



DOMESTIC/FOREIGN INSURERS BULLETIN NO. 86

TO: All Insurers, Producers, Third Party Administrators, Medical Service Plans, and Hospital Service Plans Licensed To Do Business In Delaware; and Other Interested Persons

RE: The Gender Identity Nondiscrimination Act of 2013

DATED: March 23, 2016

The purpose of this Bulletin is to provide guidance regarding implementation of the Gender Identity Nondiscrimination Act of 2013 (S.B. 97; 79 Del. Laws Ch. 47) (the “Gender Identity Nondiscrimination Act”), which was enacted by the Delaware General Assembly and signed by Governor Markell on June 19, 2013.

The Gender Identity Nondiscrimination Act specifically applies to Title 18 of the Delaware Code, Insurance, amending Section 2304(22) of the Unfair Trade Practices Act to make it an unlawful practice for any insurance company licensed to do business in Delaware to discriminate in any way based on an individual’s gender identity. The Gender Identity Nondiscrimination Act defines “gender identity” to mean “a gender-related identity, appearance, expression or behavior of a person, regardless of the person’s assigned sex at birth.”

Section 2304(13)(b) of the Unfair Trade Practices Act further prohibits unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premiums, policy fees or rates charged for any policy or contract of health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

Section 1557 of the Affordable Care Act (the “ACA”) prohibits discrimination on the basis of sex in any health program receiving federal funds or by an entity established under the ACA, including health insurance exchanges. The U.S. Department of Health and Human Services has issued guidance and a subsequent proposed rule under Section 1557 of the ACA confirming that the sex nondiscrimination protections of such section encompass discrimination on the basis of gender identity.

The Department interprets the above provisions of the law to prohibit the denial, cancellation, termination, limitation, refusal to issue or renew, or restriction, of insurance coverage or benefits thereunder because of a person’s gender identity or transgender status, or because the

person is undergoing gender transition. This includes the availability of health insurance coverage and the provision of health insurance benefits.

Insurance companies also may not deny, exclude, or otherwise limit coverage for medically necessary services, as determined by a medical provider in consultation with the individual patient, based on the individual patient's gender identity if the service would be covered for another individual under such contract of insurance. The Department takes the position that any blanket policy exclusion for gender dysphoria, gender identity disorder, medically necessary surgeries or other treatments related to gender transition or related services is a violation of the Unfair Trade Practices Act because it is discrimination based on gender identity. It is also the Department's position that the imposition of different premiums or rates for insurance coverage based on an insured's gender identity is a violation of the Unfair Trade Practices Act. Benefits for conditions related to an insured's gender identity should be available on an equivalent basis as coverage provided for any other health condition by basing coverage decisions on medical necessity and not on the basis of a person's gender identity. This assures that insureds have equal access to benefits under a contract of insurance regardless of their gender identity.

The Department further expects that determinations of medical necessity, eligibility, and prior authorization requirements for diagnoses related to an insured's gender identity are based on current medical standards established by nationally recognized transgender health medical experts.

The requirements of this Bulletin shall also apply to qualified health plans offered through Delaware's Health Insurance Marketplace operated through the Federally-Facilitated Exchange State Partnership Option under the ACA, as well as to plans offering Essential Health Benefits in accordance with Delaware's Essential Health Benefits benchmark. The Department specifically notes that Delaware's Essential Health Benefits benchmark plan for plan year 2016 contains an exclusion for surgical benefits for "change of sex surgery," except to correct a congenital defect. Insurers should not consider that benchmark to supersede this Bulletin or State law and the Department reiterates, as stated elsewhere in this Bulletin, that such a blanket exclusion constitutes a violation of the Unfair Trade Practices Act and the ACA.

The Department will take administrative or legal action against any insurance company licensed to do business in Delaware that fails to comply with the Unfair Trade Practices Act, as amended by the Gender Identity Nondiscrimination Act, or other State law.

As of the effective date of this Bulletin, new insurance policy forms filed by insurers will be disapproved by the Department if they exclude or limit coverage based on an insured's gender identity. Provisions of other Delaware laws regarding procedures and processes for appeal and review of denials of coverage, benefits, or adverse determinations apply.

The Department will not be promulgating a regulation to implement the Gender Identity Nondiscrimination Act at this time. This Bulletin and the enacted statutory provisions shall provide adequate guidance for compliance.

Any questions, comments or requests for clarification about this bulletin should be emailed to [DOI Consumer Resource@state.de.us](mailto:DOI_Consumer_Resource@state.de.us).

This Bulletin shall be effective immediately and shall remain in effect unless withdrawn or superseded by subsequent law, regulation or bulletin.



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