



State of New Jersey
DEPARTMENT OF BANKING AND INSURANCE
OFFICE OF THE COMMISSIONER
PO Box 325
TRENTON, NJ 08625-0325

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

TEL (609) 292-7272

KENNETH E. KOBYLowski
Commissioner

BULLETIN NO. 14-09

TO: ALL HOSPITAL SERVICE CORPORATIONS, MEDICAL SERVICE CORPORATIONS, HEALTH SERVICE CORPORATIONS, HEALTH INSURANCE COMPANIES AND HEALTH MAINTENANCE ORGANIZATIONS TRANSACTING BUSINESS IN NEW JERSEY

FROM: KENNETH E. KOBYLowski, COMMISSIONER

RE: FEDERAL GUIDANCE ON COMPLIANCE WITH MANDATED INFERTILITY BENEFIT (P.L. 2001, c. 236)

P.L. 2001, c. 236, effective November 29, 2001 (the "Act") provides that policies and/or contracts delivered, issued, executed or renewed by hospital, medical and health service corporations, health insurance companies, and health maintenance organizations (collectively "carriers") to groups of more than 50 persons that provide hospital or medical expense benefits, including pregnancy related benefits, shall cover medically necessary expenses incurred in the diagnosis and treatment of infertility. The Act specifies that such coverage

[I]ncludes, but is not limited to, . . . diagnosis and diagnostic tests; medications; surgery; in vitro fertili-zation; embryo transfer; artificial insemination; gamete intra fallopian transfer; zygote intra fallopian transfer; intracytoplasmic sperm injection; and four completed egg retrievals per lifetime of the covered person. . . .


The Centers for Medicare and Medicaid Services (CMS) as well as the United States Department of Labor (DOL) contacted the Department regarding the per lifetime limit associated with egg retrievals. CMS and DOL advised that the limit of four completed egg retrievals per lifetime of the covered person functions as an impermissible preexisting condition exclusion under HIPAA. See ERISA § 701(b)(1)(A) and regulations at 29 CFR 2590.701-3 and 45 CFR 146.111.

As noted by the recently received federal guidance, HIPAA requires the preexisting condition exclusion period for an employee to run from the employee's enrollment date in a

plan¹. It is possible that an employee may be covered under multiple plans during his or her lifetime. If that occurs, the four egg retrieval limit per lifetime of that employee will in effect limit benefits under any plan after the initial plan, based on the existence of the condition (and benefits received) prior to the employee's enrollment date in such subsequent plan. CMS and DOL referred to example four in 45 CFR 146.111(a)(1)(ii).

CMS and DOL first noted the four-egg retrieval limitation during the course of an audit of an employer's plan documents. Any carrier with approved policy form provisions that include the four completed egg retrievals per lifetime of the covered person limit may wish to file an amendment to amend the provision consistent with the advice included in this Bulletin. Once approved, carriers could include the amended provision in all group policies and certificates.

August 14, 2014
Date



Kenneth E. Kobylowski
Commissioner

Infertility Bulletin 2014 Final/inord

¹ ERISA § 3(1) defines “employee welfare benefit plan” as any plan fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947.

ERISA § (3)(16)(B) defines “plan sponsor” as (i) the employer in the case of an employee benefit plan established or maintained by a single employer; (ii) the employee organization in the case of a plan established or maintained by an employee organization; or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers or employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.