Chapter 4

Protected Classes

In General

This Appendix provides some background materials relative certain Protected Classes that are defined by: (a) sex and race; (b) religion and ethnicity; (c) handicapped and disabled; (d) pregnancy; (e) age and (f) health status.

There are numerous federal laws that deal with status and impact health care but are not deemed to be of the nature of defining a special class that merits discrimination testing: (a) COBRA (b) FMLA, (c) USERRA, (d) QMCSO, (e) VA recoveries. (f) Medicare Secondary rules and (g) Equal Pay Act. of 1963.

Sex Discrimination

The Civil Rights Act of 1964 and the Equal Pay Act of 1963 each addressed the issue of sex discrimination in the workplace. The one Act provided that there should be no discrimination by sex, the other Act provided that there should be no pay differential between male and female workers for jobs the performance of which requires equal skill, effort and responsibility and that are performed under similar working conditions.

After the passage of the Civil Rights Act of 1964 and upon the establishment of the Equal Employment Opportunity Commission, such commission ruled by regulation that state laws protecting female employees would be themselves deemed discriminatory and, therefore, of no legal value. The Commission's position has been upheld by the courts.

The basic practical consideration always to be kept in mind by the employer and the industrial physician is that no job should be presumed too demanding for a female. This still allows an employer to require a demonstration of ability to perform the particular job properly. A pre-placement (but post-hiring) strength test administered fairly to both male and female employees is permissible.

Before an applicant is rejected because of sex, the employer should have reasonable and nondiscriminatory medical opinion in support thereof; The employer must be able to defend the no hiring of a female applicant because of sex on one of two bases: first, business necessity; second, bona fide occupational qualifications.

Of particular difficulty because of the numerous physical and medical implications is the placement of the pregnant applicant. The 1978 amendments to the Civil Rights Act provided basically that discrimination by sex and on the basis of pregnancy were the same? This amendment has raised a host of challenging questions to the employer and the industrial physician, a detailed discussion of these questions is beyond the scope of this book.

Handicapped and Disabled Discrimination

The 1964 Civil Rights Act referred to discrimination by race, color, sex, religion and national origin but did not prohibit discrimination against the handicapped. Congress, rather that amending the Civil Rights Act to include handicapped persons as a protected group, chose to enact new legislation dealing with the handicapped in a more limited way (i.e., recipients of government contracts and grants and federal agencies).

Congress enacted a statute on handicap discrimination in 1973 commonly referred to as the Rehabilitation Act of 1973. The statute applies only to employers that receive government contracts and grants and to governmental agencies. For other employment, relief is available under either the 14th Amendment to the Constitution (due process and equal protection under the law) or under state laws (many states prohibit handicap discrimination in employment, generally as part of their employment practices laws).

In hiring and placing, a handicapped person should afford an opportunity to demonstrate that person's accommodation to the job requirements. Employers should make an effort to place employees who become handicapped in jobs. that are manageable with the handicap that makes job performance impossible or unreasonably difficult. The employer is alerted, however, to not be presumptive as to what the handicapped employee may or may not be able to do. Often it is best for the employer to be on the safe side and permit the handicapped employee to try to perform at the job rather than presuming that such employee is not capable.

The role of the industrial physician is particularly significant with alleged handicap discrimination. The employer, in defending against a handicap discrimination challenge, will be very disadvantaged without the support of a medical opinion. It is especially significant that in many such challenges, the handicapped employee provide a medical opinion from a personal physician; this opinion will carry great weight with any court or regulator if there is not counter-opinion.

Pregnancy Discrimination

The Pregnancy Discrimination Act amended Title VII of the Civil Rights Act of 1964. Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII.

Any health coverage provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions. An employer need not provide health insurance for expenses arising from abortion, except where the life of the mother is endangered. Pregnancy-related expenses should be reimbursed exactly as those incurred for other medical conditions whether payment is on a fixed basis or a percentage of reasonable-and –customary-charge basis. The amounts payable by the insurance provider can be limited only to the same extent as amounts payable by the insurance provider can be limited only to the same extent as amounts payable for other conditions. No additional, increased, or larger deductible

can be imposed. Employers must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees.

