

UNFAIR DISCRIMINATION AGAINST SUBJECTS OF ABUSE IN HEALTH BENEFIT PLANS MODEL ACT

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Introductory Note: In addition to this model act, the NAIC drafted the following model acts regarding the unfair discrimination against subjects of abuse: The Unfair Discrimination Against Subjects of Abuse in Property and Casualty Insurance Model Act, The Unfair Discrimination Against Subjects of Abuse in Life Insurance Model Act, and The Unfair Discrimination Against Subjects of Abuse in Disability Income Insurance Model Act.

Section 1. Purpose

The purpose of this Act is to prohibit unfair discrimination by health carriers and insurance professionals on the basis of abuse status. Nothing in this Act shall be construed to create or imply a private cause of action for a violation of this Act.

Drafting Note: Consideration was given to including a private cause of action for a violation of this Act. It was concluded that a private cause of action is not inconsistent with the model and that a state legislature could find that a private cause of action is appropriate for that state.

Section 2. Scope

This Act applies to all health carriers and insurance professionals involved in issuing or renewing in this state a policy or certificate of health insurance.

Section 3. Definitions

Drafting Note: Each state may wish to ensure that the definition of “abuse” for the purposes of this Act does not conflict with the terminology descriptive of abusive behavior in state civil or criminal statutes in such a way as to lead to unintended meanings.

- A. “Abuse” means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner or caretaker:
- (1) Attempting to cause or intentionally, knowingly or recklessly causing another person bodily injury, physical harm, severe emotional distress, psychological trauma, rape, sexual assault or involuntary sexual intercourse;
 - (2) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person or minor child without proper authority, under circumstances that place the person or minor child in reasonable fear of bodily injury or physical harm;
 - (3) Subjecting another person to false imprisonment; or

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- (4) Attempting to cause or intentionally, knowingly, or recklessly causing damage to property so as to intimidate or attempt to control the behavior of another person.

Drafting Note: States should include appropriate corrective or clarifying language if their ordinary Statutory meaning of “person” can be construed as implying legal capacity, since many subjects of abuse are minors and other subjects of abuse may be incapacitated.

- B. “Abuse-related medical condition” means a medical condition sustained by a subject of abuse which arises in whole or part out of an act or pattern of abuse.
- C. “Abuse status” means the fact or perception that a person is, has been, or may be a subject of abuse, irrespective of whether the person has sustained abuse-related medical conditions.
- D. “Commissioner” means the insurance commissioner of this state.

Drafting Note: Where the word “commissioner” appears in this Act, the appropriate designation for the chief insurance supervisory official of the state should be substituted.

- E. “Confidential abuse information” means information about acts of abuse or abuse status of a subject of abuse, a person’s medical condition that the carrier knows or has reason to know is abuse-related, the address and telephone number (home and work) of a subject of abuse or the status of an applicant or insured as a family member, employer or associate of, or a person in a relationship with, a subject of abuse.
- F. “Health benefit plan” or “plan” means a policy, contract, certificate or agreement offered by a carrier or insurance professional to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services. Health benefit plan includes accident only, credit health, dental, vision, Medicare supplement or long-term care insurance, coverage issued as a supplement to liability insurance, short-term and catastrophic health insurance policies, and a policy that pays on a cost-incurred basis. Health benefit plan does not include workers’ compensation or similar insurance.

Drafting Note: States should examine their statutes and insurance products to determine if additional exemptions, such as for blanket disability, are required depending upon how those products are classified under state insurance statutes.

- G. “Health carrier” means an entity subject to the insurance laws and regulations of this state, or subject to the jurisdiction of the commissioner, that contracts or offers to contract to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services, including a sickness and accident insurance company, a health maintenance organization, a nonprofit hospital and health service corporation or any other entity providing a plan of health insurance, health benefits or health services.

Drafting Note: The intent of this subsection is to encompass all state-regulated entities in the business of providing health benefits, however those entities are defined and characterized under the laws of a particular state. Appropriate state-specific terminology should be used.

Drafting Note: Each state may wish to consider the advisability of defining “insurance” or “health insurance” for purposes of this Act if the state’s present insurance code is not satisfactory in this regard. In some cases a cross reference will be sufficient.

- H. “Insurance professional” means an agent, broker, adjuster or third party administrator as defined in the insurance laws of this state.

