

Insurance Discrimination

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Introduction

Fair or unfair discrimination

Insurance discrimination is a bit different conceptually from other forms of discrimination since the business of insurance involves putting people into categories and assigning a premium based on the degree of risk which a particular category is believed to represent. Thus, treating one group of people differently from another group may not be inherently wrong. However, the way people are put into categories and the degree of risk which is assigned to a particular category can be done in ways that are unfair and discriminatory. For example, people with blonde hair could all be put into a high risk category for life insurance and charged a high premium when there is absolutely no evidence that members of this group die at a younger age than people with another hair color. In this example, the fact that the premium was not related to an established mortality rate would be a form of unfair discrimination. However, if there was scientific evidence that blonde people did in fact have a higher mortality rate than redheads, then it may be legitimate to charge them more and no unfair discrimination would have occurred. Thus, in the insurance area, the law prohibits only unjustified discrimination.

Traditionally, only states have regulated insurance. Several Wisconsin laws prohibit unfair discrimination in any type of insurance based on the fact that a person has a mental or physical disability. These laws apply only to individual insurance policies and employee benefits that are funded by an insurance plan. Federal laws regulate other employee benefit plans.

The Americans with Disabilities Act and Insurance

42 USC §§ 12182(a) The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of disability in four areas: employment; governmental programs, activities and services; activities of certain places of public accommodation; and telecommunications. Title I of the Act provides that “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to ...terms, conditions, and privileges of employment. Title III of the Act provides that “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” The ADA also provides for a “safe harbor” for insurance practices “that are based on or are not inconsistent with state law.”

42 USC § 12112(a)

42 USC § 12182(a)

28 CFR 36.212
42 USC 12201(c)

56 FR 35592

Differential treatment is generally prohibited

The U.S. Department of Justice is responsible for enforcing most non-employment provisions of the ADA. The Attorney General (the top official in the Department) has consistently taken the position that “Congress intended to ... prohibit differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified.” The non-discrimination standard set under Department of Justice regulations is very similar to that provided by Wisconsin law. While the Supreme Court has not decided if this is a proper interpretation, lower court decisions limit the ability of federal courts in Wisconsin to uphold the insurance provisions of the ADA.

Insurance as a Fringe Benefit of Employment**Equal Employment Opportunity Commission**

29 CFR § 1630.4(f)

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the employment provisions of the ADA. Its regulation clarifies that the ADA prohibits discrimination with regard to insurance when the insurance is a “fringe benefit available by virtue of employment.” The EEOC issued guidance to its staff in 1993 that providing different benefits for broad classes of medical treatment (e.g. mental illness) would not violate the ADA, but that different coverage based on a disability (e.g., an exclusion for treatment of AIDS or AIDS-related conditions), would. Federal courts in Wisconsin do not allow an individual with a disability to file or continue an employment discrimination claim for a discriminatory benefit plan under the ADA unless the employee is currently able to work, (with or without reasonable accommodation).

Wisconsin Fair Employment Act

Sec. 111.322, Wis. Stats.

Sec. 111.34(2)(c), Wis. Stats.

The Wisconsin Fair Employment Act also prohibits discrimination in “terms, conditions or privileges of employment.” One provision states that “Employment discrimination because of handicap includes, but is not limited to, contributing a lesser amount to the fringe benefits, including life or disability coverage, of any employee because of the employee’s handicap.” Another provision states that “it is not employment discrimination because of handicap to ... discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment if the handicap is reasonably related to the individual’s ability to adequately undertake the job-related responsibilities of that individual’s employment....” (*For more information see Americans with Disabilities Act: Title I - Employment Discrimination chapter, pg. 305.*)

Employee benefit plans

Several federal laws and provisions of the Wisconsin Insurance Code further regulate employment benefit plans. Generally, plans that are funded by an insurance policy are subject to both state and federal regulations. Plans that are self-funded by employers are subject to only federal regulation.

