



Insurance Circular Letter No. 9 (2018)
June 25, 2018

TO: All Insurers Authorized to Write Accident and Health Insurance in New York State, Article 43 Corporations, Health Maintenance Organizations (“HMOs”), Student Health Plans Certified Pursuant to Insurance Law § 1124, and Municipal Cooperative Health Benefit Plans (Collectively “Issuers”)

RE: Discrimination Based on Sexual Orientation, Gender Identity and/or Gender Dysphoria

STATUTORY AND REGULATORY REFERENCES: N.Y. Ins. Law § 2607; 11 NYCRR § 52.72; 42 U.S.C. 300gg-1, et al.; 42 U.S.C. 18001, et al.; 45 C.F.R. Part 92

I. Purpose

It has been reported that the Trump Administration is planning to repeal a federal regulation that clarifies that the Affordable Care Act’s (“ACA’s”) non-discrimination protections based on sex include protections based on gender identity. This circular letter reminds issuers that, regardless of protections at the federal level, New York State has its own state requirements related to non-discrimination protections based on sexual orientation, gender identity and/or gender dysphoria.

II. Federal Non-Discrimination Provisions

42 U.S.C. § 18116 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. It extends nondiscrimination protections to individuals participating in any health program or activity any part of which received funding from the Department of Health and Human Services (“HHS”); any health program or activity that HHS itself administers; and health insurance marketplaces and all plans offered by issuers that participate in those marketplaces. HHS adopted 45 CFR Part 92 effective 7/18/16. 45 CFR § 92.4 defined discrimination based on sex as including discrimination based on pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity. The final rule became effective July 18, 2016 and incorporated the above-referenced protections.¹ The rule applies to comprehensive coverage

¹ On December 31, 2016, the U.S. District Court for the Northern District of Texas issued an opinion in *Franciscan Alliance, Inc. et al v. Burwell*, enjoining the regulation’s prohibitions against discrimination on the basis of gender identity and termination of pregnancy on a nationwide basis. HHS’ Office for Civil Rights has not enforced these two provisions of the regulation implementing these same provisions while the injunction remains in place, but continues

in the individual and small group markets, Child Health Plus, Medicaid, and the Essential Plan, or any other program that receives funding from HHS.

III. New York State Non-Discrimination Provisions

Regardless of the federal non-discrimination protections or lack thereof for individuals based on sexual orientation or gender identity, New York provides its own state protections. Insurance Law § 2607 prohibits all issuers from refusing to issue any policy of insurance, or cancel or decline to renew such policy because of the sex or marital status of the applicant or policyholder. Additionally, § 52.72 of 11 NYCRR 52 (Insurance Regulation 62) prohibits issuers from discriminating on those bases, as well as other things. The regulation provides that discrimination based on sex includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity. The regulation applies to individual and small group accident and health insurance policies that provide hospital, surgical, or medical expense coverage, as well as student accident and health insurance policies. Furthermore, The Department of Financial Services (Department) will be promulgating an amendment to that regulation to clarify that the non-discrimination protections apply to sexual orientation and to large group accident and health insurance policies that provide hospital, surgical, or medical expense coverage as intended under existing New York law.

Additionally, we remind issuers of three previous circular letters issued by the Department that relate to discrimination based on sexual orientation, gender identity and gender dysphoria. Insurance Circular Letter No. 7 (2014) advises issuers that the law prohibits them from denying coverage for medically necessary treatment of gender dysphoria. It reminds issuers that an issuer of a policy that includes coverage for mental health conditions may not exclude coverage for the diagnosis and treatment of gender dysphoria. Although an issuer may subject gender dysphoria treatment to a medical necessity review, any such review must be performed consistently with the provisions of Article 49 of the Insurance Law and/or Public Health Law. Insurance Circular Letter No. 12 (2107) clarifies that issuers should not automatically deny claims for transgender individuals because the gender with which the individual identifies does not match the gender of someone to whom those services are typically provided. It reminds issuers that receive claims from insureds of one gender or sex for a service that is typically or exclusively provided to individuals of another gender or sex to take reasonable steps, including requesting additional information, to determine whether the insureds are eligible for the services prior to denying the claims. Insurance Circular Letter No. 7 (2017) addresses health insurance coverage for infertility treatment and advises issuers that the law prohibits them from discriminating based on sexual orientation, marital status or gender identity.

IV. Conclusion

to enforce protections against discrimination on the basis of race, color, national origin, age, or disability, as well as other sex discrimination provisions that are not impacted by the court order.

Regardless of federal action or inaction with respect to discrimination based on sexual orientation, gender identity and gender dysphoria, we remind issuers that, under New York State law, they are prohibited from discriminating against individuals based on sexual orientation, gender identity and gender dysphoria. The Department will monitor compliance with the non-discrimination requirements, including during market conduct exams. The Department will take action against an issuer for any failure to adhere to all statutory and regulatory prohibitions against discrimination.

Please direct any questions regarding this circular letter to Thomas Fusco, Supervising Insurance Attorney, Health Bureau, New York State Department of Financial Services, Walter J. Mahoney Office Building, 65 Court Street, Room 7, Buffalo, New York 14202 or by e-mail at Thomas.Fusco@dfs.ny.gov.

Very truly yours,

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