Age Discrimination

Congress in 1967 enacted the Age Discrimination in Employment Act, which was reflective of several realities. First, many employees are willing and able to continue working beyond the normal retirement age of 65; second, the older workers as a group, were politically militant and desired to have additional legal protection against age discrimination; third, employees have a longevity and a lifestyle that will make them useful and productive employees to a far greater extent than was true a decade or so ago.

The protected ages in the Age Discrimination in Employment Act of 1967, as amended, are currently ages through 70. Also, many states have enacted age discrimination statutes similar to the federal statute; some state statues have no age limit at all."

The discrimination rules relative to handicapped are applicable, for the most part, to age; i.e., neither the employer nor the industrial physician may presume that an employee, or prospective employee, is unable to perform a task solely' because of age; where there is any question about ability to perform, such questions should be resolved by the appropriate physician(s).
When an employee is in fact unable to perform a job solely because of age, such employee may be terminated. Such evaluation, however, must be impartial and use objective criteria.

An interesting line of logic that may be applicable this: When an employee becomes nonproductive because of age, termination is possible within the Age Discrimination in Employment Act; however, relief in the form of reasonable accommodation may be possible under the handicapped discrimination rules; such reasonable accommodation would amount to reassigning the older employee to a more suitable position.

The Age Discrimination in Employment Act recognizes that some jobs require certain abilities; with these jobs there may be a bona fide occupational qualification. A 65-year-old may not be suited to be an airline pilot or a bus driver, for example. The age discrimination statute is presently administered by the Equal Employment Opportunity Commission.

Mental Health Parity Discriminations

Initial Act

The Mental Health Parity Act of 1996 requires that certain rules apply if a plan provides both medical and surgical benefits and mental health benefits. If the plan doesn't include an aggregate limit on substantially all medical and surgical benefits, no limit may be imposed on mental health benefits. If the plan includes an aggregate limit on substantially all medical and surgical benefits, the plan must either apply the limit to mental health benefits and not

distinguish in the application of the limit between such medical and surgical benefits and mental health benefits or not include any aggregate limit on mental health benefits that is less than the plan's aggregate limit on substantially all medical and surgical benefits. Such limitation may be either annual or lifetime. Regulations are to prescribe rules for plans with different limits for different categories of benefits.

Certain rules apply only if a group health plan provides medical and surgical benefits and mental health benefits. If the plan doesn't include an annual limit on substantially all medical and surgical benefits, no annual limit may be imposed on mental health benefits. If the plan includes an annual limit on substantially all medical and surgical benefits, the plan must either apply the limit to mental health benefits and not distinguish in the application of the limit between such medical and surgical benefits and mental health benefits, or not include any annual limit on mental health benefits that is less than the plan's annual lifetime on substantially all medical and surgical benefits. Regulations are to prescribe rules for plans with different limits for different categories of benefits.

The 1996 federal mental health mandate says that all plans, including self-funded plans, must offer the same benefits for mental care as for non-mental care if such mental care is offered at all. It may be excluded entirely, of course.

The *same benefits* mean the following:

1. Lifetime and annual limitations used exclusively for mental care are not allowed.
2. Higher deductibles and/or lower copays are permitted for mental care as compared with non-mental care. Also, special inside limits applicable to outpatient psychiatric visits and inpatient care are permitted.

Some states have already enacted laws applicable to fully insured and HMOs which mandate full parity between mental and nonmental care. The pressure is on Congress to liberalize the federal mental health mandate in response to state actions.

Amendment to Initial Act

The Mental Health Parity and Addition Equity of 2008 extended prior provisions of the 1996 Mental Health Parity Act to substance-use disorder benefits. In addition, the Act significantly expanded the law for group health plans (including health insurance coverage offered in connection with a group health plan) that offer mental health or substance use disorder benefits. Specifically, the new law requires parity between medical surgical benefits and mental health or substance use disorder benefits with respect to financial requirements" and "treatment limitations" under a plan.

The Act does not require a plan to provide mental health or substance use disorder benefits or mandate the mental health or substance use disorder benefits that must be covered. The law only requires parity if such mental health or substance use disorder benefits are offered under a plan. The Act does not apply to employers with fewer than 50 employees.

