



CENTER FOR HEALTH LAW  
& POLICY INNOVATION  
Harvard Law School

# NEW TOOL TO FIGHT HEALTH INSURANCE DISCRIMINATION

FILING COMPLAINTS TO STATE INSURANCE COMMISSIONERS

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Center for Health Law  
and Policy Innovation

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# Overview

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- This webinar will:
  - Provide information on what consumers, providers and advocates need to know to file complaints to State Departments of Insurance (DOIs) to fight HIV health insurance discrimination
  - Walk us through each step in the process of completing newly available template complaint letters
  - Discuss next steps in the effort to reduce HIV health insurance discrimination!
- Filing complaints is important because:
  - Complaints to insurance commissioners have been proven to be a powerful tool, often resulting in significant regulatory changes
  - Even if the complaint is initially unsuccessful, it can help support a successful litigation campaign to combat insurance discrimination

# THE IMPORTANCE OF REGULATORY COMPLAINTS

WHY THESE LETTERS ARE CRUCIAL TO IMPROVING HEALTH CARE ACCESS

# THERE ARE MANY FORMS OF DISCRIMINATION

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- Among others, discriminatory practices include:
  - Disproportionately high co-pays, co-insurance, and deductibles that make it impossible for someone living with HIV to afford coverage
  - No coverage for anti-retroviral or other expensive drugs
  - An unfair appeals process that doesn't provide a chance to appeal an eligibility or coverage denial
- The Affordable Care Act (ACA) specifically addresses some discriminatory practices, such as prohibiting:
  - Higher premiums based on health status
  - Denial of coverage for pre-existing conditions
  - Annual/lifetime limits on coverage
- Other discriminatory practices are not explicitly prohibited, but are still protected under broad ACA anti-discrimination provisions and other laws

# STATE INSURANCE COMMISSIONERS ARE RESPONSIBLE FOR ACA ENFORCEMENT

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- Historically, the insurance industry has been regulated almost exclusively by individual state governments
- While under ACA the federal government has some oversight responsibilities, state insurance regulators are charged with frontline oversight
  - With the ACA state regulators must now oversee two insurance markets—the new ACA Marketplaces (Exchanges) & the traditional health insurance market
  - The ACA establishes some regulations that apply only to the Marketplace plans (such as actuarial value standards, network adequacy, uniform summaries of coverage and Essential Health Benefits)
- Some states are actively engaged in their ACA responsibilities, enforcing some of the new transparency and coverage requirements
- However, most states have not overhauled their insurance regulations in response to the ACA
  - DOI complaints will put pressure on states to update their regulations to meet Marketplace oversight responsibilities as required under the law

# INSURANCE COMMISSIONERS NEED TO HEAR COMPLAINTS

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- State DOIs must face consumer pressure in order to effectively regulate their insurance markets
  - Yet, few insurance regulators have received complaints from the HIV community documenting discriminatory practices
  - The lack of complaints allows them to ignore the discriminatory actions of their local health insurers
- Appropriate topics for complaints to state regulators in private health insurance plans include:
  - Changing coverage after the open enrollment period ends
  - Refusing to cover the care and treatment people living with HIV need
  - Requiring unreasonably high cost-sharing for HIV treatment

***We must ensure that our insurance commissioners in every state hear from us and feel the pressure to stop this discrimination!***

# DEPARTMENT OF INSURANCE TEMPLATE COMPLAINTS

WHEN, WHY AND HOW TO USE THESE TEMPLATES

# TARGET AUDIENCE FOR THE DOI TEMPLATE

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- The DOI Template is intended to support the development of grievance letters from advocates/providers to state's DOI regulators
  - Can also be used by consumers although a simplified version of the letter intended for consumer use will be discussed later
- The DOI Template can also be modified to send to insurers
  - We have seen success in states such as Louisiana when this letter was modified to send to insurers
  - Can also consider cc'ing relevant insurers on the letter to regulators to give them notice
  - For help modifying please contact CHLPI



# WHEN TO USE THE DOI TEMPLATE

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- The DOI Template can be used in lieu of, or to compliment, a litigation strategy
  - The purpose of the DOI Template is to draw regulators' attention to consumers' issues
  - A regulatory complaint may avoid creating an unnecessarily adversarial relationship with your state's insurers, the way litigation might
  - Regulators may respond more quickly to a complaint than it would take to resolve the issue in court

