



DOMESTIC/FOREIGN INSURERS BULLETIN NO. 86 (revised and reissued)

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

**FIRST
ISSUED: March 23, 2016**

**REVISED &
REISSUED: September 4, 2020**

I. Purpose of Bulletin and Revisions

The purpose of the March 23, 2016 version of this Bulletin was to provide guidance regarding implementation of the Delaware Gender Identity Nondiscrimination Act of 2013 (S.B. 97; 79 Del. Laws Ch. 47) (the Gender Identity Nondiscrimination Act), which was signed into law on June 19, 2013.

The purpose of revising and reissuing this Bulletin is to:

- Reinforce that the Gender Identity Nondiscrimination Act continues to apply to prohibit discrimination in the provision of insurance in any way based on an individual's gender identity; and
- Confirm that, notwithstanding the issuance of a Federal Final Rule discussed below (the 2020 Rule), the Department interprets Section 1557 of the Patient Protection and Affordable Care Act (ACA) to prohibit discrimination on the basis of an individual's gender identity.

Accordingly, the Department will continue to hold regulated persons and entities accountable for maintaining nondiscriminatory policies or practices, and to require them to make coverage determinations on a nondiscriminatory basis.

NOTE: This Bulletin is intended solely for informational purposes. It is not intended to set forth legal rights, duties, or privileges, nor is it intended to provide legal advice. Readers should consult applicable statutes and rules and contact the Delaware Department of Insurance if additional information is needed.

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II. Non-discrimination provisions in Delaware’s Insurance Code

The Gender Identity Nondiscrimination Act added nondiscrimination protections to two provisions of the Delaware Insurance Code. When these amendments are read together, they unequivocally prohibit the denial, cancellation, termination, limitation, refusal to issue or renew, or restriction, of insurance coverage or benefits thereunder on the basis of a person’s gender identity or transgender status, or because the person is undergoing gender transition:

- Section 2304(22) of the Unfair Trade Practices Act, 18 *Del.C.* Ch. 23, as amended by the Gender Identity Nondiscrimination Act makes 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;” and
- Section 2304(13)(b) of the Unfair Trade Practices Act 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 whatsoever.

These provisions apply to both the availability of health insurance coverage and to the provision of health insurance benefits.

III. The Federal Affordable Care Act, the 2016 Rule and the 2020 Rule

Section 1557 of the ACA, Pub. L. No. 111-148, 124 Stat. 119 (codified at 42 U.S.C. §§ 18001-18122 (2010)), prohibits discrimination on the basis of sex in any health program or activity receiving federal funds or that the United States Department of Health and Human Services (HHS) administers, or by any entity established under the ACA, including health insurance marketplaces and all health insurance plans offered by insurers that participate in those marketplaces.

In 2016, HHS issued guidance and a subsequent final rule under Section 1557 of the ACA (the 2016 Rule) confirming that the sex nondiscrimination protections of such section of the ACA encompass protection against discrimination on the basis of gender identity and sex stereotypes. The 2016 Rule established comprehensive anti-discrimination protections in HHS’s Section 1557 implementing regulations that are coextensive with Delaware’s anti-discrimination protections and created a federal enforcement scheme to counter discrimination in the health care context that operated in parallel to Delaware’s enforcement schemes.

Thereafter, on June 19, 2020, HHS published the 2020 Rule, entitled Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 *Fed. Reg.* 37, 160 (June 19, 2020) (to amend and be codified at 45 C.F.R. pt. 92) which:

- Purports to strip health care rights statutorily guaranteed by Section 1557 from transgender people, women and other individuals seeking reproductive health care or with pregnancy-related conditions, LEP individuals, individuals with disabilities, and other individuals experiencing discrimination (due to the narrowed scope of coverage of insurance plans); and
- Newly exempts many private employer-based plans, Medicare Part B plans, and the Federal Employee Health Benefits program from Section 1557's scope, except with respect to plans such insurers offer on the ACA exchange or that receive federal funding, like Medicaid plans.

Although some may interpret the 2020 Rule to allow regulated persons and entities to roll back or reduce certain nondiscrimination protections they previously understood to be required by the ACA, this Bulletin reiterates that discrimination in any way on the basis of gender identity or sex stereotypes in the provision of insurance is illegal in Delaware because of the protections afforded Delawareans by the Gender Identity Nondiscrimination Act and Section 1557 of the Affordable Care Act.

Two recent Court decisions inform the Department's position:

- 1) The United States Supreme Court confirmed in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that the prohibition on sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* prohibits discrimination based on sexual orientation or gender identity because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."
- 2) Following the *Bostock* ruling, the United States District Court for the Eastern District of New York granted a stay of the repeal of the portions of the 2016 Rule, and enjoined the portions of the 2020 Rule relating to discrimination on the basis of sex, finding that such portions of the 2020 Rule are "contrary to *Bostock* and, in addition, that HHS did act arbitrarily and capriciously in enacting them." Accordingly, the court granted plaintiffs' application for a stay and preliminary injunction to preclude such portions of the 2020 Rule from becoming operative and enforceable. *See Walker and Gentili v. Azar*, Case No. 20-CV-2834 (FB)(SMG) (August 17, 2020).

IV. Discrimination on the basis of gender identity continues to be illegal in Delaware

The Department continues to interpret the above provisions of Federal and State 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;

- Prohibit insurance companies from denying, excluding, or otherwise limiting 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;
- Qualify as a violation of the Unfair Trade Practices Act any blanket policy exclusion for gender dysphoria, gender identity disorder, medically necessary surgeries or other treatments related to gender transition or related services because it is discrimination based on gender identity, including blanket policy exclusions that would exclude medically necessary treatments related to gender transition because they are not approved for that specific use by the United States Food and Drug Administration; and
- Qualify as a violation of the Unfair Trade Practices Act the imposition of different premiums or rates for insurance coverage based on an insured's gender identity. 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, as determined by a medical provider in consultation with the individual patient, and not based on 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 will continue to be based on current medical standards established by nationally recognized transgender health medical experts. The failure to recognize such standards in making such determinations qualifies as a violation of the Unfair Trade Practices Act.

The requirements of this Bulletin 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, and 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 years 2016-2020 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.

The Department will continue to 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 date this Bulletin first became effective, 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 consumer@delaware.gov.

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

A handwritten signature in blue ink that reads "Trinidad Navarro". The signature is written in a cursive style and is positioned above a horizontal line.

Trinidad Navarro

Delaware Insurance Commissioner