

Compliance Directions

Proposed Regulations Would Remove Gender-Affirming Care as Essential Health Benefit

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In March, the Department of Health and Human Services (HHS) issued a [proposed rule](#) that would prohibit individual and small fully insured group plans subject to the Patient Protection and Affordable Care Act (ACA) essential health benefit (EHB) requirements from covering gender-affirming care as an EHB, beginning in 2026. HHS' actions are in furtherance of the new administration's goals stated in several of President Trump's January [executive orders](#). The proposed rule was issued with a [press release](#) and [fact sheet](#).

Background

Under the ACA, EHBs are a set of ten broad health care service categories that define the scope of services that must be included in the health coverage offered in state Marketplaces. Every state determines the benefits that make up that state's benchmark plan of EHBs. The EHB requirement also applies to fully insured individual and small group policies offered outside the Marketplace. The ACA does not require self-insured group health plans, large insured group health plans, or grandfathered small group health plans to offer EHBs.

However, because several ACA mandates relate to EHBs and apply to self-insured group health plans, large insured group health plans, and grandfathered small group health plans (e.g., the prohibition of annual or lifetime dollar limitations applied by the plan), these group health plans must still select a state's EHB benchmark plan that defines which plan benefit costs cannot have annual or lifetime limits and must accrue toward the plan's out-of-pocket maximum. For example, if an employer's group health plan offers coverage for medically necessary surgical procedures and associated inpatient hospital services (considered an EHB in virtually all states), the employer's group health plan cannot apply annual or lifetime dollar limits on this coverage and any in-network participant cost-sharing must count toward the plan's out-of-pocket.

Proposed Rule

The proposed rule would prohibit health insurers of non-grandfathered fully insured individual and small group market health insurance coverage from covering gender-affirming care as an EHB, beginning with the 2026 plan year.

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This proposed change follows HHS' recent [recission](#) of gender-affirming care protections introduced in 2022. While the 2022 guidance provided a framework for gender-affirming care based on civil rights protections for transgender people under Section 1557 of the ACA, ADA, and HIPAA, the recission notes that the 2022 guidance no longer reflects the views and policies of the current administration. See our article [Agencies Rescind Guidance on Gender Identity](#) for more details.

Excluding treatment for gender-affirming care from EHBs would remove gender-affirming care from the ACA cost-sharing limitations. Health plans could still voluntarily cover such care as a non-EHB, but states that require plans to cover gender-affirming care could be required to defray the additional cost. Almost half of states have interpreted federal and/or state nondiscrimination laws to prevent health insurers from excluding coverage for gender-affirmation, in part because treatments associated with gender-affirmation are not exclusive to transgender people. People of all orientations with endocrine disorders, children with precocious puberty, and reproductive cancer patients need the same medications and treatments sought for gender-affirmation. Acknowledging the dissonance created by treating these related disorders in the proposed rule, HHS requests comments on whether clarification would be useful underscoring that if endocrine services are provided to non-transgender people, they would still be covered as EHB.

Employer Action Steps

The recission of the 2022 guidance removing gender-affirming care from civil rights protection and the proposed rule removing gender-affirming care as an EHB do not remove all federal protections related to gender expression and reproductive health. Further, state law may still provide certain privacy and anti-discrimination safeguards for those seeking gender-affirming care. Given this uncertainty, plan sponsors should closely monitor the evolving regulatory landscape, and we note that it may be some time before litigation settles.

HHS' proposed rule reducing gender-affirming care protections was issued even though President Trump's executive orders underpinning it have been blocked in several states. HHS acknowledges the related cases in the proposed rule but suggests that the proposed rule does not conflict with the court orders because HHS is separate and independent from those orders. Either way, plan sponsors interested in placing restrictions on gender affirming care should discuss these risks with counsel.