



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM
FOR PUBLIC RELEASE

DATE: March 29, 2019

TO: TK Keen, Deputy Administrator
Division of Financial Regulation
Oregon Department of Consumer and Business Services

FROM: Pramela Reddi, Assistant Attorney General
Health and Human Services Section

SUBJECT: Provider Non-Discrimination

The Division of Financial Regulation has asked for our legal opinion regarding whether payment to providers may vary without violating non-discrimination laws. Although publicly released, this memo is intended for reliance by state officers only.¹

Question

Question. May an insurer pay contracted providers more or less for services based on their credentials, experience, years of service, and other factors without violating non-discrimination laws? For example, if the service is manipulative treatment, may an insurer pay a Doctor of Osteopathy one rate for that service and a Doctor of Chiropractic a different rate for that service?

Short Answer. Yes. An insurer may pay contracted providers a different reimbursement rate for the same service without violating the non-discrimination provisions in ACA section 2706(a)² and ORS 743B.505(2).

¹ ORS 180.060(3).

² Section 1201 of the ACA, amended the Public Health Service (PHS) Act by inserting, among other things, a new section 2706(a), codified as 42 USC § 300gg-5.

Analysis

House Bill 2468 (2015)³ added provider non-discrimination provisions to the Insurance Code that align with the federal requirements in ACA section 2706(a). Regarding payment variations, ACA section 2706(a) provides: “Nothing in this section shall be construed as preventing a group health plan, a health insurance issuer, or the Secretary from establishing varying reimbursement rates based on quality or performance measures.” ORS 743B.505(2)(c) similarly provides: “This subsection does not prevent an insurer from establishing varying reimbursement rates based on quality or performance measures.” Subsection (2)(d) further emphasizes the alignment by providing that “[r]ules adopted by the Department ... to implement this section shall be consistent with the provisions of [ACA section 2706] and the rules adopted by the United States ... to carry out [ACA section 2706]....”

To date, no state or federal regulations have been adopted to implement these provisions. Informal federal guidance published by the Center for Consumer Information and Insurance Oversight (CCIIO) of the Centers for Medicare & Medicaid Services (CMS) continues to be authoritative. The CCIIO first provided informal guidance in the form of Frequently Asked Questions (FAQs) issued April 29, 2013.⁴ This guidance elicited commentary and complaints by providers and provider organizations who were concerned about the exclusion of provider types and reimbursement rates. In 2014, members of Congress stated the guidance did not reflect the provisions’ legislative intent and eventually directed CMS to issue new revised guidance.

The current guidance, issued May 26, 2015, supersedes the 2013 guidance and is in the form of two FAQs.⁵ The guidance includes background on the 2013 guidance and answers two questions. The first question addresses the “Departments’ approach to the PHS Act section 2706(a)” with this statement (emphasis added): “In light of the breadth of issues identified in the comments to the RFI, the Departments are restating their current enforcement approach to PHS Act section 2706(a). Until further guidance is issued, the Departments will not take any enforcement action against a group health plan, or health insurance issuer offering group or individual coverage, with respect to implementing the requirements of PHS Act section 2706(a) as long as the plan or issuer is using a good faith, reasonable interpretation of the statutory provision” The second question confirms that the previous guidance no longer applies.

Notably, the introductory paragraph to the two questions in the current guidance includes a reference to a similar non-discrimination provision for Medicare Advantage plans in the Social Security Act and its implementing regulations.⁶ The reference cites the rule that

³ Provider non-discrimination provision in ORS 743B.505 was added by HB 2468 to specify “that rules relating to provider non-discrimination must align with federal requirements” as stated in House Committee on Health Care Staff Measure Summary for HB 2468A.

⁴ Affordable Care Act Implementation FAQs – Set15 available at https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs15.html.

⁵ Revised FAQs About Affordable Care Act Implementation (Part XXVII) available at <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part-XXVII-MOOP-2706-FINAL.pdf>.

⁶ Section 1852(b)(2) of the Social Security Act, codified as 42 USC § 1395w-22; 42 CFR 422.205.

specifically permits a Medicare Advantage plan to: “use of different reimbursement amounts for different specialties or for different practitioners in the same specialty.”⁷ The inclusion of this reference in the current guidance indicates the Medicare Advantage framework is an appropriate model for a good faith, reasonable interpretation of the ACA non-discrimination provision.

Conclusion

The Oregon Legislature added provider non-discrimination provisions to the Insurance Code to align with the ACA non-discrimination provision. ORS 743B.505(2)(d) goes as far to link implementation of the non-discrimination provision to the ACA provision and its implementation. Absent regulations, the current federal guidance sets forth a “good faith, reasonable interpretation” standard for the ACA non-discrimination provision. Using this standard and noting the guidance’s reference to Medicare Advantage plan rules, insurers may pay contracted providers different reimbursement rates based on their credentials, experience, years of service, and other factors without violating provider non-discrimination laws.

⁷ See footnote 5 in Revised FAQs About Affordable Care Act Implementation (Part XXVII).