**Employment Retirement
Income Security Act**
29 USC §§ 1024, 1059, 1144, 1191

The Employee Retirement Income Security Act (**ERISA**) applies to all employee benefit plans. It requires employers and other plan officials to give certain notices to employees and other beneficiaries, including the right to a copy of a “Summary Plan Description” which describes the benefits. An ERISA amendment known as the Consolidated Omnibus Budget Reconciliation Act of 1986 (**COBRA**) allows a person covered under a group health plan to continue coverage when a reduction of hours, termination of employment, entitlement to Medicare benefits or certain other events would cause loss of coverage under the plan. Wisconsin law provides similar protection. *(For more information see Private Health Insurance and HMOs chapter, pgs. 81 and 86.)*

Coverage continuation

29 USC § 1161 et seq.
Sec. 632.897, Wis. Stats.

29 USC § 1181;
Sec. 632.746, Wis. Stats.

Pre-existing conditions

Another federal law with similar provisions under Wisconsin law is the Health Insurance Portability and Accountability Act of 1996 (**HIPAA**). This law generally prohibits health insurers from excluding coverage for pre-existing conditions for more than twelve months. Only conditions for which medical advice was received or recommended within six months prior to enrollment may be counted as pre-existing conditions. Time for which the condition was covered under another policy or plan generally counts toward the exclusion period so that someone with twelve months of creditable coverage will have no pre-existing condition exclusion. HIPAA also prohibits group health plans and insurers from denying coverage, charging additional premiums or imposing different waiting periods for individuals solely due to individual health-related factors. However, benefit limitations applied equally to all similarly situated employees, and premium discounts or other incentives under a bona fide wellness program are allowed. *(For further discussion of HIPAA see Private Health Insurance and HMOs chapter, pg. 85.)*

29 USC § 1185a;
Sec. 632.89, Wis. Stats.

Mental health benefits

Federal and Wisconsin law also provide certain guarantees for mental health benefits. The federal law applies only to group health plans, insurance companies and HMOs. It does not apply to plans or policies by employers of fifty or fewer employees, those that provide no mental health benefits or those whose claims costs would increase by one percent or more due to the protection. It will cease to apply to benefits for services furnished on or after September 3, 2001 unless it is renewed by Congress. Under this law, insurers and plans may not set annual or lifetime dollar limits on mental health (other than substance abuse or chemical dependence) benefits that are lower than limits on medical and surgical benefits.

Under state law, health insurance policies must include at least \$7,000 of coverage for inpatient and outpatient treatment of nervous and mental disorders and alcoholism and other drug abuse problems.

29 USC § 1185b

Both federal and state law provide other protections, as well. The most recent federal protection requires health plans offering mastectomy coverage to include coverage for reconstructive surgery.

State Regulation of Insurance

Limits on practices of insurers

Sec. 628.34(3)(b), Wis. Stats.

Wisconsin insurance law prohibits a company from refusing to offer insurance or continue coverage; limiting the amount, extent or kind of coverage; or charging a different rate to an individual because of his/her mental or physical disability unless the company's action is based on "sound actuarial principles supported by reliable data or actual or reasonably anticipated experience." This last phrase generally means that the company must have some statistical evidence, some actual experience in handling this type of coverage and disability, or a reliable expert opinion on what the experience could reasonably be expected to be, in order to justify or back up its actions.



Unfortunately, companies often do not have statistical information and they may rely on expert opinion which is out of date. Thus, one should closely question the information a company puts forth to justify its actions.

Auto and Property Insurance

Protection against unjustified cancellation

Secs. 625.12(2) and 106.04(9)(a),
Wis. Stats.
Ins. 6.54, Wis. Admin. Code

Wisconsin laws prohibit refusal of coverage or charging a higher rate for automobile insurance due to a physical condition or developmental disability (as defined under state law). Furthermore, an insurance company cannot cancel auto insurance due to one's physical or developmental disability or refuse to insure, cancel insurance or base rates on one's past history of mental illness unless the company files reliable information to justify its actions with the Wisconsin Commissioner of Insurance.

Ins. 6.54, Wis. Admin. Code

In addition, a company cannot refuse to insure a house or personal property, cancel such insurance or base rates on the basis of one's physical or developmental disability or past history of mental illness unless it files reliable information with the Commissioner of Insurance to justify its actions.

Life, Health and Disability Insurance

Ins. 6.67, Wis. Admin. Code

Wisconsin regulations for life, health and disability insurance largely parallel the general state statute which prohibits unfair discrimination. Thus, an individual may not be refused coverage, terminated, charged a higher rate, or have limited coverage (often called a rider) due to a mental or physical disability unless the company has a sound justification for doing so.

Reasons must be given for denial or termination

Sec. 632.785, Wis. Stats.

Another law requires that whenever a person is rejected or terminated from health insurance or has other restrictions imposed on coverage, s/he must be given the reasons and notified of the state's high risk health insurance plan. *(See HIRSP chapter, pg. 75.)*

**Policy extension for
handicapped children**

Sec. 632.88, Wis. Stats.

Finally, although it is not strictly speaking a non-discrimination provision, an insurance company may not terminate health insurance coverage on the basis of age (often 18 or 21 years) for a child or young adult who has mental retardation or a physical handicap, is incapable of self-sustaining employment and is financially dependent on the person insured under the policy.