Drafting Note: Many states license other categories of insurance professionals such as agencies, consultants and producers. Each state should review this definition for consistency with the terminology used in its licensing law.

Drafting Note: Unfairly discriminatory underwriting or claims handling practices of a company writing life insurance may be committed by insurance professionals when they refuse to process an application or a claim in violation of this act. There is no intent, however, to hold insurance professionals liable for the acts of health carriers over which they have no control.

- I. “Insured” means a party named on a health benefit plans as the person with legal rights to the benefits provided by the health benefit plan. For group plans, “insured” includes a person who is a beneficiary covered by a group health benefit plan.
- J. “Subject of abuse” means a person against whom an act of abuse has been directed; who has current or prior injuries, illnesses or disorders that resulted from abuse; or who seeks, may have sought, or had reason to seek medical or psychological treatment for abuse; or protection, court-ordered protection or shelter from abuse.

Section 4. Unfairly Discriminatory Acts Relating to Health Benefit Plans

Drafting Note: Because of the nature and consequences of the prohibited acts, this model provides that a single instance of prohibited conduct is a violation rather than defining a violation as a general business practice of prohibited conduct. States that choose to incorporate this model into their version of the Unfair Trade Practices Act (or other statute) under which those states define a violation as a general business practice should consider whether that approach provides sufficient protection to subjects of abuse.

- A. It is unfairly discriminatory to:
 - (1) Deny, refuse to issue, renew or reissue, cancel or otherwise terminate a health benefit plan, or restrict or exclude health benefit plan coverage or add a premium differential to any health benefit plan on the basis of the applicant’s or insured’s abuse status; or
 - (2) Exclude or limit coverage for losses or deny a claim incurred by an insured on the basis of the insured’s abuse status;
- B. When the health carrier or insurance professional has information in its possession that clearly indicates that the insured or applicant is a subject of abuse, the disclosure or transfer of the confidential abuse information, as defined in this Act, by a person employed by or contracting with a health carrier or insurance professional for any purpose or to any person is unfairly discriminatory, except:
 - (1) To the subject of abuse or an individual specifically designated in writing by the subject of abuse;
 - (2) To a health care provider for the direct provision of health care services;
 - (3) To a licensed physician identified and designated by the subject of abuse;
 - (4) When ordered by the commissioner or a court of competent jurisdiction or otherwise required by law; or
 - (5) When necessary for a valid business purpose to transfer information that includes confidential abuse information that cannot reasonably be segregated without undue hardship. Confidential abuse information may be disclosed only if the recipient has executed a written agreement to be bound by the prohibitions of this Act in all respects and to be subject to the enforcement of this Act by the courts of this state for the benefit of the applicant or the insured, and only to the following persons:

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- (a) A reinsurer that seeks to indemnify or indemnifies all or any part of a policy covering a subject of abuse and that cannot underwrite or satisfy its obligations under the reinsurance agreement without that disclosure;
 - (b) A party to a proposed or consummated sale, transfer, merger or consolidation of all or part of the business of the health carrier or insurance professional;
 - (c) Medical or claims personnel contracting with the health carrier or insurance professional, only where necessary to process an application or perform the health carrier's or insurance professional's duties under the policy or to protect the safety or privacy of a subject of abuse (also includes parent or affiliate companies of the health carrier or insurance professional that have service agreements with the health carrier or insurance professional); or
 - (d) With respect to address and telephone number, to entities with whom the health carrier or insurance professional transacts business when the business cannot be transacted without the address and telephone number;
 - (6) To an attorney who needs the information to represent the health carrier or insurance professional effectively, provided the health carrier or insurance professional notifies the attorney of its obligations under this Act and requests that the attorney exercise due diligence to protect the confidential abuse information consistent with the attorney's obligation to represent the health carrier or insurance professional;
 - (7) To the policyowner or assignee, in the course of delivery of the policy, if the policy contains information about abuse status; or
 - (8) To any other entities deemed appropriate by the commissioner.
- C. It is unfairly discriminatory to request information relating to acts of abuse or an applicant's or insured's abuse status, or make use of that information, however obtained, except for the limited purposes of complying with legal obligations or verifying a person's claim to be a subject of abuse.
- D. It is unfairly discriminatory to terminate group coverage for a subject of abuse because coverage was originally issued in the name of the abuser and the abuser has divorced, separated from, or lost custody of the subject of abuse, or the abuser's coverage has terminated voluntarily or involuntarily. Nothing in this subsection prohibits the health carrier or insurance professional from requiring the subject of abuse to pay the full premium for coverage under the health plan or from requiring as a condition of coverage that the subject of abuse reside or work within its service area, if the requirements are applied to all insureds of the health carrier or insurance professional. The health carrier or insurance professional may terminate group coverage after the continuation coverage required by this subsection has been in force for eighteen (18) months, if it offers conversion to an equivalent individual plan. The continuation coverage required by this section shall be satisfied by coverage required under P.L. 99-272, the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, provided to a subject of abuse and is not intended to be in addition to coverage provided under COBRA.

