Wisconsin Legislative Council
INFORMATION MEMORANDUM

IM-2020-20

PROTECTIONS FOR PREEXISTING CONDITIONS

Prior to the Affordable Care Act (ACA), insurers could deny enrollment in a health insurance policy and limit benefit coverage for persons with a preexisting condition, subject to certain limitations in each state's laws. The ACA created uniform provisions that apply consistently throughout the states to address coverage for a preexisting condition. Wisconsin's provisions regarding coverage for preexisting conditions were in place prior to the ACA and would apply if the ACA were to be overturned or repealed without replacement.

As highlighted in this information memorandum, both the ACA and state law address protections for preexisting conditions through provisions relating to the ability of a plan to refuse coverage, limit benefits, or charge higher premiums. The ACA's requirements apply to group health plans, individual policies, and self-insured plans.[1] The provisions in state law apply to group health plans, with limited aspects applying to individual policies and governmental self-insured plans.[2]

AFFORDABLE CARE ACT

The ACA generally requires a health insurance policy to cover certain preventive services and essential health benefits. Under these provisions, a plan may not charge a deductible, copayment, or coinsurance for preventive services, and other services are subject to an out-of-pocket maximum.[3] Also, under the ACA, as amended, a health insurance policy generally may not refuse coverage, limit benefits, or charge a higher premium based on a preexisting condition.[4]

First, regarding eligibility for coverage, the ACA specifies that an individual may not be refused coverage due to a preexisting condition, under both guaranteed issue and nondiscrimination provisions.

Under guaranteed issue requirements, a person may not be denied enrollment in a plan if other eligibility requirements are met, such as timing in open or special enrollment periods. Under nondiscrimination requirements, a person may not be denied eligibility based on certain health status-related factors, including medical condition, health status, and medical history.

Second, regarding limits on benefits, the ACA specifies that a plan may not impose a preexisting condition exclusion for any condition that was present before enrollment. The ACA also prohibits a plan from imposing annual and lifetime limits on the dollar value of benefits received under the plan.

---

[1] Generally, with some exceptions, grandfathered plans are exempted from the requirements of the ACA. [42 U.S.C. s. 18011 (a) (2).]

[2] The provisions in state law do not regulate private self-insured plans due to preemption by the Employee Retirement Income Security Act (ERISA). [29 U.S.C. ss. 1003 (b) (1) and 1144 (a).]

[3] 42 U.S.C. ss. 300gg-6, 300gg-11, 300gg-13, 18011 (a) (4) (A) (ii) and (B) (i), and 18022.

[4] 42 U.S.C. ss. 300gg to 300gg-4, 300gg-11, 300gg-91, and 18011 (a) (2).

Third, regarding premiums, the ACA specifies that for a policy offered in the individual or small group market, premiums may be based only on specific, identified rating factors: a person's age, tobacco use, and location in a geographic rating area in the state, and whether coverage is for an individual or a family. Consideration of any other factor, such as a preexisting condition, is impermissible. Additionally, the ACA's nondiscrimination provision prohibits a policy from charging a higher premium based on an individual's medical condition or other health status-related factors.

Under the ACA, a Plan May:			
	Refuse Coverage	**Limit Benefits**	**Charge a Higher Premium**
In a group health plan	No Based on guaranteed issue and nondiscrimination on health status	No For any condition before enrollment	No For small employers, based on identified rating factors and nondiscrimination on health status For other group plans, based on nondiscrimination on health status
In a self-insured plan	No Based on nondiscrimination on health status	No For any condition before enrollment	No Based on nondiscrimination on health status
In an individual policy	No Based on guaranteed issue and nondiscrimination on health status	No For any condition before enrollment	No Based on identified rating factors and nondiscrimination on health status

CURRENT STATE LAW

Although the ACA preempts state law provisions relating to coverage of a preexisting condition, Wisconsin has laws in place that would address coverage if the ACA were to be repealed or overturned. Generally, under state law, a group health plan may not refuse coverage or charge a higher premium based on a preexisting condition, but may limit benefits under certain circumstances. An individual policy is generally not subject to these restrictions.[5]

First, regarding eligibility for coverage, current state law specifies that a group health plan may not refuse coverage under the state's nondiscrimination provision on the health status-related factors that are also identified under the ACA. For both group health plans and governmental self-insured plans, state law specifies that coverage may not be denied under the state's guaranteed issue provision, similar to the guaranteed issue requirement under the ACA.

Second, regarding limits on benefits, current state law authorizes a group health plan to apply a preexisting condition exclusion that limits benefits for a specific condition, if the person received the diagnosis or any recommendations for care or treatment for the condition within six months before enrollment. A preexisting condition exclusion may apply for up to 12 months after enrollment (or 18 months, for a late enrollment), unless a person had continuous coverage

[5] ss. 632.746 (1) to (3) and (10), 632.747, 632.748 (1) and (2), and 632.76 (2) (ac) 1. and 2., Stats.

from a prior policy, in which case the person may be able to reduce the length of time in the exclusion period by the amount of "creditable" previous coverage.

For an individual policy, current state law authorizes a preexisting condition exclusion to apply more than 12 months after enrollment, if the preexisting condition was explicitly excluded by name or specific description in the original policy. An individual policy may consider a condition to be "preexisting" if the person received the diagnosis or any recommendations for care or treatment for the condition within 12 months before enrollment.

Current state law does not prohibit a plan from imposing an annual or lifetime limit on covered benefits.

Third, regarding premiums, current state law prohibits a group health plan from charging a higher premium based on an individual's medical condition or other health status-related factors. This nondiscrimination provision identifies the health status-related factors that are also identified under the ACA.

Under State Law, a Plan May:			
	Refuse Coverage	**Limit Benefits**	**Charge a Higher Premium**
In a group health plan	No Based on guaranteed issue and nondiscrimination on health status	Yes For up to 12 months, with credit for previous coverage For a condition diagnosed or treated in the previous 6 months	No Based on nondiscrimination on health status
In a self-insured plan	No, for a governmental self-insured plan Yes, for a private self-insured plan[6]	Yes[7]	Yes[8]
In an individual policy	Yes	Yes If condition was specifically named in the policy For a condition diagnosed or treated in the previous 12 months	Yes

This information memorandum was prepared by Margit Kelley, Senior Staff Attorney, and Tom Koss, Staff Attorney, on November 18, 2020.

[6] However, the current state law provision that prohibits discrimination on health status-related factors in determining enrollment eligibility and premium rates mirrors the nondiscrimination provision provided under ERISA, which would apply to a private self-insured plan if the ACA were to be repealed or overturned. [29 U.S.C. ss. 1182 and 1185d.]

[7] However, the current state law limits on imposing a preexisting condition exclusion mirror the limits provided under ERISA, which would apply to a private self-insured plan if the ACA were to be repealed or overturned. [29 U.S.C. ss. 1181 and 1185d.]

[8] See footnote 6 regarding nondiscrimination provisions under ERISA.