



AMERICAN BENEFITS

COUNCIL

September 23, 2008

The Honorable George Miller
Chairman,
House of Representatives
Education and Labor Committee
2181 Rayburn House Office Building
Washington, DC 20515

The Honorable Howard P. "Buck" McKeon
Ranking Member,
House of Representatives
Education and Labor Committee
2181 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Miller and Ranking Member McKeon:

I am writing on behalf of the member companies of the American Benefits Council ("Council") to share our concerns about H.R. 758, the Breast Cancer Patient Protection Act of 2007 ("Act"). The Council urges you to consider whether this legislation is needed in light of the lack of evidence that health plans are limiting patient hospital stays for breast cancer treatment and because it will increase health care costs, particularly because of the inclusion of provisions that would interfere with financial incentives and network arrangements that help ensure patients receive high quality care. If, however, H.R. 758 moves forward, we offer a number of clarifications that would be appropriate to improve its workability and conform the bill to similar provisions in existing law.

The Council's approximately 275 members are primarily major U.S. employers that provide employee benefits to active and retired workers, and do business in most, if not all, states. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

As sponsors of some of the most generous health plans offered in the nation, Council members believe strongly in the importance of good coverage for breast cancer conditions. Consequently, Council members have raised concerns about the policy and practical effects of H.R. 758; most notably provisions that limit employers' flexibility to

design and administer health plans that fit the specific needs of their workforces. The Council would be very concerned if health plans were to limit inpatient coverage for mastectomies or lumpectomies. However, we are unaware of any case studies or data that substantiate even existence of this problem, let alone the pervasiveness that would warrant a legislative response.

Patients and their physicians may, nonetheless, choose outpatient procedures in medically appropriate situations, and some studies suggest that such outpatient surgery for certain breast cancer diagnoses promotes reduced recovery times and improved psychological response.¹

In the event that Congress does choose to proceed in considering H.R. 758, the Council suggests the following modifications:

The legislation needs to make clear that it applies only to plans providing coverage for breast cancer treatment. The legislation is similar in structure to the Newborn's and Mother's Act, which mandates minimum hospital stays for mothers with hospital maternity benefits who choose to give birth in a hospital. However, the bill is drafted in a manner that suggests that breast cancer coverage is required. It also fails to adopt important provisions that clarify that the requirements only apply to plans that offer coverage for breast cancer treatment. Thus, a provision similar to ERISA section 711(c)(2) should be included. That section clarifies that the Newborn's and Mother's Act is not a benefit mandate and that nothing in the bill should be construed to apply to a health plan that does not offer benefits for hospital lengths of stay in connection with childbirth.

The legislation should not prevent health plans from managing the cost of coverage through in- or out-of-network coverage. The Breast Cancer Patient Protection Act requires health plans to cover secondary consultations by out-of-network specialists and requires that plans cover such consultations as if the specialists were in-network. Coverage would have to be provided with no limits on the cost plans would have to bear. This provision has no precedent in either the Mother's and Newborn's Act, Women's Health Cancer Rights Act ("WHCRA") or any other provision of federal law. In fact, WHCRA expressly provides that a plan is permitted to negotiate cost-saving limits on reimbursements. WHCRA does not mandate out-of-network coverage for breast reconstruction and it does not limit the costs that may be imposed on participants in the event out-of-network coverage is sought. Requiring health plans to cover unlimited charges for out-of-network specialists is poor health care policy and will needlessly cause health care costs to rise.

We strongly urge the deletion of the requirement for mandatory out-of-network coverage on an in-network basis and the inclusion of a rule of construction similar to

¹ See Annals of Surgical Oncology (Vol. 7, No.3).

the rule adopted by WHCRA, which expressly clarifies that nothing in WHCRA prevents a plan from negotiating cost savings. *See* ERISA § 713(d).

The bill's prohibition on penalties and incentives should be clarified. As drafted, the prohibition on penalties and incentives could be interpreted to prohibit programs that reward physicians for meeting certain quality of care measures. Providing financial incentives to encourage the provision of high quality health care is an increasingly important strategy being used by employers and public payers, including Medicare, and will help ensure that patients get the best possible care for their condition.

The bill should eliminate the provision restricting hospital preauthorization requirements. Most plans contain hospital preauthorization requirements. These provisions are an important health care quality management mechanism and there is no policy reason for exempting breast cancer hospitalization from such provisions that apply to other types of medical coverage.

The bill should include a workable effective date. The effective date of the Act will apply to plan years beginning on or after 90 days after enactment. This effective date is unworkable for plans and insurers that must implement the changes. Additionally, it would require employers and insurers to implement the changes before federal regulations are issued. The Act should adopt a later effective date that allows for at least one full-plan year to implement changes after the regulations have been issued. This proposed effective date would conform the bill to the recently enacted Genetic Information Nondiscrimination Act, H.R. 493.

We look forward to working with you in analyzing the implications of this legislation, and in making the necessary revisions. Thank you for considering our comments and concerns.

Sincerely,

A handwritten signature in cursive script that reads "Lynn D. Dudley".

Lynn D. Dudley
Senior Vice President, Policy