

New and Potential Mandates from the 110th Congress

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A Note on the Mental Health Parity Negotiations

- Proposals do not have real parity rules and are not consistent with FEHBP.
- People seem to be ignoring this point.

This is Not a Parity Rule

- the financial requirements applicable to such mental health or substance abuse disorder benefits are no more restrictive than the predominant financial requirements applied to substantially all medical and surgical benefits covered by the plan (or coverage), and there are no separate cost sharing requirements that are applicable only with respect to mental health or substance use disorder benefits

Original Senate Language had Important Provisions on Categories

-such plan or coverage shall not be prohibited from--
 - ` (3) applying the provisions of this section in a manner that takes into consideration similar treatment settings or similar treatments.

Original Senate Bill Had Important Language on Medical Management

-such plan or coverage shall not be prohibited from—
 - (2) managing the provision of mental health benefits in order to provide medically necessary services for covered benefits, including through the use of any utilization review, authorization or management practices, the application of medical necessity and appropriateness criteria applicable to behavioral health, and the contracting with and use of a network of providers;

Examples

- Let's say a plan has a 25% copay for specialists but only a 10% copay for general practitioners. Does this mean you cannot charge a 25% copay for a psychiatrist even if he is a specialists?
- Is a given drug a mental health benefit. If so this language will be problems for formularies

Possible Solution

“(___) BENEFIT COMPARABILITY BASED ON SUBCATEGORIES.—A group health plan (or health insurance coverage) shall be treated as satisfying paragraphs (___) and (___) if for each subcategory of benefits as defined under the plan the subcategory does not make a distinction in the application between mental health or substance-related disorder benefits and other benefits within the same subcategory or applies the same requirements relating to treatment limitations and financial requirements among comparable subcategories.

General Privacy Question

- Can a patient tell a doctor that he may not coordinate information with another doctor?
- Can the doctor say he does not want to see patients who say they will not allow for such coordination?
- What does it mean to have opt out provisions?

Some Questions on Proposed Privacy Provisions

- Is using health information for disease management or prevention services inappropriate marketing?
- Who is responsible under breach notifications when the breach could occur in cyberspace and there are multiple parties participating in a system?
- Do we really want access provisions for business associates?

More Questions on Privacy Provisions

- Will HHS be interpreting contract terms in federal court between business associates and covered entities?
- Is putting the fact of breaches in the newspaper really good for privacy and security concerns?

“...Before I built a wall I'd ask to
know
What I was walling in or walling
out,
And to whom I was like to give
offence.
Something there is that doesn't
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That wants it down...”

Mending Wall, Robert Frost

GINA 101 for Group Health Plans and Insurers

Unhappy Accidents of Politics and Laziness: Group Health Plan and Insurer Edition

- Potentially two new regulatory schemes.
- Multiple and confusing enforcement schemes.
- Unworkable and confusing definitions.
- Inconsistent overlap with state laws and definitions.
- Some impediments to disease management and health literacy efforts.

Unhappy Accidents of Politics and Laziness: Group Health Plan and Insurer Edition

- Complications for application of pre-existing conditions requirement.
- New litigation arguments when there are changes or renewals of contracts.
- Minor arguments concerning application of unworkable Title II provisions and possible EEOC enforcement.

Definition of Genetic Test

- The term `genetic test' means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.
- This appears to include blood tests, cancer tests, dna identifications among others
- Question about mixed tests.

The Title I Exception is Not in Title II

- The term `genetic test' does not mean—
 - `(ii) an analysis of proteins or metabolites that is directly related to a manifested disease, disorder, or pathological condition that could reasonably be detected by a health care professional with appropriate training and expertise in the field of medicine involved.

Genetic Information Includes

- The term `genetic information' means, with respect to any individual, information about—
- `(iii) the manifestation of a disease or disorder in family members of such individual.

Possible Impediment to Disease Management and Education

Efforts

- `(1) LIMITATION ON REQUESTING OR REQUIRING GENETIC TESTING- [Plans]... shall not request or require an individual or a family member of such individual to undergo a genetic test.
- `(2) RULE OF CONSTRUCTION- Paragraph (1) shall not be construed to limit the authority of a health care professional who is providing health care services to an individual to request that such individual undergo a genetic test.
- `(3) RULE OF CONSTRUCTION REGARDING PAYMENT-

Potential Problems with Testing Request Prohibition

- If requesting is the same as stating something is the right thing to do, this language may intrude on the role of plans and insurers as important providers of health information.
- This may inhibit disease management, preventive care, prenatal care, and patient safety efforts (related to pharmacogenomics).

Prohibition on Collection of Genetic Information

A [plan or insurer] shall not request, require, or purchase genetic information for underwriting purposes...

Underwriting Purposes

The term 'underwriting purposes' means...--

- `(A) rules for, or determination of, eligibility (including enrollment and continued eligibility) for benefits under the plan or coverage;
- `(B) the computation of premium or contribution amounts under the plan or coverage;
- `(C) the application of any pre-existing condition exclusion under the plan or coverage; and
- `(D) other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits.'

Potential Problems with Collection Prohibition

- Application of the pre-existing conditions exclusion will have more issues to litigate, since it is very difficult to separate genetic information from other medical information.
- There will be new arguments for litigation over changes and renewals of contracts for health insurance benefits.

GINA 101 for Conditions of Employment & Other Employee Benefits

Unhappy Accidents of Politics and Laziness: Conditions of Employment & Benefits Edition

- Civil Rights structures cover employee benefits.
- Title II has a prohibition on requesting or disclosing genetic information with some exceptions.
- Health information is important for many employee functions.
- The definition of genetic information in Title II is overly broad.

Employee Benefits

- Group Health Plans
- Health Clinics and Counseling
- Disability Insurance
- Workers Compensation
- Personal Health Record Services
- Day Care

Conditions of Employment

- Safety Monitoring
- Blood Tests
- Disabilities Issues
- Sick Leave

Main Sources of Problems

- Prohibition on Collection and Disclosure.
- Exceptions Must Be Statutory and Current
Statutory Exceptions are Incomplete and
Not as Rational as HIPAA.
- Overlap and New Litigation for Disabilities
Issues.
- Protections for Employers not as good as
under ADA.

A Good Exclusion For Covered Entities

- Relationship to HIPAA Regulations- With respect to the regulations promulgated by the Secretary of Health and Human Services under part C of title XI of the Social Security Act (42 U.S.C. 1320d et seq.) and section 264 of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d-2 note), this title does not prohibit a covered entity under such regulations from any use or disclosure of health information that is authorized for the covered entity under such regulations. The previous sentence does not affect the authority of such Secretary to modify such regulations.

Good Separation Language

- (c) Relation to Authorities Under Title I-
With respect to a group health plan, or a health insurance issuer offering group health insurance coverage in connection with a group health plan, this title does not prohibit any activity of such plan or issuer that is authorized for the plan or issuer under any provision of law referred to in clauses (i) through (iv) of subsection (a)(2)(B).

More Good Separation Language

- Nothing shall
(B) provide for enforcement of, or penalties for violation of, any requirement or prohibition applicable to any employer, employment agency, labor organization, or joint labor-management committee subject to enforcement for a violation under– (Title I and a variety of Laws)

BUT WAIT

- Nothing shall limit the rights or protections of an individual to bring an action under this title against an employer, employment agency, labor organization, or joint labor-management committee for a violation of this title.

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