
<td>A health condition</td>
<td>Sexual orientation</td>
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42 U.S.C. § 18022(b)(4)(D); 45 C.F.R. §§ 156.125 & .200(e)
Nondiscrimination Provisions – EHB

• States have primary enforcement authority over the EHB non-discrimination provisions. 45 C.F.R. § 150.101(b).

• If a state fails to enforce them, the federal government assumes primary enforcement authority. Id.
Nondiscrimination Provisions – QHP Certification & Marketing

• Cannot discriminate on the basis of:

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42 U.S.C. § 18031(c); 45 C.F.R. 156.200(e).

• Cannot employ marketing practices that will have the effect of discouraging the enrollment of individuals with significant health needs. 42 U.S.C. § 18031(c)(1)(A); 45 C.F.R. 156.225(b).
Nondiscrimination Provisions – Civil Rights

• Section 1557 of the ACA prohibits discrimination on the ground of race, color, national origin, sex, age, or disability under “any health program or activity, any part of which is receiving Federal financial assistance … or under any program or activity that is administered by an Executive agency or any entity established under [Title I of ACA]…”:
  
  • **Applies to Marketplaces and QHPs**
  • **Prohibits discrimination based on race, color, national origin, sex, age, or disability**
  • **HHS Office for Civil Rights has jurisdiction and enforcement authority**
Nondiscrimination Provisions – Civil Rights

• HHS has issued a proposed rule to implement Section 1557 Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,172 (Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).
  • Includes prohibitions on gender identity discrimination as a form of sex discrimination
  • Enhances language assistance for people with limited English proficiency
  • Requires effective communication for individuals with disabilities
What concerns and challenges have EHB requirements imposed for consumers and consumer groups?

Wayne Turner, National Health Law Program (NHeLP)
ACA non-discrimination protections

• **Market reforms** (e.g., guaranteed issue)

• **Essential health benefits** – benefit design must not discriminate based on “present or predicted disability, degree of medical dependency, quality of life, or other health conditions”

• **QHPs** – no marketing or benefit design that “discourages persons with significant health needs from enrolling”

• **Section 1557**
Section 1557

- No discrimination based upon race, ethnicity, age, sex, or disability

- Complaints filed on pregnancy coverage, gender rating, mistreatment of transgender individuals, and HIV/AIDS

- Broad definition of disability – ADA Amendments Act of 2008
  - **Major life activities** (e.g., manual tasks, seeing, hearing, eating, sleeping, walking, standing, speaking, learning, concentrating)
  - **Major bodily functions** (e.g., immune system, normal cell growth, digestive, bladder, neurological, respiratory, circulatory, endocrine)

- Proposed rule bans discriminatory benefit design and marketing
2014 HIV discrimination complaint

FL Silver plans –
• Inadequate formularies
• HIV drugs on highest tiers

OCR or state regulators –
• Does 1557 protect against discriminatory benefit design?
• National standards, monitoring, and enforcement
• Same plan could be discriminatory in one state, non-discriminatory in another
• Insurance commissioners best positioned to address consumer complaints
Cases involving insurance present new issues. Examples include how to evaluate whether health plans’ practices of setting specialty prices for drugs used to treat HIV/AIDS, discriminate based on disability; how to determine which conditions should be treated as comparators in evaluating whether a plan’s exclusion of particular services for a medical condition is discriminatory;
Discriminatory benefit design analysis

• No bright line

• Fact based analysis

• Letters to Issuers (2016/2017) and BPP rules suggest a framework
Outlier analysis

• Out of pocket costs for medical services and Rx

• Tiering structures

• Formularies
  • Adequacy
  • Cost sharing
  • Prior authorization, step therapy, treatment limits

• Good plans vs. bad plans
  • Race to the bottom effect

• CCIIO recognizes the mere fact that a benefit design is similar to other benefit designs offered in a market does not establish that the benefit design is non-discriminatory
Treatment guidelines/standard of care

• Formularies/services consistent with nationally recognized clinical guidelines?

• Limitations and exclusions based on clinical guidelines and medical evidence?

• Prior authorization or step therapy for an unusually high number of drugs in a category or class?

• 1557 – “the proposed rule does not require plans to cover any particular benefit or service, but a covered entity cannot have a coverage policy that operates in a discriminatory manner” 80 Fed Reg 54189 (Sept. 8, 2015)
5 things to think about for a 1557 complaint

1. Is this a covered entity?
   ➢ Is it a covered program or activity?

2. Am I a protected class?

3. What was the discriminatory activity or action?

4. What process should I use?
   ▫ Internal grievance procedures
   ▫ State insurance commissioner
   ▫ OCR

5. Caution! Please do not rush to federal court
   ▫ Bad facts + bad lawyers = bad law
What role are issuers playing in this space? Where is more guidance required?