- E. Subsection B does not preclude a subject of abuse from obtaining his or her insurance records.
- F. Subsection D does not prohibit a health carrier or insurance professional from asking about a medical condition or from using medical information to underwrite or to carry out its duties under the policy, even if the medical information is related to a medical condition that the insurer or insurance professional knows or has reason to know is abuse-related, to the extent otherwise permitted under this Act and other applicable law.

Section 5. Justification of Adverse Insurance Decisions

A health carrier or insurance professional that takes an action that adversely affects an applicant or insured on the basis of a medical condition that the health carrier or insurance professional knows or has reason to know is abuse-related shall explain the reason for its action to the applicant or insured in writing and shall be able to demonstrate that its action, and any applicable plan provision:

- A. Does not have the purpose or effect of treating abuse status as a medical condition or underwriting criterion;
- B. Is not based upon any actual or perceived correlation between a medical condition and abuse;
- C. Is otherwise permissible by law and applies in the same manner and to the same extent to all applicants and insureds with a similar medical condition without regard to whether the condition or claim is abuse-related; and
- D. Except for claim actions, is based on a determination, made in conformance with sound actuarial principles and supported by reasonable statistical evidence, that there is a correlation between the medical condition and a material increase in insurance risk.

Drafting Note: It is not the intent of this Act to permit any medical underwriting not otherwise permitted by law. Subjects of abuse may currently be subject to this type of underwriting. States may wish to consider whether it is appropriate to adopt the restrictions contained within the NAIC's Small Employer Health Insurance Availability Model Act (Prospective Reinsurance With or Without an Opt-Out) or the NAIC's Small Employer and Individual Health Insurance Availability Model Act or Individual Health Insurance Portability Model Act to restrict underwriting in this market for the benefit of subjects of abuse and consumers generally.

Section 6. Insurance Protocols for Subjects of Abuse

Health carriers shall develop and adhere to written policies specifying procedures to be followed by employees and by insurance professionals they contract with, for the purpose of protecting the safety and privacy of a subject of abuse and shall otherwise implement the provisions of this Act when taking an application, investigating a claim, pursuing subrogation or taking any other action relating to a policy or claim involving a subject of abuse. Insurers shall distribute their written policies to employees and insurance professionals.

Drafting Note: States may wish to consider requiring health carriers to develop procedures in consultation with domestic violence advocacy groups.

Section 7. Enforcement

The commissioner shall conduct a reasonable investigation based on a written and signed [add any means by which the commissioner receives complaints] complaint received by the commissioner and issue a prompt determination as to whether a violation of this Act may have occurred. If the commissioner finds from the investigation that a violation of this Act may have occurred, the commissioner shall promptly begin an adjudicatory proceeding. The commissioner may address a violation through means appropriate to the nature and extent of the violation, which may include suspension or revocation of certificates of authority or licenses, imposition of civil penalties, issuance of cease and desist orders, injunctive relief, a requirement for restitution, referral to prosecutorial authorities or any combination of these. The powers and duties set forth in this section are in addition to all other authority of the commissioner.

Drafting Note: States may wish to delete this section if the substance of it already exists in state law.

Section 8. Effective Date

This Act is effective [insert date], and applies to all actions taken on or after the effective date, except where otherwise explicitly stated. Nothing in this Act shall require a health carrier or insurance professional to conduct a comprehensive search of its contract files existing on the effective date solely to determine which applicants or insureds are subjects of abuse.

Chronological Summary of Actions (all references are to the Proceedings of the NAIC).

1996 Proc. 2nd Quarter 8, 22, 762, 763-765 (adopted).

1998 Proc. 3rd Quarter 14, 83, 88-89, 96-101 (amended and reprinted).