

WISCONSIN OFFICE OF THE COMMISSIONER OF INSURANCE
NOTICE OF PROPOSED GUIDANCE DOCUMENT

Pursuant to s. 227.112, Wis. Stats., the Wisconsin Office of the Commissioner of Insurance (OCI) submits to the Legislative Reference Bureau the proposed guidance document for publication in the Wisconsin Administrative Register and is accepting comments on the proposed guidance document.

Nondiscrimination regarding Coverage for Insureds Who are Transgender or Gender Dysphoric.

LOCATION OF PROPOSED GUIDANCE

Proposed OCI guidance document may be reviewed on the OCI's website at:

<https://oci.wi.gov/Pages/Regulation/BulletinsPending.aspx>

SUBMITTING PUBLIC COMMENTS

Comments may be submitted to Office of the Commissioner Insurance Director of Public Affairs, Olivia Hwang, at Olivia.Hwang@wisconsin.gov.

DEADLINE FOR SUBMITTING PUBLIC COMMENTS

The comment period will run no fewer than 21 days after publication of this document in the Wisconsin Administrative Register. The final version of this guidance document will be posted at <https://oci.wi.gov/Pages/Regulation/Bulletins.aspx> to allow for ongoing comment.

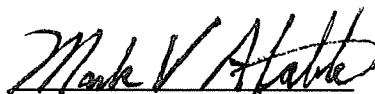
AGENCY CONTACT PERSON

Olivia Hwang, Director of Public Affairs, at Olivia.Hwang@wisconsin.gov.

CERTIFICATION

Pursuant to the authority delegated to me by the Secretary, I have reviewed the attached guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.

Dated July 1, 2020.



Mark V. Afable
Commissioner of Insurance



Date: June 24, 2020

To: Insurers, Agents, and Interested Parties

From: Mark V. Afable, Commissioner of Insurance

Subject: Nondiscrimination regarding Coverage for Insureds Who are Transgender or Gender Dysphoric

This bulletin outlines the legal requirements regarding nondiscrimination in health insurance coverage for therapeutic interventions, medical and surgical procedures, and prescription medications as they apply to gender identity, including persons who are transgender or diagnosed with gender dysphoria. It is unlawfully discriminatory to exclude, limit, or deny benefits to an insured on the basis of the insured's gender identity.

Under Wisconsin law, "no insurer may unfairly discriminate among policyholders by ... offering different terms of coverage except on the basis of classifications related to the nature and the degree of the risk." Wis. Stat. § 628.34. Further, it is unlawful to deny benefits or refuse coverage on the basis of sex. Wis. Admin. Code § Ins 6.55 (1976). An insured's gender identity is unrelated to the nature and degree of risk and denying benefits or coverage based on gender identity is unlawful discrimination based on the sex of the insured. Therefore, excluding coverage for health treatments that would otherwise be covered based on gender identity is unfairly discriminatory under Wisconsin law. The exclusion, limitation, or denial of covered benefits under individual or group health insurance based on an insured's gender identity is also a violation of Wis. Stat. §§ 632.746 (10), and 632.748 (2). Further, the exclusion, limitation, or denial of covered benefits based on an insured's gender identity by self-funded, non-federal governmental plans is a violation of Wis. Stat. § 632.746 (10) (b) 2.

The Office's position is further supported by two recent 7th Circuit federal court decisions that found exclusions for services and treatment of otherwise covered benefits based upon the member's gender identity violate Title VII of the Civil Rights Act of 1964, and the Fourteenth Amendment equal protection clause.

In *Flack, Cody et al. v. Wisconsin Department of Health Services et al.*, 328 F.Supp.3d 931 (W.D. Wis. 2019), the court enjoined the Department of Health Services from enforcing exclusions from coverage for certain medical services that are medically necessary to treat gender dysphoria. The court found that the exclusions were discriminatory in violation of § 1557 of the ACA and the equal protection clause of the Fourteenth Amendment. Similarly, in *Boyden et al. v. Conlin et al.*, 341 F.Supp3d 979 (W.D. Wis. 2018), the court determined that the State of Wisconsin Department of Employee Trust Funds' exclusion of procedures, services, and supplies

related to gender reassignment constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964, the Fourteenth Amendment equal protection clause and the ACA. These cases and the Office's interpretation of the law are further supported by a recent decision of the United States Supreme Court, which found "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex" under Title VII of the Civil Rights Act of 1964. *Bostock v. Clayton County, GA.*, 590 U.S. ___, [19] (2020).

To enforce state anti-discrimination laws, the Office of the Commissioner of Insurance (OCI) will not accept policy form filings that contain exclusions or limitations on benefits that are based on a person's gender identity. Further, OCI will require insurers and self-funded non-federal governmental plans to fully comply with state insurance laws for policies currently in effect.

Any questions concerning this bulletin may be directed to Olivia Hwang, Director of Public Affairs, at Olivia.Hwang@wisconsin.gov.