Lisa Campbell & Tammy Killion, Groom Law Group
Non-Discrimination—Issuer Role

• **Coordination multiple layers of regulation:**
  ▫ Exchange nondiscrimination requirements, EHB nondiscrimination requirement, proposed 1557, mental health parity, EEOC rules, state benefit mandates and other requirements

• **Reporting to multiple regulators:**
  ▫ States, exchanges, CMS and OCR all have roles

• **Interpreting broad requirements and prohibitions:**
  ▫ Some specific requirements (e.g., transgender coverage under proposed ACA section 1557 rules; meaningful access requirements under several rules) and many nonspecific requirements (benefit designs should not discourage enrollment of high-cost enrollees)
Non-Discrimination – Challenges for Issuers

• New requirements effective mid-plan year – Challenge to change benefit designs without sufficient lead time (i.e., state filing requirements; rates; prohibition on changes to benefit design mid-year)

• Broad requirements

• Multiple regulators

• Learn about regulatory agencies’ interpretations through investigations

• Varying standards for meaningful access
Where is Additional Guidance Needed?

• How to reconcile conflicts between regulators and courts

• How proposed ACA section 1557 applies to third party benefit administrators

• Are there any safe harbors or ways to demonstrate compliance?
What actions have your agencies taken to enforce or monitor protections? How are you collaborating with other agencies or groups?

Johanna Fabian-Marks, Pennsylvania Department of Insurance

Mila Kofman, DC Health Benefit Exchange Authority
Non-Discrimination Oversight Activities

• State-Led Activities
  ▫ Form review
  ▫ Data calls regarding specific concerns, e.g. formulary design
  ▫ Market conduct exams

• State/Federal Activities
  ▫ QHP template reviews
  ▫ QHP compliance reviews

• State/Other Collaboration
  ▫ Consumer liaison position established
  ▫ Outreach to state sister agencies and consumer organizations to discuss concerns and solicit complaints
DC Health Link

• **Built from the ground up** - patient & consumer advocates, physicians, other health care providers, brokers, health plans, small businesses

• Although **last state to start building IT**, was 1 of 4 states that opened on time and stayed open (Bloomberg News)

• **Congress and the President** enrolled

• **Advocate for our customers**: lowest rates, best products, real choice
2016 Health Insurance Options Through DC Health Link

- **Plans**: 136 Small Group Plans and 26 Individual (2 catastrophic)

- *Also offer Dental Coverage (SHOP and individual) and Vision (individual)*

- **Uninsured rate dropped by 20% in the District** (Sept 2015 U.S. Census)
Ensuring Nondiscrimination in Benefits: Lessons from the Field

- External analysis revealed HIV/AIDS prescription drugs discrimination
- Did not have consumer complaints
- Both review by insurance department and HBX staff missed HIV/AIDS discrimination on formulary for one carrier
- Carrier also missed (was compliant on group side but not on individual side)
- HIV/AIDS medications classified on highest cost sharing tier (highest coinsurance)
- Quick corrective action
Qualified Health Plans Now

- Reviews with additional focus based on new knowledge

- Standard design and non standard plans (no benefit substitution for EHB)

- Standard silver plans: HIV/AIDS copayments only; NO co-insurance

- One carrier only has copays for silver plans, other carrier encouraged to do same
Lessons

• Very helpful to have external expert analysis

• Opportunity for providers and advocates to inform product reviews (and we welcome that)

• CCIIO tools – right step but more is needed
What’s on the horizon for your work on this issue? What are you seeing as emerging issues and concerns?
What’s on the horizon in PA?

• **Areas of interest include:**
  ▫ Formulary design
  ▫ Mental health/substance use disorder parity

• **PA is taking on plan management functions for the FFM for the first time this year**
  ▫ Will be reviewing QHP templates for both QHPs and non-QHPs

• **Market conduct exams**
  ▫ Will be initiating ACA-focused market conduct exams on health insurance issuers
Other Opportunities

- Transgender and gender identity -- working to remove “Gender” from application. This will help prevent barriers to accessing care.
  - Strongly support proposed reg on this issue. Worked with insurance dep’t: issued two bulletins prohibiting exclusionary clauses and benefits denial like gender reassignment surgeries

- HHS proposed regulation:
  - New notice requirements (notices are already 16 pages); would like a model notice from feds – a notice that has been consumer focus group tested to ensure it is understood and meaningful
  - Age rating and permissible approaches
Q&A Discussion

Use the chat box on the left of your screen to type in your question.
Questions? Comments? Contact Corinne Alberts at calberts@nashp.org

Thank you to our panelists

Trish Riley
Executive Director
National Academy for State Health Policy

David Cusano
Georgetown University Health Policy Institute

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DC Health Benefit Exchange Authority

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Johanna Fabian-Marks
Pennsylvania Department of Insurance
David Cusano

David Cusano is a Research Professor at the Center on Health Insurance Reforms within the Georgetown University Health Policy Institute, and is also a Health Policy Group Leader at the MITRE Corporation. Prior to joining Georgetown, Mr. Cusano was in-house counsel with Coventry Health Care, Inc., and served as a health insurance specialist to the Office of Oversight, within the Center for Consumer Information and Insurance Oversight, under the Centers for Medicare & Medicaid Services.

