



OFFICE OF
INSURANCE COMMISSIONER

June 23, 2020

To Health Insurance Carriers in Washington State:

The purpose of this letter is to clarify and reaffirm prohibitions in Washington State law against discrimination in health care coverage on the basis of race, color, national origin, disability, age, sex, gender identity or sexual orientation.¹ Broad exclusions of coverage on the basis of gender identity continue to be prohibited under Washington state law. Additionally, denial of a medically necessary service on the basis of gender identity remains prohibited under Washington state law.

On June 12, 2020, the United States Department of Health and Human Services (HHS) issued a final rule related to §1557 of the Affordable Care Act.² This rule retracts many important protections established in the previous version of the rules for insurance consumers. However, the preamble to the final rule states that the final federal rule does not deny states the ability to provide protections that exceed those required by federal civil rights law.³ In Washington state, the legislature has enacted protections against discrimination that exceed those embodied in the final §1557 regulations through the enactment of RCW 48.43.0128, RCW 48.30.300 and RCW 49.60.178. Thus, regardless of the changes to federal regulations implementing §1557 of the ACA, state law provides comprehensive protections against discrimination consistent with federal rules and guidance in effect on January 1, 2017 implementing the Patient Protection and Affordable Care Act (ACA).⁴

RCW 48.43.0128, as amended by section 9 of Substitute House Bill (SHB) 2338⁵ provides that a health carrier offering a health plan, a short-term limited duration medical plan or a student health plan may not:

- (a) In its benefit design or implementation of its benefit design, discriminate against individuals because of their age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions; and
- (b) With respect to the health plan, discriminate on the basis of race, color, national origin, disability, age, sex, gender identity, or sexual orientation.

¹ RCW 48.43.0128, as amended by Chapter 228, Laws of 2020.

² 42 U.S.C. §18116

³ U.S. Department of Health and Human Services, *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority* (RIN 0945-AA11) issued June 12, 2020, accessed at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-11758.pdf>, at p. 27.

⁴ RCW 48.43.0128(3)

⁵ Chap. 228, Laws of 2020

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The 2020 amendment to RCW 48.43.0128 was effective on June 11, 2020. It expands the scope of the discrimination prohibitions enacted in 2019 from individual and small group health plans to all health plans, as well as short term limited duration medical plans and student health plans.

In early 2020, the Office of the Insurance Commissioner adopted rules to implement RCW 48.43.0128.⁶ The rules set out the discriminatory activities prohibited under RCW 48.43.0128 for individual and small group health plans with respect to benefit design and implementation, health plan administration, member communication, medical protocols or criteria for medical necessity or other aspects of health plan operations, and with respect to access to care for individuals with limited English proficiency and individuals with disabilities.

The rules adopted by OIC authorize enforcement action against health carriers offering the newly expanded types of health coverage under SHB 2338. The current Washington rule acknowledges that the prohibitions in the rule are not exclusive. WAC 284-43-5940(2) & (4) provide:

(2) The enumeration of specific forms of discrimination in subsection (1)(b)(ii) through (vi) of this section does not limit the general applicability of the prohibition in subsection (1)(b)(i) of this section.

. . .

(4) The commissioner will determine whether an issuer's actions to comply with this section are consistent with current state law, the legislative intent underlying RCW 48.43.0128 to maintain enrollee protections of the Affordable Care Act, and the federal regulations and guidance in effect as of January 1, 2017, including, but not limited to, those issued by the U.S. Department of Health and Human Services Office of Civil Rights.

The rule is not the only basis for finding discriminatory behavior, and the Commissioner has discretion to determine if other conduct is discriminatory. The current rule does not bar the Commissioner from taking any action against large group, short term, or student only health plans that discriminate in ways prohibited under the federal regulations and guidance in effect as of January 1, 2017.

The OIC interprets RCW 48.43.0128 as applying the federal ACA nondiscrimination obligations and requirements that were in effect on January 1, 2017, to all health plans, short term limited duration medical plans, and student only health plans offered by health carriers in Washington state. OIC also has initiated permanent rulemaking to implement SHB 2338.⁷

Sincerely,



Mike Kreidler
Insurance Commissioner

⁶ WAC 284-43-5940; WAC 284-43-5950

⁷ OIC 2020-06 (WSR 20-12-033)