

Regulatory Update

Western Claim Conference
June 15, 2009

Marilyn A. Monahan
Emmer & Graeber

Today's Agenda

- An overview of recent federal developments
- What we are waiting for from the federal regulators
- What is happening on the state level
- Questions

Michelle's Law

- If a group health plan covers dependents enrolled in a postsecondary school, coverage must continue for one year (or when coverage would otherwise end) while the dependent is on a leave of absence due to a serious illness or injury and the leave is medically necessary
- Must receive a physician's certification

Michelle's Law

- Applies to plan years beginning 1 year after date of enactment of law (10/9/09)
- Review SPDs and plan documents
- Notice must be included with requests for verification of student status
 - Must be in language which is understandable to the typical plan participant

Michelle's Law—CA Version

- SB 1168 - Health Care Coverage: Dependent Children (Chapter 390)
 - Effective Date: January 1, 2009
- Coverage shall not terminate—for up to 12 months or until the coverage is otherwise scheduled to terminate—if the dependent takes a medical leave of absence from school
 - Dependent must be over 18 and a full-time student
 - Certification must be provided

Military Leave—FMLA

- National Defense Authorization Act for FY 2008 (Public Law 110-181)
 - Military Exigency Leave – up to 12 weeks
 - Military Caregiver Family Leave - up to 26 weeks
- New FMLA Regulations
 - Implements military leave amendments to FMLA
 - Review SPDs and plan documents

CHIP Reauthorization Act (HR 2)

- *Premium Assistance*: States may offer premium assistance for qualified employer-sponsored coverage for those who qualify for Medicaid or CHIP
- Subsidy would be the difference between employee contribution for employee-only and employee plus dependent coverage
- State would be secondary payor
- California unlikely to adopt

CHIP Reauthorization Act (HR 2)

- *Notice:* Plans must provide notice of potential opportunities for premium assistance
- Notices must be provided the first plan year after model notices are issued
 - Model notices due 1 year from enactment (2/4/09)

CHIP Reauthorization Act (HR 2)

- *HIPAA special enrollment rights*: Expanded
- Right to enroll outside open enrollment due to:
 - Termination of coverage under Medicaid or CHIP
 - Becoming eligible for premium assistance under Medicaid or CHIP
 - 60 days to elect
- Review plan documents
- Effective April 1, 2009

Mental Health Parity

- **Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008**
 - Enacted: October 9, 2008
- Effective:
 - Group health plans: Applies to plan years beginning 1 year after the date of enactment—for calendar year plans, January 1, 2010
 - Collectively bargained plans: Applies to plan years beginning the later of--(A) the date on which the last of the collective bargaining agreements relating to the plan terminates, or (B) January 1, 2010

Mental Health Parity

- If a group health plan or health insurer provides mental health or substance use disorder benefits, the plan must ensure that,
 - The financial requirements are no more restrictive than the predominant financial requirements applied to all medical and surgical benefits also covered
 - The treatment limitations applicable to mental health or substance use disorder benefits are no more restrictive than the predominant treatment limitations applied to substantially all medical and surgical benefits covered
 - If the plan provides coverage through out-of-network providers, it shall also provide coverage for these benefits through out-of-network providers

Mental Health Parity

- The criteria for medical necessity determinations must be made available to participants upon request
- The reasons for denial of reimbursement or payment shall be made available upon request and as required by regulation
- *Exemption:* Only applies to employers of 51 or more employees
- *Exemption:* A cost exemption may be available, but only after the plan has implemented the law for 6 months

Mental Health Parity



- Regulations must be issued 1 year after date of enactment (10/3/09)
- Before issuance, regulators seeking comments on:
 - Plan policies & procedures that may be impacted & the cost
 - Any unique cost issues for small plans
 - How do plans currently apply financial requirements & treatment limitations
 - What clarifications of the law would be helpful
 - To what extent does the plan make available the criteria for medical necessity determinations
 - How does out-of-network coverage currently differ

Genetic Information Nondiscrimination Act (HR 493)

- Applies to health plans, insurers, & employers (agencies & unions)
- Prohibits insurers & employers from discriminating against an individual based on genetic predispositions
- Group health plans cannot adjust premiums based on genetic information
- Individual health plans cannot establish eligibility rules or pre-existing condition limitations based on genetic information

Genetic Information Nondiscrimination Act (HR 493)

- Group health plans cannot request, require, or purchase for underwriting purposes
- Group health plans cannot ask someone to undergo a genetic test
- Insurers can obtain test results to make a payment determination—but only ask for minimum amount necessary

Genetic Information Nondiscrimination Act (HR 493)

- It shall be an unlawful employment practice to discriminate based on genetic information
 - Employer cannot fail or refuse to hire, discharge, limit, segregate, or classify employees due to genetic information
- Employers cannot acquire genetic information
 - Limitations on requesting family medical histories
- Employers must keep separate employee files

Genetic Information Nondiscrimination Act (HR 493)

- Employer effective date: 11/21/09
- Health plan effective date: first plan year after May 21, 2009
- Proposed regulations issued by EEOC for employers; final regulations were expected in May
- No regulations yet for health plans

Genetic Information Nondiscrimination Act (HR 493)

- Definition of “genetic information” includes:
 - Genetic tests of individuals & family members
 - Manifestation of disease or disorder (family medical history)
 - Request for genetic services

Genetic Information Nondiscrimination Act (HR 493)

