When Benefits and Exclusions Create a Crossroads between Plan and Employer Requirements

By: Erin M. Hussey, Esq.

Plan Administrators of self-funded plans are able to customize their benefit offerings to meet the needs of the employer group, as long as that customization is compliant. Compliance for self-funded plans subject to the Employee Retirement Income Security Act ("ERISA") includes federal health-related regulations such as the Patient Protection and Affordable Care Act ("PPACA" or "ACA") and the Mental Health Parity and Addiction Equity Act ("MHPAEA").

The lurking problem exposing employers, who sponsor those self-funded plans, to unexpected liability are the federal employer-related regulations. The Equal Employment Opportunity Commission ("EEOC") and the Department of Justice ("DOJ") have taken action to enforce compliance with certain employer-related regulations such as the

Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII").

Provided below are examples of when an exclusion in a self-funded plan, such as an excluded medical condition or treatment for that medical condition, can be compliant with the applicable health-related regulations, such as the ACA and MHPAEA, but that same medical condition is still afforded protection under employer-related regulations such as the ADA and Title VII.

ACA and Title VII Compliance

Discrimination on the Basis of Sex

The ACA's Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability with regards to certain covered entities' health programs. A covered entity is one that receives federal funding as outlined in the ACA. The convoluted issue is whether treatment for gender identity is a protected class under the category of "discrimination based on sex." While Section 1557 does not specifically state that plans subject to it must cover gender transition surgery, the rules do state that the Health and Human Services, Office for Civil Rights ("HHS, OCR") will investigate any complaints.

With that said, the December 31, 2016, U.S. District Court injunction (applicable nationwide) was placed on certain parts of Section 1557, including the prohibitions against discrimination on the basis of gender identity and termination of pregnancy, and that injunction is still in effect. The DOJ's recent guidance, while it does not specifically address Section 1557, appears to hint that the current administration is not going to ask a federal judge to lift the current injunction.

The self-funded plans that are not directly subject to Section 1557, because of the lack of federal funds, must still comply with the ACA. There are no actual benefit mandates for transgender services under the ACA for self-funded plans that are not subject to Section 1557. Therefore, there does not appear to be a direct benefit compliance issue for plans that exclude treatment for gender identity. Regardless, there is the potential for a discrimination issue under Title VII which may draw unwanted attention from the EEOC (as HHS does not have the authority in this case).

Whether a Plan is or is not subject to Section 1557, it would still be a plan's best practices to cover gender identity services since employers are not shielded from liability under Title VII. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin, and the EEOC's interpretation of its prohibition on discrimination based on sex, includes discrimination based on gender identity and sexual orientation.

The EEOC, as an independent commission, takes the stance that employees who undergo gender reassignment are protected under Title VII. For example, the EEOC filed an amicus brief on August 22, 2016, arguing that an individual's gender dysphoria made gender

reassignment surgery "medically necessary" and that the failure to cover this surgery was a sex discrimination violation of Title VII. The case for which this amicus brief was filed, involved a self-funded health plan that had a sex transformation surgery exclusion.

The above-noted case is a perfect example of when an exclusion that complies with health-related regulations can cause a discrimination lawsuit to be brought by the EEOC against the employer. Therefore, Plan Administrators must proceed with caution when excluding treatment for gender identity or dysphoria, even if they are not subject to Section 1557, because the EEOC may still have a discrimination claim under Title VII.

MHPAEA and ADA Compliance

Mental Health

The MHPAEA requires mental health and substance use disorder benefits to be covered in parity with the plan's medical and surgical benefits. The Department of Labor ("DOL") recently issued *proposed* FAQs on mental health and substance use disorder parity, and they seem to imply that a plan can compliantly exclude a particular medical condition (i.e., autism), because the exclusion of all benefits for a particular condition would not be considered a "treatment limitation" in the MHPAEA regulations.

Comments on these proposed FAQs should be submitted to the DOL by June 22, 2018. As for the medical condition of autism, there is currently no consensus in the medical community regarding whether autism should be classified as a mental health disorder (psychiatric disorder) or a neurological/developmental disorder. With that said if a private self-funded ERISA plan chose to explicitly exclude autism there would be no direct violation of the MHPAEA or the ACA.

Excluding the medical condition of autism does not, however, shield the employer from responsibilities they have under the ADA. Pursuant to the ADA, a "qualified individual with a disability" must be provided


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with reasonable accommodations unless the employer can show that the accommodation would impose an undue hardship to them. An employee with autism, who would qualify as a disabled individual under the ADA, may request such reasonable accommodations.

A violation of the ADA could result in a lawsuit being brought by the EEOC. For example, the EEOC filed a lawsuit against an employer in California who did not provide reasonable accommodations to their employee with autism. The employer was subject to a large fine, agreed to change their policies and procedures, and will also submit annual reports to the EEOC regarding compliance.

Therefore, even if the medical condition of autism is compliantly excluded under the plan, the employer still has to comply with the ADA, such as providing reasonable accommodations. In addition, given the EEOC's protection of individuals with autism, the EEOC may find an exclusion of autism to be discriminatory and employers of self-funded plans must be cautious.

Substance Use Disorder

As discussed above, private self-funded ERISA plans are not required to cover mental health and substance use disorder benefits, but if they do, they must cover them in parity with the medical and surgical benefits. In other words, if a plan chooses not to cover these benefits at all, the plan would still be in compliance with the ACA and the MHPAEA. With that said, this will pose the same situation as above, because even if these benefits are not covered, employees would still have federal rights under the ADA.

For example, a qualified individual in Massachusetts had sought treatment for opioid use disorder and was denied treatment by a skilled nursing facility, creating action to be taken by the DOJ. The complaint was brought under the ADA because it was determined that these individuals were disabled on the basis of opioid use disorder.

On May 10, 2018, the United States of America entered into a Settlement Agreement with Charlwell Operating, LLC, the skilled nursing facility, wherein the facility was found to be discriminating against individuals seeking treatment for opioid use disorder in violation of the ADA. The outcome of that settlement involved a penalty to be paid by the facility, and they were to adopt policies and conduct training, including training on the ADA itself.

Although this settlement involved discrimination by a provider and not an employer, it brings to light that the ADA protects and encompasses medical conditions that, at the same time, are not covered under the plan. If a medical condition is not covered, the employer must still ensure that reasonable accommodations and potential discrimination issues are being monitored.

Meeting at the Crossroads

Plan Administrators of self-funded plans should always keep in mind the protections of certain medical conditions that are enforced by the EEOC and DOJ. These protections are outside the realm of health-related requirements but inside the realm of employer-related requirements.

When a plan's benefit offerings or exclusions are compliant with the applicable health-related regulations, it does not mean the employer who sponsors that plan is safeguarded from (1) exclusions that may be deemed discriminatory under the ADA and Title VII, (2) the ADA requirements, such as reasonable accommodations, for those excluded medical conditions, or (3) general workplace discrimination regarding those excluded medical conditions. ■

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Erin earned her B.A. from the University of New Hampshire, graduating magna cum laude, and her J.D. from Suffolk University Law School, graduating cum laude. While attending Suffolk Law, Erin interned at the Boston Municipal Court (Dorchester Division) and the United Nations in New York City. She also worked as a law clerk for a personal injury law firm and volunteered at a court service center.