
ADVISORY MEMORANDUM

TO: ALL HEALTH INSURANCE ISSUERS
FROM: JOHN MORRISON, MONTANA STATE AUDITOR
AND INSURANCE COMMISSIONER
SUBJECT: CONTRACEPTIVE COVERAGE
DATE: 5/23/2006

EXPLANATION OF THE LAW IN MONTANA REGARDING COVERAGE OF CONTRACEPTIVE SERVICES

On March 28, 2006, the Montana Attorney General issued an opinion regarding inclusion of contraceptives and related medical services in health insurance plans. Attorney General Opinion, Volume No. 51, Opinion No. 16 (2006). That opinion holds as follows:

1. When an employer provides an insurance policy providing prescription drug coverage and other medical services, the Montana unisex insurance law, Mont. Code Ann. § 49-2-309, requires inclusion of coverage for prescription contraceptives and related medical services.
2. When an employee benefit plan provides prescription drug coverage and other medical services, the Montana Human Rights Act, Mont. Code Ann. § 49-2-303, requires inclusion of coverage for prescription contraceptives and related medical services.

The full text of the opinion can be accessed at <http://doj.mt.gov>. The first holding is based on the unisex insurance law, which provides, in pertinent part:

It is an unlawful discriminatory practice for a financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits. Mont. Code. Ann. § 49-2-309(1).

In Bankers Life & Casualty Co. v. Peterson, 263 Mont. 156, 866 P.2d 241 (1993), the Montana Supreme Court held that discrimination based upon pregnancy is discrimination based on sex and is specifically prohibited by the Montana unisex insurance statute. In addition, federal case law cited in the March 2006 Attorney General's opinion holds that the condition that contraception addresses, the potential for pregnancy, is a pregnancy-related condition. International Union, UAW v. Johnson controls, 499 U.S. 187, 199 (1991). This Attorney General opinion specifically states as follows:

Contraception and related medical services such as gynecological visits, are virtually the only way for women to prevent and control the timing of pregnancy. Just as exclusion of

pregnancy coverage constitutes sex discrimination because "distinctions based on pregnancy are sex-linked," it follows that exclusions of coverage for prescription contraceptives and related medical services would also be sex discrimination and a violation of Montana's unisex insurance statute. 51 Op. Att'y Gen. 16 (2006), Page 3.

Because the language in Mont. Code Ann. § 49-2-309 includes individual health insurance policies and certificates, as well as employer-sponsored group health plans and because the facts in the Bankers Life case specifically involved an individual health insurance policy, Commissioner John Morrison wrote to Attorney General Mike McGrath requesting clarification of the opinion regarding its application to individual health insurance. Attorney General McGrath responded to Commissioner Morrison in a letter dated April 24, 2006, which states as follows: "Nothing in the Unisex Insurance Law would restrict the application of the holding to insurance provided in the employment setting. The statute [Mont. Code Ann. § 49-2-309(1)] prohibits sex discrimination with respect to the 'issuance' of an insurance 'policy' as well as the 'operation' of an insurance 'plan.'

Therefore, the Montana Insurance Department will apply the law established in 51 Op. Att'y Gen. 16 (2006), to all group and individual insurance policies and certificates that are issued for delivery to Montana residents. Every insurance policy or certificate that provides coverage for prescription drugs must also include coverage for prescription drugs that are used for contraceptive purposes. Every policy or certificate must provide the same coverage for contraceptive-related inpatient and outpatient services as is offered for other inpatient and outpatient services.

The second holding in this opinion applies to employers who sponsor group health plans. Since this Department does not have jurisdiction over employers, the second holding will not be discussed in depth in this memorandum. ERISA preemptions preclude this Department from enforcing state insurance laws with regard to self-funded employer health plans. However, third party administrators processing claims under fully insured health plans for Montana residents should be aware that Mont. Code Ann. § 49-2-309 applies to "any person," not just to insurance companies.

ALL INSURANCE FORMS, INCLUDING BUT NOT LIMITED TO POLICIES, CERTIFICATES, AND RIDERS, MUST CONFORM TO MONTANA LAW AS STATED IN 51 Op. Att'y Gen. 16 (2006).

All insurers that have forms currently in use in Montana that do not conform to the law as stated in 51 Op. Att'y Gen. 16 (2006) and this memorandum must revise those forms and resubmit them for approval to this Department no later than July 31, 2006. Once the forms have been approved, the correct version must be mailed to all policyholders and certificate holders within 60 days following approval.

All claims must be processed in conformity with state law, as expressed in 51 Op. Att'y Gen. 16 (2006) and this memorandum. Furthermore, claims must be processed retroactively to March 28, 2006, the date the Attorney General issued the Opinion, regardless of when the corrected form is delivered.

Please submit any questions and revised forms to Rosann Grandy, Rates and Forms Bureau Chief, 840 Helena Avenue, Helena, MT 59601; rgrandy@mt.gov; 406-444-2040.