SOLUTIONS LAW PRESS

HR & BENEFITS UPDATE

New Affordable Care Act Mandated High Risk Pre-Existing Condition Insurance Pool Program Regulations Prohibit Plan Dumping of High Risk Members, Set Other Rules

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July 31, 2010

Group health plans and insurers risk are prohibited from dumping or engaging in other actions designed to drive individuals with pre-existing high risk conditions to enroll in coverage under high risk pool plans established under the "Pre-Existing Condition Insurance Plan" (PCIP) program established by the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act) in lieu of maintaining existing private coverage.

Section 1101 of the Affordable Care Act requires HHS to set up the PCIP program to ensure that a temporary high risk health insurance pool program exists to provide affordable health insurance coverage to uninsured individuals with pre-existing conditions until January 1, 2014, when Exchanges established under sections 1311 and 1321 of the Affordable Care Act take effect.

Interim final rules implementing the PCIP program (Regulations) issued by the Department of Human Services on Friday, July 30, 2010 prohibit group health plans and insurers from dumping individuals with high risk conditions from coverage. The Regulations also identify the individuals that will qualify for enrollment in PCIP plans and detail the rules governing the establishment, implementation and administration of the PCIP program.

Dumping High Risk Patients Prohibited

In addition to already-existing liability for any violation of existing prohibitions against discrimination based on health history under the Health Insurance Portability & Accountability Act, the Genetic Information Nondiscrimination Act, and the Affordable Care Act, the Regulations provide that a health insurance issuer or group health plan found to have illegally discouraged an individual from remaining enrolled in its coverage or engaging in other actions considered “dumping” based on the individual's health status will be responsible for any medical expenses incurred by the PCIP to provide coverage for a dumped individual who subsequently enrolls in the PCIP plan. Additionally, HHS also may refer the insurer or the plan to Federal and State authorities for other enforcement actions that may be warranted based on the behavior at issue. In light of these exposures, group health plans and insurers should review and tighten their eligibility terms, processes and procedures to avoid prohibited conduct. In this respect, plans and insurer should pay particular attention to managing the conduct of individuals involved in communicating with members or prospective members. Insurers and plans should adopt policies clearly prohibiting eligibility discrimination in violation of these and other rules and back up these rules by clear operating policies and training that makes clear to individuals involved in enrollment and other enrollment activities what conduct is prohibited.

More OnThe PCIP Program & Regulations

The Regulations provide an individual will be eligible to enroll in a PCIP if he or she:

- Is a citizen or national of the United States or lawfully present in the United States;

- Has not been covered under creditable coverage for a continuous 6-month period of time prior to the date on which such individual is applying for PCIP;
- Has a pre-existing condition within the meaning of the Affordable Care Act;
- Is a current resident of one of the 50 States or the District of Columbia which constitutes or is within the service area of the PCIP; and
- Meets other criteria established by the PCIP with HHS approval.
- PCIP Plans will be required to cover eligible individuals without any pre-existing condition limitation or waiting period.

The Regulations outline the process that a State or nonprofit private entity to pursue and enter into a contract with HHS to set up and run a PCIP program. The PCIP program generally anticipates that each State will contract with HHS to maintain a qualifying PCIP program directly or by subcontracting with another party. If a State elects not to or fails to maintain a PCIP program, however, the Regulation states HHS will contract with a nonprofit private entity to offer a PCIP program in that State.

PCIP program operates must have enrollment and disenrollment rules and processes that meet the applicable standards in the Regulations. The Regulations dictate that as part of this process, a PCIP verify that an individual is a United States citizen or national or lawfully present in the United States in accordance with the Regulations. The Regulations also allow PCIPS to employ certain strategies to manage enrollment over the course of the program that may include enrollment capacity limits, phased-in (delayed) enrollment, and other measures, as defined by the PCIP and approved by HHS to manage the PCIP program's compliance with funding and other allowable requirements.

The Regulations specify that each benefit plan offered by a PCIP cover at least the following categories and the items and services:

- Hospital inpatient services
- Hospital outpatient services
- Mental health and substance abuse services
- Professional services for the diagnosis or treatment of injury, illness, or condition
- Non-custodial skilled nursing services
- Home health services
- Durable medical equipment and supplies
- Diagnostic x-rays and laboratory tests
- Physical therapy services (occupational therapy, physical therapy, speech therapy)
- Hospice
- Emergency services and ambulance services
- Prescription drugs
- Preventive care
- Maternity care

The Regulations also prohibit PCIP Plans from offering certain benefits. Benefit plans offered by a PCIP cannot cover the following services:

- Cosmetic surgery or other treatment for cosmetic purposes except to restore bodily function or correct deformity resulting from disease.
- Custodial care except for hospice care associated with the palliation of terminal illness.
- In vitro fertilization, artificial insemination or any other artificial means used to cause pregnancy.
- Abortion services except when the life of the woman would be endangered or when the pregnancy is the result of an act of rape or incest.
- Experimental care except as part of an FDA-approved clinical trial.

The Regulations regulate the premiums and cost sharing that PCIP programs can use. The Regulations limit the premium a PCIP may charge to 100 percent of the premium for the applicable standard risk rate that would apply to the coverage offered in the State determined in accordance with the Regulations using HHS-approved reasonable actuarial techniques. Premiums charged to enrollees in the PCIP may vary on the basis of age by a factor not greater than 4 to 1. Also, the PCIP program's average share of the total allowed costs of the PCIP benefits must be at least 65 percent of such costs. Furthermore, the out-of-pocket limit of coverage for cost-sharing for covered services under the PCIP cannot exceed the Internal Revenue Code § 223(c)(2) limit. If the plan uses a network of providers, this limit may be applied only for in-network providers, consistent with the terms of PCIP benefit package.

