Tuesday, May 17, 2022

On January 5, 2022, we discussed the Notice of Benefit and Payment Parameters for 2023 proposed rule released by the Centers for Medicare & Medicaid Services (CMS). On April 28, 2022, CMS issued the NBPP 2023 Final Rule. CMS published a Fact Sheet and other resources on April 28, 2022. The rule will take effect on January 1, 2023, but the optional early bird application deadline is May 18, 2022 and the final deadline for issuers to submit changes to their QHP Application is August 17, 2022.

The 2023 NBPP final rule makes regulatory changes in the individual and small group health insurance markets and establishes requirements for the 2023 benefit year. It also includes regulatory standards to strengthen the coverage of qualified health plans (QHPs) on the federal Marketplace and ensure that consumers can more easily find quality, affordable coverage. The 2023 NBPP final rule includes several
provisions addressing health equity, consistent with the Biden Administration’s Inauguration Day executive order committing to advancing racial equity and supporting underserved communities.

**Essential Health Benefits Policy for Plan Designs**

The 2023 NBPP final rule aims to protect consumers from discriminatory practices in the coverage of essential health benefits (EHB). Specifically, a benefit design that limits coverage for an EHB on a discriminatory basis under this rule must be clinically-based to be considered nondiscriminatory. The final rule includes examples of *per se* discriminatory benefit designs, such as the use of age limits for hearing aid coverage, Autism Spectrum Disorder coverage, or fertility treatment. To overcome this presumption of impermissible discrimination, issuers must demonstrate that clinical evidence justifies the differential treatment or that the difference is required to comply with federal law—such as compliance with the recommendations of the United States Preventive Services Task Force (USPSTF) which may include age limits and other limitations.

When designing nondiscriminatory plan designs and ensuring that any limitations on EHB on a basis prohibited under § 156.125 are clinically indicated, CMS encourages issuers to seek current and relevant clinical evidence, rather than utilizing standards that tend to overlap or are potentially inconsistent with the scope of the plan design. CMS also acknowledges, however, that limitations in medical research may restrict availability of such clinical evidence. CMS therefore is not including any specific standard of care because it is not specifying sources of acceptable clinical information an issuer may use to show its benefit design is not discriminatory. This is a departure from the proposed rule, which would proposed specific criteria to identify appropriate, evidence-based guidelines and sources. Here, the final rule provides no definitions of “clinically based” or “clinically indicated.”

The rule also updates Quality Improvement Strategy Standards to require issuers to address health and health care disparities.

**Nondiscrimination Based on Sexual Orientation and Gender Identity**

We previously noted that the 2023 NBPP proposed rule would have amended 45 C.F.R. § 147.104(e) to explicitly prohibit discrimination on the basis of sexual orientation and gender identity, as had been the case prior to 2020. The proposed rule cited a Biden Administration executive order on preventing and combating discrimination on the basis of gender identity or sexual orientation as well as an HHS announcement to interpret Section 1557 and Title IX to include discrimination on the basis of sexual orientation and gender identity, pursuant to pursuant to *Bostock v. Clayton County*.

The proposed rule would have prohibited health insurance issuers, their officers, employees, agents, and representatives from employing practices or designs that resulted in disenrollment of or discrimination against individuals based on race, color, national origin, present or predicted disability, age, sex, sexual orientation,
gender identity, expected length of life, degree of medical dependency, quality of life, or other health conditions. The proposed rule found a statutory basis for this independent from ACA Section 1557, citing ACA Section 1311(c)(1)(A) regarding QHP issuer certification requirements and ACA Section 1321(a) regarding authority to establish and operate exchanges and the offering of QHPs through such exchanges. This provision was strongly supported by various stakeholders.

The final rule declined to finalize any changes, however, because HHS’s Office of Civil Rights (OCR) is developing a rule that also will address prohibited discrimination based on sex in health coverage under ACA Section 1557. HHS also removed its proposed example of presumptively discriminatory benefit design related to gender-affirming care. HHS stated that “it would be most prudent to address the nondiscrimination proposals related to sexual orientation and gender identity in the 2023 Payment Notice proposed rule at a later time, to ensure that they are consistent with the policies and requirements that will be included in the Section 1557 rulemaking.” Thus, until the new rule is finalized, HHS will continue to interpret and enforce Section 1557 and its protections against sex discrimination to “prohibit discrimination on the basis of sexual orientation and gender identity in all aspects of health insurance coverage governed by Section 1557.”

OCR’s proposed rule on nondiscrimination under Section 1557 is pending regulatory review at the Office of Management and Budget. HHS previously announced that this rule would be published by April 2022, so it is likely that the rule will be published soon. Until then, insurers covered by Section 1557 should ensure compliance with nondiscrimination requirements, including HHS’s interpretation that sex discrimination under Section 1557 includes sexual orientation and gender identity. In particular, insurers should review plan terms and remove plan exclusions for treatments and services that may bar access to healthcare based on sexual orientation or gender identity.

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National Law Review, Volume XII, Number 137