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DIVISION OF INSURANCE

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BULLETIN 2014-03

To: All Insurers Licensed or Authorized to Operate in the Commonwealth of Massachusetts, Including Commercial Health Insurers, Blue Cross and Blue Shield of Massachusetts, Inc. and Health Maintenance Organizations (collectively, “Carriers”)

From: Joseph G. Murphy, Commissioner of Insurance

Date: June 19, 2014

Re: Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Transgender Surgery and Related Health Care Services

The Division of Insurance issues this Bulletin regarding prohibited discrimination in insurance coverage on the basis of gender identity or gender dysphoria, including medically necessary transgender surgery and gender identity or gender dysphoria related health care services. As set forth below, denial of coverage for medically necessary treatment based on an individual’s gender identity or gender dysphoria by any Carrier is sex discrimination that is prohibited under Massachusetts law.

On November 23, 2011, Governor Deval Patrick signed into law Chapter 199, An Act Relative to Gender Identity. *See* Chapter 199 of the Acts of 2011 (“Chapter 199”). This law added “gender identity” as a protected characteristic to Massachusetts’ employment, housing, credit and public education anti-discrimination laws and to Massachusetts’ hate crimes laws. All of these laws also provide protection against discrimination with respect to several other characteristics, including sexual orientation, disability, sex, age, race, ancestry and religion. The law went into effect on July 1, 2012.

Chapter 199 defines “gender identity” as “a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.” The law allows a person to demonstrate his/her gender identity by providing evidence including: “medical history; care or treatment of the gender identity; consistent and uniform assertion of the gender identity;

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or any other evidence that the gender identity is sincerely held as part of a person's core identity."

Chapter 199, while formally amending various laws precluding discrimination in employment, housing and other areas on the basis of one's "gender identity," did not specifically amend any laws covering discrimination in the areas of health insurance laws. Nevertheless, the Division has determined that the strong prohibition in Massachusetts against sex discrimination in all areas including with respect to health insurance, must likewise be interpreted as prohibiting discrimination in healthcare coverage on the basis of gender identity or gender dysphoria.

Section 1557(a) of the Affordable Care Act ("ACA") has been determined to prohibit discrimination on the basis of gender identity and sex stereotyping in any health program receiving federal funds or by an entity established under the ACA including exchanges. Health insurers, hospitals, the health insurance exchanges, and any other entities that receive federal funds are covered by this law. Section 1557 gives the federal Department of Health and Human Services' Office for Civil Rights ("OCR") the authority to investigate potential violations of the law and enforce this new civil rights guarantee.

OCR has concluded that existing sex discrimination laws — including Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 — also preclude discrimination on the basis of gender identity or gender dysphoria. OCR has stated that, since Section 1557 incorporates these same anti-discrimination laws, Section 1557 therefore also prohibits discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity. Thus, OCR has concluded that discrimination against transgender people in federal health programs or health programs that receive federal funds is specifically prohibited under the ACA. *See* Letter from Leon Rodriguez, Director of Office of Civil Rights, Department of Health and Human Services ("HHS"), to Maya Rupert, Federal Policy Director, National Center for Lesbian Rights, dated July 12, 2012, *available at* <http://www.washingtonblade.com/2012/08/07/hhs-affirms-trans-protections-in-health-care-reform/>.

The U.S. Equal Employment Opportunity Commission has also issued a formal ruling that gender identity discrimination is *per se* "sex discrimination." *See Macy v. Eric Holder*, Atty General, U.S. Dept. of Justice, EEOC Appeal No. 0120120821 (April 24, 2012). Therefore, in specifically addressing the scope of sex discrimination under federal law, these two federal agencies have found that sex discrimination precludes discrimination on the basis of gender identity or gender dysphoria.

Massachusetts law prohibits sex discrimination in the business of insurance. Chapter 175, § 24A provides: "No company authorized to issue policies of accident or sickness insurance, policies providing coverage against disability from injury or disease, or policies of life or endowment insurance shall refuse to issue such a policy or limit the coverages normally contained therein with respect to the risk of such loss solely because of the sex of the insured." In addition, Chapter 175, § 120F, provides that "[n]o company, officer or agent thereof shall make or permit a distinction, classification or discrimination, or otherwise recognize a difference

in life expectancy, on the basis of race, color, religion, *sex*, marital status or national origin in the terms or conditions of a group or individual annuity” (Emphasis added). Also, Chapter 175, §4C, states that “[n]o insurer licensed to write and engaged in the writing of homeowners insurance in this commonwealth . . . shall take into consideration when deciding whether to provide, renew, or cancel homeowners insurance the race, color, religious creed, national origin, *sex*, age, ancestry, sexual orientation, children, marital status, veteran status, the receipt of public assistance or disability of the applicant or insured.” (Emphasis added).

Massachusetts courts have found that this prohibition on sex discrimination extends to situations where discrimination is based on gender nonconformance, where the discrimination is based on an employee's failure to conform to gender norms, and where the discrimination is based on stereotyped notions of appropriate gender behavior. Therefore, if a Carrier refuses to cover medically necessary treatment because the insured failed to conform to the Carrier's idea of how a man or woman should look and behave, then the insured has been discriminated against based on the insured's sex. Thus, denying medically necessary treatment based on an individual's gender identity or gender dysphoria is prohibited sex discrimination under Massachusetts law.

Therefore, the Division has concluded that excluding coverage for gender identity or gender dysphoria-related treatment will be considered prohibited sex discrimination because it would be a limitation on coverage based on the sex of the insured. Any health care services that are ordinarily or exclusively available to individuals of one sex may not be denied based on the perceived gender identity of a person when the denial or limitation is due only to the fact that the insured is enrolled as belonging to the other sex or has undergone, or is in the process of undergoing, gender transition. Although a Carrier may categorically exclude coverage for a particular condition or treatment, the insurer may not base such exclusion on gender identity or gender dysphoria. In this regard, a Carrier may not discriminate on the basis of an insured's or prospective insured's actual or perceived gender identity, or sex stereotyping, or on the basis that the insured or prospective insured is a transgender person.

Any questions regarding this Bulletin should be directed to Robert A. Whitney, Deputy Commissioner and General Counsel, at (617) 521-7308, or robert.a.whitney@state.ma.us.