Mr. Cusano began his legal career as an associate at both Mintz Levin and Foley Hoag in Boston, MA. Prior to attending law school, Mr. Cusano practiced as a registered nurse at Beth Israel Deaconess Medical Center in Boston, MA.

Mr. Cusano holds a B.S. in Nursing from the University of Connecticut and a J.D. from Northeastern University School of Law.
Wayne Turner

Wayne Turner is a staff attorney with the National Health Law Program (NHeLP), working to advance healthcare access and quality for low income and underserved communities through advocacy and litigation. Wayne prepared the HIV discrimination complaint filed by NHeLP and The AIDS Institute with the HHS Office for Civil Rights showing “adverse tiering” of HIV/AIDS medications by four Florida insurers. In addition to working on non-discrimination in health plan benefit design and marketing, he also focuses on Medicaid managed care oversight and accountability and eligibility under Modified Adjusted Gross Income methodologies. Wayne graduated magna cum laude from the UDC David A. Clarke School of Law, and is featured in the 2011 PBS documentary Out in America, in which he describes the impact of the AIDS pandemic on the LGBT community through his personal account of losing his life-partner Steve to the disease.
Lisa Campbell is a principal at Groom Law Group, Chartered. Ms. Campbell works with health insurers, service providers, employers, consultants and trade associations on federal laws regulating health insurance programs. Her practice includes all aspects of the Affordable Care Act (ACA), including insurance market reforms, qualified health plan standards, Exchange rules and consumer assistance programs for the Federal Marketplace. Ms. Campbell’s practice also includes work on Federal Mental Health Parity and state insurance law. She provides advice on compliance, government enforcement, and regulatory initiatives.

Ms. Campbell is the former Director of the Compliance and Enforcement Division for the Oversight Group at the Center for Consumer Information and Insurance Oversight (CCIIO) at the Department of Health & Human Services and most recently was the Group Director for the Consumer Support Group at CCIIO.

As Director of the Compliance and Enforcement Division, Ms. Campbell directed the implementation of the enforcement program for ACA market reform provisions, managed work related to implementing program and policy initiatives for the requirements of the ACA and other federal requirements, and provided technical assistance to States, health insurers, and health plans on the ACA. As Group Director of the Consumer Support Group, Ms. Campbell was responsible for implementing consumer assistance programs for the federal Marketplace, including the Navigator, non-Navigator enrollment assistance personnel, and Certified Application Counselor programs, casework, and reporting of plan data.
Tammy Killion

Tamara Killion is a principal in the Health & Welfare Group. Ms. Killion works with health insurers, service providers, consultants and trade associations on federal and state laws regulating health insurance programs. Her practice includes all aspects of the Affordable Care Act (ACA) including insurance market reforms, qualified health plan standards, Exchange rules, the employer responsibility requirement, and the ACA's other tax provisions. Ms. Killion provides advice on compliance, government enforcement actions, and legislative and regulatory initiatives. She is a frequent speaker on the ACA.

Ms. Killion’s practice also includes counseling large employers on the establishment and operation of their health care and other welfare plan programs, including ACA compliance, plan design, claims administration, compliance with ERISA's fiduciary responsibility provisions, and HIPAA requirements.

Before joining Groom, Ms. Killion clerked for the Honorable Carlos F. Lucero of the Tenth Circuit Court of Appeals and then joined the U.S. Department of Labor as an attorney in the Office of the Solicitor's Honors Program. After working at the Department of Labor, she worked for a large national law firm where she represented employers and plans in ERISA fiduciary litigation and employment class action litigation. Her pro bono activities have included representing a social security disability claimant in administrative appeal and a non-profit dance company in appealing state unemployment insurance assessments.
Johanna Fabian-Marks

Johanna is the Director of Life, Accident, and Health Product Regulation in the Pennsylvania Insurance Department. Prior to joining the PID, Johanna worked on health care reform at the federal level at the Center for Consumer Information and Insurance Oversight in the Centers for Medicare and Medicaid Services. While at CCIIO, she focused on implementation of the market rules, rate review, and medical loss ratio provisions of the Affordable Care Act.
Mila Kofman

Mila Kofman is the Executive Director of the DC Health Benefit Exchange Authority. Appointed to the position by a unanimous vote of the Board of Directors, Kofman is a nationally recognized expert on private health insurance markets and has worked with states and all stakeholders to implement health insurance reforms. Her approach is informed by her hands-on experience as the former Superintendent of Insurance in Maine implementing health insurance reforms, being a former federal regulator working with states to implement HIPAA reforms of the 1990s, studying state-based reform efforts and markets, and working with employer purchasing coalitions seeking to leverage purchasing power for sustainable financing of medical care. Ms. Kofman holds a J.D. from Georgetown University Law Center and a B.A. in Government and Politics from the University of Maryland (summa cum laude).