- 6 exceptions to the general prohibition on acquisition of genetic information by employers
 - Inadvertent requests
 - FMLA compliance
 - Information publicly or commercially available
 - When monitoring biological effects of toxic substances
 - Employers who conduct DNA analysis for law enforcement purposes
 - As part of health services offered, including wellness programs

Genetic Information Nondiscrimination Act (HR 493)

- Wellness programs:
 - Must be voluntary
 - Cannot be penalized for non-participation
 - Prior written authorization
 - Disclosure of information limited

CMS MSP Reporting

- New CMS data sharing requirements
- To facilitate implementation of the Medicare Secondary Payor Rule
- Applies to insurers, TPAs, & self-funded plans

The Stimulus Bill: COBRA Subsidy

- “Assistance eligible individuals” will receive a 65% federal subsidy toward the cost of COBRA for up to 9 months
- Special election period—second chance—for those who did not elect COBRA or elected and dropped
- No subsidy if “eligible” for Medicare or other group coverage



The Stimulus Bill: COBRA Subsidy

- AB 23: Amends Cal-COBRA
 - Effective: May 12, 2009
- Provides for second election period
- Insurers must provide a notice to QBs who had a QE between 9/1/08 and 12/31/09
 - Specifies what must be included in notice, such as notice of subsidy, election form, & option to enroll in different coverage
 - Notice provided within 14 days of effective date
- Insurer not required to amend EOC
- 60 days to elect Cal-COBRA
- May request verification of involuntary termination from employer

The Stimulus Bill: HIPAA Privacy & Security Rules

- ARRA amends the HIPAA Privacy and Security Rules
- Delayed effective dates (except penalties)
- Rules will now apply directly to business associates (generally effective 2/17/10)
 - Amend contracts
 - Change policies and procedures

HIPAA Privacy & Security Rules

- Higher penalties (effective immediately)
 - If person did not know & with reasonable diligence would not have known of violation, \$100 for each violation, not to exceed \$25,000
 - If violation was due to reasonable cause & not willful neglect, \$1,000/\$100,000
 - If violation was due to willful neglect:
 - \$10,000/\$250,000 or
 - \$50,000/\$1,500,000 if not corrected
- Penalties distributed in part to participants
- Penalties distributed to HHS for enforcement



HIPAA Privacy & Security Rules

- Notification of breach of “unsecured” PHI
 - If a breach occurs, notices must be provided
 - Methods vary: by mail, posting on the web, or to prominent media outlets
- Guidance will be issued on what is “unsecured” PHI
 - Guidance to be updated annually
 - Will describe methods to make PHI unusable, unreadable, and indecipherable
 - It provides a safe harbor
 - Guidance issued by HHS April 17th

HIPAA Privacy & Security Rules

- Other HIPAA changes include
 - Accounting of disclosures of PHI
 - Minimum necessary
 - Right to request restrictions on communications
- May have to amend policies and procedures and forms

Never Events

- Billing for selected “hospital-acquired” conditions or medical errors
- October 1, 2008—Medicare will not pay
- Medicare is encouraging states to coordinate Medicaid policies
- Some insurers are also denying payment
- Review your provider contracts

Ingenix

- Allegations: Ingenix database “distorts” reasonable & customary rate applied to out-of-network charges
- Settlements reached
- A non-profit will own and operate a new database
- Database will be available to insurers
- Consumers will be able to find out reimbursement amounts

Discretionary Clauses

- De novo review vs. arbitrary and capricious
 - *Firestone Tire & Rubber Co. v. Bruch* (1989)
- NAIC: Prohibition on the Use of Discretionary Clauses Model Act
 - A number of states—including California and Utah—prohibit the use of discretionary clauses
- ERISA preemption—cases vary

COB: Benefit Reserves

- In a COB situation, plans may “bank” savings when paying secondary
 - These savings are sometimes used to pay other claims
- A number of states now eliminating benefit reserves or “credit savings” (Oregon)

California: DMHC

- “Timely Access To Non-Emergency Health Care Services”
- Proposed regulations in the comment period
- Arrange for covered health care services in a timely manner appropriate for the nature of the enrollee’s condition consistent with good professional practice
- Pre-authorizations shall be timely
- Promptly reschedule appointments
- Coordinate interpreter services
- Must modify EOCs and provider contracts

California: DOI

- “Standards for Health History Questionnaires in Health Insurance Applications, Pre-Issuance Medical Underwriting and Rescission of Health Insurance Policies”
- Proposed regulations posted 6/3/09
- Health history questionnaires
 - Shall hold applicants to a “reasonable layperson standard”
 - 7 specific prohibitions for health history questions
- Underwriting
 - Outlines the medical review the insurer must undertake before policy is issued
 - If the steps are not followed, cannot rescind
- Must document actions

California: DOI

- Disability income benefit deductions
- In 2008, DOI adopted regulation that prohibits insurers from offsetting disability benefits by amounts they estimate the beneficiary will receive from state-mandated disability or workers' compensation if the insured has not voluntarily retired
- November 4, 2008: DOI proposes repeal of regulations as “unnecessary”

Federal: What to Watch for in 2009

- More regulations
 - Federal government reviewing all agency regulations to see if federal preemption of state law is justified
- Federal health reform proposals
- Informed Consumer Choices in Health Care Act (H.R. 2427 & S. 1050)
- Tax Equity for Health Plan Beneficiaries Act of 2009 (H.R. 2625 & S. 1153)



*"It's a smoke detector. The boss thinks
I might be headed for a burnout."*

Questions

