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Essential Health Benefit Coverage and State Mandates

There are many questions about the state's obligations for new mandates under the Affordable Care Act (ACA). This memo outlines the federal law and risks/responsibilities of the state relative to mandate legislation under consideration this session.

Background

The Affordable Care Act requires all states to pay the costs of state-mandated benefits in qualified health plans that are in excess of the Essential Health Benefit (EHB) benchmark plan.

- The State of Oregon must defray the costs of any new mandates enacted after December 31, 2011. The ACA is clear on this issue – if the Oregon Legislature enacts any new benefit mandates on or after January 1, 2012, the state is responsible to fund those benefits for individual market purchasers inside and outside the exchange who purchase a qualified health plan (QHP).

- Federal regulations require Cover Oregon to determine what, if any, state-required benefits exceed the EHB plan.

- Qualified Health Plans (QHP) would then calculate the costs of providing those benefits, and the State of Oregon would pay either the health plan or the enrollee for those costs. The final rule on Essential Health Benefit, Actuarial Value and Accreditation, published on February 25, 2013, prescribed the requirements for the State to reimburse enrollees or QHP issuers for additional mandated benefits. This may be calculated by actuarial analysis or by tracking actual claims data.

Key Questions to Determine Mandate Status:

1. Is it an insurance coverage mandate for a specific service or treatment not included in the EHB Benchmark plan or is it specifically excluded under the EHB benchmark plan?
2. Is the mandate's date of enactment after December 31, 2011?
   - *If the answer to both questions is "yes," then under the ACA the state is obliged to pay for the mandate.*
   - *If the answer to one, but not both, of these questions is "yes," then the status of the benefit may be open to interpretation by Cover Oregon and the courts.*

Risk of not following the federal mandate process:

A new mandate that is not recognized by the state as such is likely to be litigated, which could both delay implementation of the mandate and increase the state's financial exposure due to legal costs.

If the state incorrectly determines that a mandate is not new, the state would be responsible to pay for both the retrospective and prospective costs of the mandate.

In addition to risks related to potential litigation/enforcement actions, the relations between the State of Oregon and the federal agencies involved with enforcing and overseeing the implementation of ACA may become strained, with potential additional financial impacts for the State, Cover Oregon, and Oregonians.

2013 legislation that should be subject to a mandate analysis:

In each example below, the question is not whether the treatment or the individuals served are worthy. The question is *who pays* for the Legislature's policy initiative: *Insurance purchasers* or *all Oregon taxpayers?*

2013 Legislation Subject To Mandate Analysis

Bill	Not already Included in EHB?	Mandate Enactment after 12/31/2011?	New Mandate?	Comments
SB 365 Applied Behavioral Analysis for autism	Yes	Yes	**Yes**	CMS guidance specifically describes legislation such as this as an example of a new mandate for which state funding is required. (*see HHS May 9 FAQ on page 3*)
HB 2385 Court-ordered chemical dependency treatment for DUII Convicts	Yes	Yes	**Yes**	Court-ordered treatment is specially excluded in the EHB Benchmark plan; further this treatment is based on legal proceedings rather than medical necessity and is specifically excluded from coverage requirements under Oregon law. (*Note: Because the treatment is court-ordered, state assistance is available to those unable to pay*).
SB 457 Insurance coverage continuation for county jail inmates	Yes	Yes	**Yes**	Most insurance policy contracts exclude services provided to inmates, including the Oregon EHB benchmark plan. SB 457 would require coverage, which would result in a cost-shift from county budgets to the General Fund.

Conclusion

The ACA contains new requirements and parameters that impact how any new mandate is paid for. As such, it is essential that Oregon decision-makers understand pertinent federal regulations guiding this issue, as they may have a significant impact on the state's responsibility for the cost of the mandate for plans inside and outside the exchange.

Relevant Federal Regulations
Available: http://www.gpo.gov/fdsys/pkg/FR-2013-02-25/pdf/2013-04084.pdf

45 C.F.R. § 155.170 Additional required benefits.

(a) ***Additional required benefits.*** (1) A State may require a QHP to offer benefits in addition to the essential health benefits.

(2)A State-required benefit enacted on or before December 31, 2011 is not considered in addition to the essential health benefits.

(3) The Exchange shall identify which state-required benefits are in excess of EHB.

(b) ***Payments.*** The State must make payments to defray the cost of additional required benefits specified in paragraph (a) of this section to one of the following:

(1) To an enrollee, as defined in § 155.20 of this subchapter; or

(2) Directly to the QHP issuer on behalf of the individual described in paragraph (b)(1) of this section.

(c) ***Cost of additional required benefits.***

(1) Each QHP issuer in the State shall quantify cost attributable to each additional required benefit specified in paragraph (a) of this section.

(2) A QHP issuer's calculation shall be:

(i) Based on an analysis performed in accordance with generally accepted actuarial principles and methodologies;

(ii) Conducted by a member of the American Academy of Actuaries; and

(iii) Reported to the Exchange.

U.S. Health and Human Services FAQ, issued May 9:
Available: https://www.regtap.info/uploads/library/PM_FAQ10v2_508cr_052313.pdf (log in required)

Q40: If a state enacts a new requirement for applied behavioral analysis (ABA) therapy, is that a benefit in excess of EHB, or can ABA be considered EHB because it is a service specific to an EHB category (falls within habilitative or mental health including behavioral health treatment)?

A40: Defining habilitative services would not result in a mandate, but requiring specific treatments/benefits, including ABA, creates a new mandate. Below is an example of a definition of habilitative services and a mandate for services, for illustrative purposes.

Example of definition - Habilitative benefits for purposes of the state's EHB benchmark plan are defined as follows: "Habilitative services are services that help a person retain, learn, or improve skills and functioning for daily living that are offered in parity with, and in addition to, any rehabilitative services offered in the state's EHB benchmark plan. Parity in this context means of like type and substantially equivalent in scope, amount, and duration."

Example of mandate – A bill requires private insurance companies to provide coverage under group health insurance policies for psychiatric care; psychological care; habilitative or rehabilitative care (including ABA therapy); therapeutic; and pharmacy care to children who have been diagnosed with autism spectrum disorder (ASD).

Attachment:
CMS – Oregon State Required Benefits Matrix