The Evolution of the Health Plan Coverage Mandates Continues

12.12.14

Gender Dysphoria Treatment Mandate Added for New York Issued Policies of Insurance and HMO Coverage

Employers with health insurance policies issued in New York may find that such insured policies under their group health plans are now covering the treatment of gender dysphoria. Yesterday the New York State Department of Financial Services issued Insurance Circular Letter No. 7 (2014 in which it interpreted the mandated coverage under the state insurance laws and the requirements under the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA") in light of the diagnosis recognized in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders ("DSM"). Because the current edition of the DSM recognizes the diagnosis of gender dysphoria for person whose gender at birth is contrary to the one with which they identify as a mental disorder, New York is mandating that insurers issuing policies in New York use the "DSM as the recognized independent standard of current medical practice in determining what constitutes a mental health condition."

Circular Letter No. 7 did not include any provision for a delayed effective date and since the MHPAEA is currently effective, this interpretation is presumably also currently in effect.

Circular No. 7 indicates that this means the health insurance issuer or HMO must consider gender dysphoria as protected by MHPAEA's protections and that the policies or insured coverage must not exclude coverage for the diagnosis and treatment of gender dysphoria and any medical necessity review for such diagnosis must be performed consistently with the requirements of applicable New York law.

Employers providing group health plan coverage outside of New York that are subject to the MHPAEA should watch for additional developments in this area, including the new requirements applicable to federal contractors described below.

Federal Contractors Must Provide Protections for LGBT in Notices, Contract Provisions and in Operations Effective On and After April 8, 2015

While this final regulation primarily impacts federal contractors in employment matters with respect to hiring, workplace rules, advertising for open positions, promoting and demoting and transferring employees, it also applies to the terms, conditions, rates of pay or "other forms of compensation" or training of employees. Thus, this may impact employee benefits as part of the "other forms of compensation" provided. This final regulation prohibits and employer from discriminating in many aspects of employment with regard to an individual's race, color, religion, sex, sexual orientation, or gender identity in the same manner as it is prohibited from discriminating based on an individual's race, color, religion, sex or national origin. The regulation prohibits segregated facilities and requires notices in job advertisements and to be posted by the federal contractor. This final regulation implements President Obama's Executive Order 13673 Issued on July 31, 2014 entitled, "Fair Pay and Safe Workplaces".

A federal contractor is also required to include a provision in its contracts for services, subcontracts and purchase orders which it enters into on or after April 8, 2015, *so HR departments of federal contractors need to be aware that they will need to include new clauses in the contracts with their plan service providers to comply with this regulation if they enter into a new contract or purchase order, etc. on or after April 8, 2015 to comply with the requirements of this regulation.*

The extent to which this extends to require a change in health plan coverage for treatment of gender dysphoria was not addressed specifically, but there is to be no discrimination with respect to term, conditions, rates of pay or other forms of compensation based on sexual orientation or gender identity under the regulation's requirements. Given New York's Circular No. 7 and its interpretation of the MHPAEA as applied to gender dysphoria, employers should watch for additional guidance from the agencies with jurisdiction to regulate the application of the MHPAEA and their health plans.

California Paid Sick Leave – AB 1522

Employers with employees working in California should begin to plan to capture the records necessary to administer California's new mandate for paid sick leave accrual and use under the Health Workplaces, Healthy Families Act of 2014

(AB- 1522) (the "Act"). For employers in the construction industry entering into a collective bargaining agreement on or after January 1, 2015, the law will apply to such collective bargaining agreement ("CBA") and if the CBA meets certain requirements, the employees in the construction industry in California can be exempt from the Act's requirements. Certain other collectively bargained employees of airlines can also be exempt if the they are flight crew (pilots) or cabin crew members subject to the Railway Labor Act if their CBA provides for certain sick leave. Employees covered by certain other CBAs can also be exempted from the Act's requirements.

For employers with employees in California who are not covered by a CBA, the Act is effective on and after July 1, 2015 and it applies to employees who on or after July 1, 2015 work in California for 30 or more days within a year. The Act requires such employees to accrue paid sick leave at a rate of not less than one hour for every 30 hours worked. The Act contains record retention requirements for employers, rules regarding use of paid sick ;leave, notice requirements, a statement that this does not alter any protections of the privacy of health information, an enforcement mechanism, ,penalties and a prohibition on retaliation and discrimination. We are not licensed in California, but we wanted to raise awareness of this new California requirement that may impact employers with operations in California so that appropriate steps may be taken and any needed advice obtained.

Other Paid Sick Leave Mandates Recently Added

Employers with operations in Massachusetts, Connecticut and New York City are also subject to the paid sick leave mandates enacted in each of those jurisdictions. Massachusetts' requirement is effective July 1, 2015, like the California requirement.

Change in Rules Related to Employee Communications and Use of Employer's E-mail

This week the National Labor Relations Board reversed its 2007 position which had not permitted employees to use company e-mail for Section 7 purposes (e.g., e-mail communications regarding organizing). The NLRB stated, "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." The implications of this decision and the scope of what it permits and how it will impact and employer's employee policies and procedures is yet to be determined and requires the consultation of a labor attorney.

This is raised as an issue for HR departments to keep in mind as they interact with employees. This may raise issues for employers who monitor email communications for example as part of the employer's health plan's HIPAA Privacy and Security compliance efforts because the interaction of HIPAA Privacy and Security with the NLRA's prohibition on certain activities which may constitute unfair labor practices, interference or retaliation has not been addressed to date. Watch for expanded discussion of this ruling and other recent labor law developments that will be coming to your in-box soon.

If you have any questions regarding the contents of this email, please do not hesitate to contact one of the individuals listed below. While we are all benefits and executive compensation types, we can get you to the right person to assist on other related issues, such as labor and employment. issues.

Contacts:

Greta Cowart | 214.745.5275 | gcowart@winstead.com
Tony Eppert | 713.650.2721 | aeppert@winstead.com
Nancy Furney | 214.745.5228 | nfurney@winstead.com
David Jackson | 281.681.5944 | djackson@winstead.com
Lori Oliphant | 214.745.5643 | loliphant@winstead.com