Womens' Health and Cancer Discrimination

The Womens' Health and Cancer Rights Act of 1998 requires that group health plans, health insurers and HMOs must permit breast reconstruction if mastectomy is a covered procedure. Such breast reconstruction includes these three types of reconstruction surgery coverage:

1. Reconstruction of the breast on which the mastectomy was performed
2. Surgery on the other breast to produce symmetry
3. Prostheses and physical complication for all stages of mastectomy including lymphoedemas.

The purpose of this law must not be subverted by denying eligibility, reducing benefits, lowering limits, offering inducements to covered persons.

Newborns and Mothers Health Discrimination

The Newborns' and Mothers' Health Protection Act of 1996 requires that plans not restrict benefits for any hospital length of stay in connection with childbirth for the mother or newborn child, following a normal vaginal delivery, to less than 48 hours; or restrict benefits for any hospital length of stay in connection with childbirth for the mother or newborn child, following a Caesarean section, to less than 96 hours; or require that a provider obtain authorization from the plan for prescribing any length of stay. The minimums don't apply if the decision to discharge the mother or newborn is one made by the mother and her doctor.

Such plan may not deny to the mother or her newborn child eligibility, or continued eligibility, to enroll or to renew coverage under the terra of the plan, solely for the purpose of avoiding the requirements of this act; provide monetary payments or rebates to mothers to penalize or otherwise reduce or limit the reimbursement of an attending provider because such provider provided care to an individual participant or beneficiary; provide to an individual participant or beneficiary, or restrict benefits for any portion of a period within a protected hospital stay in a manner that is less favorable than the benefits provided for any preceding portion of such stay.

The Act does not require a mother to give birth in a hospital or to stay in the hospital for a fixed period of time following the birth of her child. Nor does it prevent a group health plan or issuer from imposing deductibles, coinsurance or other cost sharing in relation to benefits for hospital stays in connection with childbirth for a mother or newborn child under the plan, except that the same level of coinsurance or other cost sharing must apply throughout the stay.

HIPAA

The plan will not use health factors to deny benefits to any covered person nor charge a higher premium than that charged similarly situated covered persons without health factors. Health factors include health status, a medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of acts of domestic violence) and disability.

The plan may limit or exclude benefits but only if the benefit limitation or exclusion applies uniformly to all similarly situated covered persons and is not directed at covered persons based on any health factor. The same rule applies to annual, lifetime or other limits.

Any plan amendment that is applicable to all covered persons in one or more groups of similarly situated covered persons and that is made effective no earlier than the first day of the first plan year after the amendment is adopted is not considered to be directed at individual covered persons.

It will not be considered discrimination for the plan to have classification of participants based on full-time versus part-time status, different geographic locations, membership a collective bargaining unit, date of hire, length of service current employee vs. former employee status, and occupation.

The plan will not consider health factors in the determination of (a) enrollment, (b) effective date of coverage (c) waiting periods, (d) late or special enrollments, (e) eligibility for benefit package, (f) benefits, (g) continued eligibility (h) coverage termination (dis-enrollment).

The plan will not deny the eligibility of any covered person to enroll for benefit or charge a higher premium because such covered person was confined to a hospital when the coverage became available. In addition, a plan generally may not deny eligibility based on any individual's ability to engage in normal life activities.

The plan will not impose the so-called actively-at-work provision unless such reason for not being actively at work is not health related (non-medical leave of absence, e.g.)

The plan does require a newly hired employee to have me the actively-at-work requirement before becoming a plan participant.

Health care, otherwise provided, will not be denied for such reasons as (a) due to engaging in hazardous activities and (b) the direct result of the commission of a crime (misdemeanor or felony).

End Stage Renal and Pediatric Vaccine

The Omnibus Budget reconciliation Act of 1981 amended the code so as require that any plan to retain its full IRC §105(a) tax advantages had to provide coverage for (a) end stage renal disease and also (b) pediatric vaccine care as any other illness. IRC Section 5000 imposes on the plan sponsor (including a self-employed person) or employee organization that contributes to nonconforming group health plan a tax equal to 25% of the employer's or employee organization's expenses incurred during the calendar year for each group health plan to which the employer or employee organization contributes.

New Classes Created by ACA

The Patient Protection and Affordable Care Act of 2010 created the following new classes against whom discrimination by health status might occur: (a) pre-existing (b) equality/parity for

health care providers, (c) benefit plan parity, (d) preventive care coverage, (e) childrens age extension to 26 and (f) health-profiling.