



Legislative & Regulatory Update: Life Insurance and Gender Identity

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Outline

- Where we are today
 - Federal activity
 - State activity
- Recent legislative and political developments
 - Oregon Bulletin 2016-1
 - New Jersey A. 4217

Where we are today – federal activity

- Enacted in 2010 - Affordable Care Act (ACA)
Section 1557(a) prohibits discrimination on the basis of gender identity and sex stereotyping in any health program receiving federal funds or by an entity established under the ACA, including exchanges
- First federal civil rights law protecting gender identity
- Litigation is ongoing – *Franciscan Alliance, Inc. et al v. Burwell* (N.D. Tex. 2016)

Where we are today – state activity

- Most state health insurance bulletins aimed at health insurance
- A few states explicitly include life insurance and disability insurance (CA 2007-02; OR DFR 2016-1)
- Varying definitions of “gender identity”

Where we are today – state activity

- “Gender” means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.” California DOI 2007-02
- “Gender identity” means a gender-related identity, appearance, expression or behavior of a person, regardless of the person’s assigned sex at birth. Gender identity may be demonstrated by consistent and uniform assertion of the gender identity or any other evidence that the gender identity is sincerely held as part of a person’s core identity; provided, however, that gender identity shall not be asserted for any improper purpose. (Delaware, S. 97, 2013)
- “Gender identity“ means a person's internal sense of being male, female, a gender different from the gender assigned to the person at birth, a transgender person or neither male or female. Oregon DFR 2016-01

Recent developments - Oregon Bulletin 2016-1

- Purpose is to “clarify prohibitions” against unfair discrimination
- Oregon law forbids unfair discrimination Ore. Rev. Stat. § 746.015(1)
- Unfair discrimination is defined to include sex “unless the distinction is demonstrably based on reasonable supporting data.” Ore. Admin. Rules 836-080-055

Recent developments - Oregon Bulletin 2016-1

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Recent developments - Oregon Bulletin 2016-1

- DCBS will deem unfair discrimination to exist if the insurer demands/requires payment that is based “in whole or in part on the *insurer’s* perceived gender identity of an insured or prospective insured rather than the gender identity of the insured.” (emphasis original)
- What does this prohibit? Is the prohibition supported by existing state law or regulations?

Recent developments - Oregon Bulletin 2016-1

What does bulletin's application of disparate impact analysis mean for insurers?

- “Although insurers may adopt rates based on statistical evidence of varying risk, the insurer cannot act, either facially or in effect, to discriminate based on race, gender, sexual orientation or any other protected class.”
 - Sex is a protected class in Oregon
 - Bulletin explicitly cites the disparate impact standard
 - “DCBS believes the Insurance Code does not distinguish between facially discriminatory policies and policies that – while facially neutral – discriminate based by their operation.”

Recent developments - New Jersey A. 4217

NJ currently prohibits “unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any policy of life insurance...or in any other terms and conditions of such policy of life insurance[.]” NJ Stat. 17B:30-12(c)

Recent developments - New Jersey A. 4217

Proposed bill would add a new section to the Unfair Trade Practices Act:

- h. No person shall make or permit any unfair discrimination in the issuance, extension, or renewal of a life insurance policy or in the fixing of the rates, terms or conditions of a life insurance policy, against in individual on the basis of:
 - (1) An individual's transgender status, including a diagnosis of gender dysphoria and any related medical treatments; or
 - (2) Any apparent incongruence between the individual's gender identity and the individual's sex assigned at birth or the gender designated in the individual's insurance application or records or other identification documents."

Recent developments - New Jersey A. 4217

What are the implications of A. 4217?

- Does it rule out underwriting of underlying medical conditions if they are related to gender dysphoria?
- If yes, does that include depression? Suicide attempts? Medical problems caused by surgical complications?
- If pertinent risk factors and medical conditions are not permissible to underwrite, would an insurer violate NJ law prohibiting different rates for individuals of the same risk?



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