

The Nondiscrimination Provision Levels the Playing Field for Nonphysicians

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Practice Points

- Section 2706(a) of the Patient Protection and Affordable Care Act applies to all health plans, including self-insured plans.
- This section applies to any state licensed or certified health care providers, including chiropractors, naturopathic physicians, acupuncturists, massage therapists, optometrists, nurse practitioners, midwives, and podiatrists, as long as they hold state licenses.
- The implementation details of section 2706(a) will vary by state but will most likely be implemented by the Department of Insurance.
- The nondiscrimination provision does not require equal reimbursement for all types of providers and does not establish specific provider fees.

There is a saying that if you are not at the table, you are probably on the menu. These days the table for health care providers is becoming very crowded with nonphysicians. Under a provision of the Patient Protection and Affordable Care Act (PPACA) it seems the intent is to expand the scope of nonphysicians, possibly in an attempt to increase access to care because so many more individuals are expected to have health care coverage. Section 5101 of the PPACA defines the national health care workforce to include all “doctors of chiropractic . . . licensed complementary and alternative medicine providers, integrative health practitioners”¹ Section 2706(a) (title XXVII of the Public Health Service Act) is the nondiscrimination in health care provision that takes effect next year and mandates that insurance companies cannot discriminate against any health care provider “with respect to participation under the plan or coverage against any health care

provider who is acting within the scope of that provider’s license or certification under applicable State law.”¹ Legitimizing the independent practice of medicine by nonphysicians is a major concern associated with this provision, particularly for dermatologists.

Under this provision, it would be illegal “discrimination” for health insurers, including individual, group, and state-based health plans, to distinguish between the qualifications of physicians and nonphysician health care professionals. The nondiscrimination provision has the potential to create panels of providers in any given health plan that include different types of health care professionals. For example, a psoriasis patient whose treatment is covered under his/her insurance plan can choose to be treated by a dermatologist, family physician, naturopathic physician (if licensed), or nurse practitioner, as they would all be part of the reimbursable panel of providers. The good news is that insurers could still vary reimbursement and would not be bound to contract with any willing provider. In most states, an insurer does not have to include any willing provider, but it must include enough providers to serve the population.

One of the major problems is the vague language used in this section, fueling nonphysician groups in scope of practice battles, according to a letter from James L. Madera, MD, of the American Medical

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Association in July 2013, which has the potential to jeopardize patient safety. A bill to license naturopathic physicians recently passed the House Chamber in Pennsylvania, which would allow naturopathic physicians to order and perform physician and laboratory examinations.² In California, legislation that would have allowed nurse practitioners to practice independently at certain medical facilities recently was halted.³ Efforts to stop expansion of the nonphysicians' scope of practice are being further hampered by the Federal Trade Commission, which has charged state professional licensing boards with antitrust violations for trying to restrict nonphysicians from performing services that are usually performed by a physician and has been backed in the courts. For example, the North Carolina State Board of Dental Examiners recently was charged with antitrust violations for trying to prevent nondentists from performing teeth-whitening procedures.⁴ As a result, the board has retreated from the issue of teeth whitening by nonphysicians. These cases have had a chilling effect on other professional licensing boards including many state medical boards.

Section 2706(a) was not in the House of Representatives' version of the PPACA but was included in the Senate version driven by Senator Tom Harkin. It was heavily supported by the American Chiropractic Association, naturopathic physicians, and other complementary and alternative medicine providers, as well as some other nonphysician providers such as nurse anesthetists and optometrists.⁵

A major concern with section 2706(a) is that it disrupts how states typically have regulated the practice of medicine and other health care providers. Traditionally, distinct licensing boards and various certifications have provided regulation. The federal government now is potentially disrupting this state-based accountability. By all accounts, the nondiscrimination provision sends the message that nonphysicians are on equal footing with physicians when it comes to patient care, contrary to the traditional physician-led, team-based approach.

Although implementation of the nondiscrimination provision is set to take effect on January 1, 2014,

regulations have not yet been published. In an unusual twist, the US Department of the Treasury is expected to enforce the provision, even though it has no specific expertise on state scope of practice laws or their interpretation.⁶ Efforts currently are under way to repeal the provision. On July 24, 2013, Representative Andy Harris, MD, an anesthesiologist, introduced the Protect Patient Access to Quality Health Professionals Act of 2013⁷ that aims to repeal the nondiscrimination provision and has received support from a number of major physician organizations, including the American Medical Association.

The nondiscrimination provision is one more challenge facing dermatology. Our field already lends itself to many providers who impersonate board-certified dermatologists. Because of the cosmetic aspect of our practice and the perception that our patients are otherwise healthy, dermatology often is viewed as low-hanging fruit for wannabes. It remains in our best interest to repeal this provision of the PPACA, as it is another opportunity for nondermatologists to join panels and provide dermatologic care.

REFERENCES

1. Patient Protection and Affordable Care Act, HR 3590, 111th Cong, 2nd Sess (2010).
2. An Act relating to the right to practice naturopathic medicine; providing for the issuance of licenses and the suspension and revocation of licenses; providing for penalties; and making repeals, HR 612, 197th Leg, 2nd Sess (Pa 2013).
3. An act to add Section 2835.3 to the Business and Professions Code, relating to healing arts. S 491 (Ca 2013).
4. *The North Carolina State Board of Dental Examiners v Federal Trade Commission*, 12-1172 (4th Cir 2013).
5. NACA applauds non-discrimination in health care reform [press release]. Arlington, VA: American Chiropractic Association; July 22, 2010.
6. Bellamy J. Obamacare and CAM II: discrimination (or not) against CAM. Science-Based Medicine Web site. Published October 4, 2012. Accessed October 21, 2013.
7. Protect Patient Access to Quality Health Professionals Act of 2013, HR 2817, 113th Cong, 1st Sess (2013).

QUICK POLL QUESTION



Are you in favor of repealing section 2706(a), the nondiscrimination in health care provision, of the Patient Protection and Affordable Care Act?

a. Yes **b.** No **c.** I don't know

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