

ESSENTIAL HEALTH BENEFITS & NONDISCRIMINATORY BENEFIT DESIGN

October 2022

Overview

Recent (May 2022) rulemaking from the Centers for Medicare and Medicaid Services (CMS) helps clarify expectations in designing nondiscriminatory health plans. Importantly, the refined standards highlight a clear path forward for including a medically tailored meal (MTM) benefit as an Essential Health Benefit (EHB). This means that regulators can potentially require more private health plans to include MTMs in their core package of benefits.



Defining MTM:

For purposes of this analysis, medically tailored meals has the definition used in the Food is Medicine Research Action Plan: fully prepared meals designed by a Registered Dietitian Nutritionist to address an individual's medical diagnosis, symptoms, allergies, and medication side effects.¹

Nondiscrimination Under the ACA

An EHB-benchmark plan and issuers providing EHB may not contravene certain nondiscrimination standards.² Specifically, discrimination in benefit design (or the implementation of benefit design) based on an individual's age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions is prohibited.³ Discrimination on the basis of race, color, national origin, or sex is also prohibited.⁴

NBPP 2023: Introducing the Clinical Evidence Standard

The 2023 Notice of Benefit and Payment Parameters (NBPP) final rule, issued in May 2022, provides that a nondiscriminatory health plan design is one that is clinically based.⁵ In other words, any limitation on coverage of an EHB based on an individual's age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, other health conditions, race, color, national origin, or sex must be based on clinical evidence.⁶

Example: Foot Care and Discrimination on the Basis of Health Condition

The preamble to the final rule uses an example involving routine foot care to aid readers in understanding the clinical evidence standard. Routine foot care includes cutting or removing corns and calluses; trimming, cutting, or clipping or debriding of nails; and hygienic or other preventive maintenance care, such as using skin creams, cleaning, and soaking the feet. Typically part of an individual's personal self-care, there are instances where the performance of routine foot care by a health care provider is medically necessary.

In the presence of some systemic health conditions, foot care procedures otherwise considered routine may pose a hazard when performed by a nonprofessional. Diabetes mellitus is one such underlying condition. But there is also clinical evidence demonstrating that routine foot care may be medically necessary for treatment of other conditions (e.g., chronic thrombophlebitis). Therefore, it is presumptively discriminatory for an EHB to cover routine foot care only for people with diabetes and not people with other conditions for which there is a clinical evidence base when there is no clinical basis for the limitation.



CMS encourages entities to incorporate current and relevant clinical evidence into coverage design. The agency also acknowledges that limitations in medical research may restrict availability of such clinical evidence. The final rule does not include any specific standard for clinical evidence; CMS does not specify sources of acceptable clinical information.

Implications for a Medically Tailored Meal EHB

The guidance provided as part of the NBPP 2023 final rule creates several key takeaways for an MTM EHB:

- An MTM benefit does not need to be offered to everyone in order to be nondiscriminatory.
- In order to avoid a presumption of discrimination, the MTM benefit should not differentiate between people with different underlying health conditions where the MTM benefit, as demonstrated by the clinical evidence base identified, has a same or similar impact.
- It is unlikely that MTM benefit limitations taking into account financial hardship are presumptively discriminatory. Financial hardship is not a prohibited basis for a limitation under the nondiscrimination rules.



Example: Designing a Nondiscriminatory MTM Benefit

Based on the literature synthesized in the Food is Medicine Research Action Plan, the evidence base **likely supports** limiting a medically tailored meal benefit to people living with one or more of four conditions: Type 2 diabetes, HIV, heart failure, and chronic liver disease. The evidence base **may support** further differentiation between these health conditions.

Eligibility criteria could include an expanded ICD-10 2023 patient noncompliance code such as Z91.110 (patient's noncompliance with dietary regimen due to financial hardship).

- 1 Downer S, Clippinger E, Kummer C. [Food is Medicine Research Action Plan](#). Published Jan. 27, 2022.
- 2 See 45 C.F.R. §156.125 (nondiscrimination standards) and 45 C.F.R § 156.110(d) (applying 45 C.F.R §156.125 non-discrimination standards to EHB benchmark plan standards).
- 3 See 45 C.F.R. §156.125 (nondiscrimination standards) and 45 C.F.R § 156.110(d) (applying 45 C.F.R §156.125 nondiscrimination standards to EHB benchmark plan standards).
- 4 See 45 C.F.R. §156.125 (nondiscrimination standards) and 45 C.F.R § 156.110(d) (applying 45 C.F.R §156.125 nondiscrimination standards to EHB benchmark plan standards).
- 5 [Patient Protection and Affordable Care Act: HHS Notice of Benefit and Payment Parameters for 2023](#), 87 Fed. Reg. 27208 (May 6, 2022).
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