

## Department of Justice Position on Texas Lawsuit Calling for ACA Repeal – Implications for Children’s Coverage

On June 7, the Department of Justice filed a brief in the case *Texas v. Azar*, which states that the department will not defend key private insurance consumer protections of the Affordable Care Act (ACA) in the pending case’s challenge of the law’s constitutionality. Specifically, the administration asserts that the law’s community rating and guaranteed issue requirements are unconstitutional as a result of the repeal of the individual mandate tax penalty in the 2017 tax reform bill. Those two requirements are key protections for children with a pre-existing condition who are covered by private insurance.

- The ACA’s community rating requirement prevents insurers from using health status, disability, age, gender, or other factors to set higher premiums.
- The law’s guaranteed issue requirement requires insurers to sell insurance to everyone who seeks it regardless of health or disability status, age, gender, or other factors.

Repeal of these provisions as a result of the Texas lawsuit and the subsequent DOJ filing would have slightly different implications for children with a pre-existing condition (PEC)<sup>1</sup> in the individual, small group or large group (fully-insured and self-insured) markets. The following provides an overview of those implications.<sup>2</sup>

### Child with a PEC in the individual market

- A child with a PEC could be denied coverage outright, even though the parent gets coverage; could be charged a higher premium than his or her parent; could be offered coverage, which includes a rider that excludes treatment for the PEC; could be subject to a premium rate increase after claims are submitted; or could be subject to a waiting period of up to a year before coverage goes into effect for that specific condition.<sup>3</sup>
- In some states, the child would be sent to a high-risk pool for coverage, which could be very expensive and cover a limited set of services.
- A newborn/newly adopted child of a parent in the individual market would most likely begin coverage at birth/upon adoption and be covered for any congenital anomalies, as required under state law. The parent would then have 30 or 60 days (depending on the policy) to officially add the newborn or newly adopted child to coverage and that congenital anomaly would be covered.

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<sup>1</sup> A child is typically considered to have a PEC if he/she has a condition that has been treated or would otherwise cause a prudent person to seek treatment within some prior time-frame (typically six months). If a child has an underlying condition without symptoms or previous treatment it would not be a PEC.

<sup>2</sup> Children covered by any of the alternative health plans (such as short-term plans or health ministries) would not be directly impacted because those plans do not have to comply with the ACA protections.

<sup>3</sup> For example a child that has heart defect at the time he or she is enrolled in a plan will not be covered for treatment of the heart condition until he or she has satisfied the waiting period. The child will be covered for any other services not related to the treatment of the PEC.

### **Child with a PEC in the small group employer market**

- A child with a PEC could not be denied coverage in the small group market as a result of a HIPAA requirement that all health plans for small groups be guaranteed issue. However, in some states, the insurer could charge the child (parent) a higher premium and could include a rider in the policy that excludes coverage for the particular PEC.

### **Child with a PEC in the large group employer market**

- A child with a PEC could be subject to a waiting period of up to 12 months before the plan would pay for services to treat that condition.
- HIPAA offers some protections for these children:
  - Insurers cannot medically underwrite (charge higher premiums to these children/parents)
  - In order for a waiting period to be imposed, the child must have had a gap of more than 63 days between coverage through a plan with “creditable coverage” (e.g. CHIP, Medicaid, parent’s previous plan) and the new plan. In addition, the child must have been treated for the PEC within the previous 6 months.
- In some states, the child would be sent to a high-risk pool for coverage, which could be very expensive and cover a limited set of services.
- A newborn/newly adopted child of a parent in the large group employer market would most likely begin coverage at birth/upon adoption and be covered for any congenital anomalies, as required under state law. The parent would then have 30 or 60 days (depending on the policy) to officially add the newborn or newly adopted child to coverage and that congenital anomaly would be covered.