The Regulations allow a PCIP program to require that covered persons use network providers for non-emergency services if that the PCIP has sufficient providers to ensure that all covered services are reasonably available and accessible to its enrollees. Out-of-network coverage for emergency services will be required under certain conditions. The Regulations also will require PCIPst o process and administer claims and appeals in compliance with the Regulations.

The Regulations also require PCIPs to develop and apply operating procedures to prevent, detect, report to HHS and law enforcement and recover (when applicable or allowable) incidences of waste, fraud, and abuse and to cooperate with Federal law enforcement and oversight authorities in cases involving waste, fraud and abuse.

Register For 8/24 Internet Briefing To Learn If Your Plan Will Be Grandfathered Plan & What Health Plan Updates Your Plan Will Require To Meet 2010/2011 Affordable Care Act & Other Federal Health Plan Compliance Deadlines

Solutions Law Press invites you to catch up on the latest guidance about the new group health plan mandates imposed under the Patient Protection and Affordable Care Act (Affordable Care Act) and other federal health plan regulations by participating in a live **"2010 Health Plan Update"** internet broadcast briefing on Tuesday, August 24 2010. The briefing will be conducted via live video broadcast from 11:00 A.M.-1:30 P.M. Central Time. **Register & Get More Details.**

For Assistance or More Information

If your organization needs assistance updating your heath care program documentation, policies or procedures in response to these or other requirements or with other employee benefit, insurance or human resources matters, please contact the author of this update, Board Certified Labor & Employment attorney Cynthia Marcotte Stamer at (469) 767-8872 or via e-mail **here**.

Current Chair of the American Bar Association (ABA) RPTE Employee Benefit & Other Compensation Group, a Council Member of the ABA Joint Committee on Employee Benefits and Past Chair of the ABA Health Law Section Managed Care & Insurance Interest Group, Ms.

Stamer continuously advises employers, health and other employee benefit plans, plan sponsors, fiduciaries, plan administrators, plan vendors, insurers and others about health program related legal, operational, documentation, public policy, enforcement, privacy, technology, litigation and risk management and other concerns. Ms. Stamer also publishes, conducts client and other training, speaks and consults extensively on these and other health and managed care program concerns and practices. She regularly speaks and conducts training for the ABA, American Health Lawyers Association, Institute of Internal Auditors, Society for Professional Benefits Administrators, Southwest Benefits Association and many other organizations. Her insights on these and related topics have appeared in Atlantic Information Service, Bureau of National Affairs, World At Work, The Wall Street Journal, Business Insurance, Managed Healthcare, Health Leaders, various ABA publications and a many other national and local publications. To contact Ms. Stamer or for additional information about Ms. Stamer, her experience, involvements, programs or Publishers of her many highly regarded writings on health industry and human resources matters include the Bureau of National Affairs, Aspen Publishers, ABA, AHLA, Aspen Publishers, Schneider Publications, Spencer Publications, World At Work, SHRM, HCCA, State Bar of Texas, Business Insurance, James Publishing and many others. You can review other highlights of Ms. Stamer's experience **here**.

Other Resources

If you found this information of interest, you also may be interested in reviewing other recent Solutions Law Press updates including:

- ✓ **Businesses Employing Children Should Review & Tighten Practices In Light of Tightened Rules & Increased Penalties**
- ✓ **2010 Health Plan Update: Learn What You Must Do Now To Meet Key 2010/2011 Affordable Care Act & Other Federal Health Plan Deadlines**
- ✓ **New Affordable Care Act Health Plan Appeals Regulations Require Health Plan Updates**
- ✓ **Blockbuster & Health Delivery Disability Discrimination Settlements Highlight Need For Tightened Disability Discrimination Risk Management**
- ✓ **Agencies Release Regulations Implementing Affordable Care Act Health Plan Preventative Care Mandates**
- ✓ **New Retirement Plan Resource To Help Spanish-Speaking Participants With Retirement Planning**
- ✓ **Office of Civil Rights Proposes Changes To HIPAA Privacy, Security & Civil Sanctions Rules**
- ✓ **St. Louis Employer's OSHA Violations Trigger Contempt Order and Penalties**
- ✓ **Review & Strengthen Defensibility of Existing Worker Classification Practices In Light of Rising Congressional & Regulatory Scrutiny**
- ✓ **Key Affordable Care Act Health Plan Coverage Mandates Guidance Issued June 28; Apply ASAP For Early Retirement Reinsurance Program**
- ✓ **HHS, DOL & IRS Rules Define "Grandfathered" Group Health Plans & Health Insurance Coverage under the Patient Protection and Affordable Care Act**
- ✓ **New Rule Requires Federal Government Contractors To Post New "Employee Rights Under The National Labor" Poster**
- ✓ **Defined Contribution Plans Investing In Publically Traded Employer Securities Face New Requirements**
- ✓ **CBO Raises Estimated Cost of Health Care Reforms As Employers, Health Plans Brace Costs Of Newly Effective & Impending Mandates**
- ✓ **Certain Workforce Reductions Trigger Plant Closing Notice & Other Obligations**

- ✓ **Mishandling Employee Benefit Obligations Creates Big Liabilities For Distressed Businesses & Their Business Leaders**
- ✓ **DOL Plans To Tighten Employment Protections For Disabled Veterans & Other Disabled Employees Signals Need For Businesses To Tighten Defenses**
- ✓ **COBRA, HIPAA, GINA, Mental Health Parity or Other Group Health Plan Rule Violations Trigger New Excise Tax Self-Assessment & Reporting Obligations**

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