Worker's Compensation

Sec. 626.12(3), Wis. Stats.

Wisconsin law prohibits basing worker's compensation insurance rates or rating plans on the physical impairments of covered employees.

Enforcement**Office of the Commissioner
of Insurance**

Sec. 601.62-.64, Wis. Stats.

The provisions of the Wisconsin Insurance Code prohibiting discrimination may be enforced by filing a complaint with the Office of Commissioner of Insurance. The staff in the office will investigate the complaint and attempt to resolve it through informal means. If this is not possible, the Commissioner may hold an enforcement hearing against the company and issue an order directing the company to provide the insurance or take other action. If a company fails to comply with an order, it may be required to pay a forfeiture. If the Commissioner does not take enforcement action, the consumer may ask the Commissioner to hold a special hearing on the complaint. This hearing will involve the consumer and the insurance company with the Commissioner's office conducting the hearing.

Special hearings

To File an Insurance Complaint or Get More Information:

Office of Commissioner of Insurance
Information and Complaints Section
P. O. Box 7873

Madison, WI 53707-7873

608-266-3585 or 800-236-8517

www.state.wi.us/agencies/oci/oci_home.htm

U.S. Department of Labor
[www.dol.gov/dol/pwba/
welcome.html](http://www.dol.gov/dol/pwba/welcome.html)

ERISA and other federal employee health benefit protections are enforced by the U.S. Department of Labor. Questions or complaints that an employer or plan administrator does not resolve to your satisfaction can be made to the Department at the Pension and Welfare Benefits Administration, 200 W. Adams St., Suite 1600, Chicago, IL 60606, 312-353-0900.

Family and Medical Leave Act (FMLA)

29 USC 1161

Large employers are required to allow most employees leave for certain family-related or medical reasons under both federal and state law. Both laws require covered employers to continue health benefits during a permitted leave under the same conditions as prior to the leave and restore eligible employees to the same or an equivalent position in all

terms and conditions after a permitted leave. In addition, both laws prohibit employers from disciplining an employee for a covered absence.

Both laws allow employers to require medical certification to support a request for leave because of a serious health condition.

There are significant differences between the federal and state laws summarized in the table below. The federal law provides superior protection under some circumstances. Employees have greater rights under state law in other respects. Where there are differences in protections under the state and federal laws, the one providing the most protection prevails.

	Federal Family and Medical Leave Act	Wisconsin Family and Medical Leave Act
Which employers are covered?	Employers of 50 or more employees in at least 20 weeks of the current or preceding year.	Employers of at least 50 permanent employees during at least 6 of the preceding 12 calendar months.
Who is an eligible employee?	All who have worked for a covered employer for at least 1,250 hours in preceding 12 months, employed for at least 12 months, and employed at worksite by employer with 50 or more employees or within 75 miles of that worksite.	All who have worked for a covered employer for at least 1,000 hours in preceding 52 weeks and for at least 52 consecutive weeks. Special rules apply to employees of school districts who work less than 12 months per year.
How much leave must* be offered?	Up to 12 weeks during a 12 month period for birth, placement of a child for adoption or foster care; to provide care for a parent, child or spouse with a serious health condition; or a serious health condition that makes the employee unable to perform the functions of his/her position. Leave for birth, adoption, or to care for a sick parent must be shared by spouses working for the same employer.	Up to 10 weeks during a 12 month period as follows: Up to 6 weeks for birth or adoption. Up to 2 weeks for serious health condition of parent, child or spouse. Up to 2 weeks for the employee's own serious health condition.

	Federal Family Medical Leave Act	Wisconsin Family Medical Leave Act
What is a serious health condition?	One or a combination of illness, injury, impairment, or physical or mental condition involving (1) inpatient care in a hospital, hospice, or residential medical care facility; or (2) continuing treatment by a health care provider.	A disabling physical or mental illness, injury, impairment or condition involving inpatient care in a hospital, nursing home or hospice, or outpatient care that requires continuing treatment or supervision by a health care provider.
Do I get paid for the leave?	An employee may elect or an employer may require accrued paid vacation or personal leave to be substituted in some cases. There is no election to substitute paid sick leave, medical, or family leave for any situation not covered by employer's leave plan.	An employee may elect to substitute accrued paid or unpaid leave of any other type of leave provided by employer.
When must I request leave?	If foreseeable, at least 30 days in advance. Otherwise, as soon as practicable.	In advance in a reasonable and practicable manner.