OR

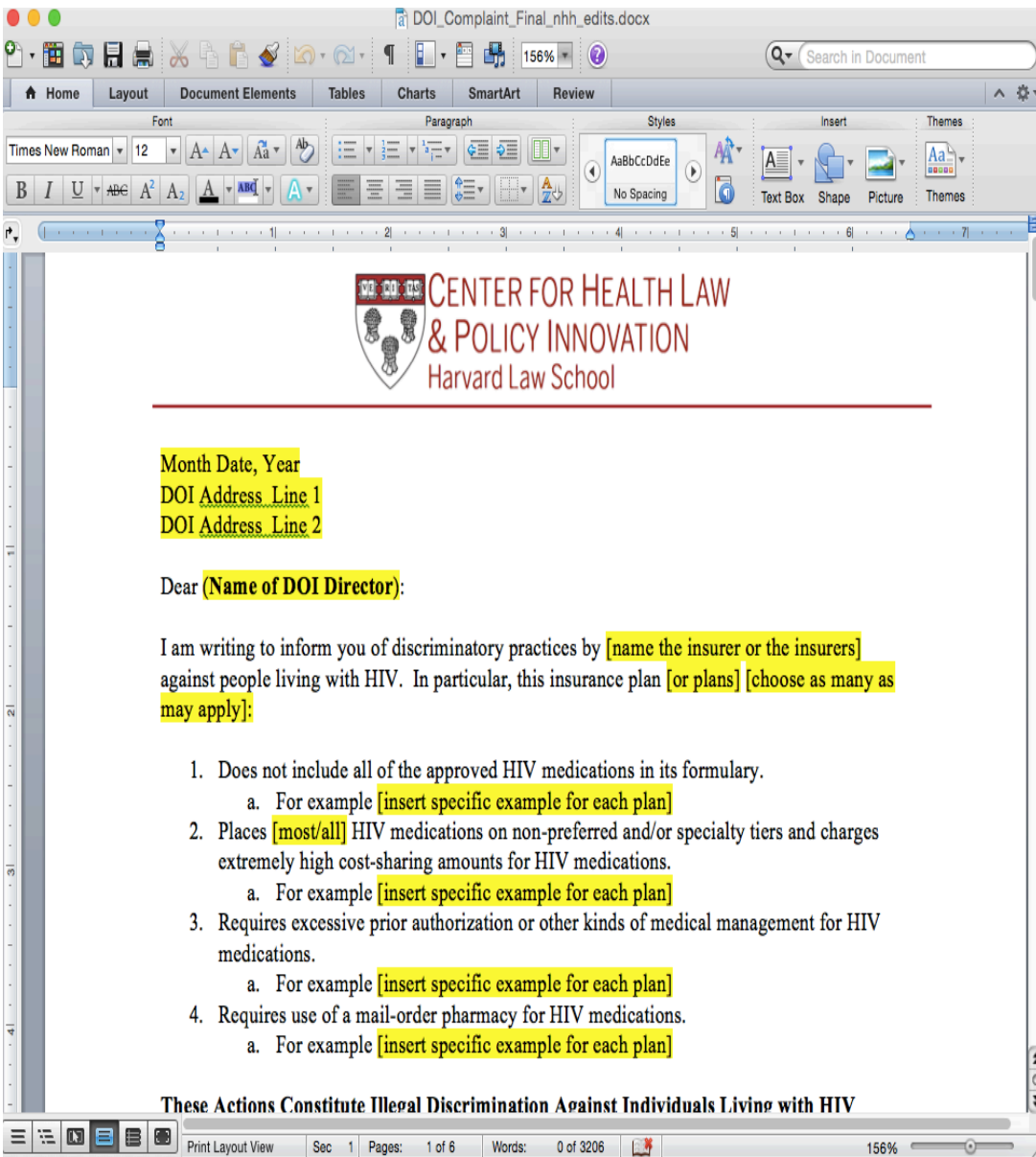
- Even sympathetic regulators may require the pressure of litigation (in addition to the complaint letters) in order to respond effectively
  - We have seen this scenario play out frequently with the U.S. Department of Health and Human Services, who both need political cover and are motivated by impending litigation

# WHY USE THE DOI TEMPLATE

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- The DOI Template can be used to address a variety of complaints:
  - Insurers aren't covering important HIV medications
  - Insurers are changing coverage after the end of open enrollment
  - Insurers are practicing adverse tiering (*i.e.*, placing HIV medications in formulary tiers with high cost sharing)
  - Insurers are requiring onerous prior authorization or other kinds of medical management requirements for HIV medications
  - Insurers are requiring use of mail-order pharmacies for HIV medication (note: federal regulations going into effect in 2016 will help alleviate this issue)
- The most effective letters are those that are specific and detailed!
  - Give medication names, denial of coverage dates, and attach documentation

# HOW TO USE THE DOI TEMPLATE



- The first page will require the most modifications
- All fields requiring your input are highlighted
- Can use the letter to highlight multiple complaints
- Remember to delete the inapplicable material!

# HOW TO USE THE DOI TEMPLATE

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## **These Actions Constitute Illegal Discrimination Against Individuals Living with HIV**

The Patient Protection and Affordable Care Act (ACA) prohibits health insurance issuers with qualified health plans (QHPs) from discriminating against individuals on the basis of disability.<sup>1</sup> All QHPs must provide coverage of Essential Health Benefits (EHB), and a plan does not provide coverage of EHB “if its benefit design, or the implementation of its benefit design, discriminates based on . . . present or predicted disability . . . or other health conditions.”<sup>2</sup> Disability includes HIV, even when a person is in the asymptomatic phase of the illness.<sup>3</sup>

The concerns I have listed above have the effect of both discouraging people with HIV from enrolling in the particular plan(s) and from accessing the care they need to stay engaged in care and health. These actions are inconsistent with the current standard of care for HIV as outlined by the Department of Health and Human Services (HHS) and are discriminatory against individuals living with HIV.

- The next section strongly states the protections guaranteed in the ACA
  - Regulators must be reminded that insurers are prohibited from discriminating against consumers on the basis of disability!
- This section is specific to health plans offered on the Marketplaces
  - If your complaint relates to an employer plan or a Medicare Part D plan contact CHLPI for help modifying the DOI Template
- New federal regulations on this subject may be forthcoming
  - CHLPI will update the DOI Template as necessary

# CURRENT STANDARDS OF HIV CARE

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## The Current Standard of HIV Care

A combination of multiple antiretroviral medications is necessary to suppress the human immunodeficiency virus (HIV), and the most effective combination depends on factors unique to the individual. Left untreated, HIV can replicate by the billions every day, and as it does so, it mutates rapidly. Indeed, HIV has the highest mutation rate of any virus due to its uniquely error-prone process of transforming RNA into DNA. Because it mutates so rapidly, HIV quickly adapts and becomes immune to drugs when treated with only one type of drug at a time or when treatment is interrupted, even briefly.

### A. Medical Guidelines for the Treatment of HIV

The great breakthrough in HIV treatment came in the mid-90s when researchers discovered that effectively fighting the virus requires using multiple types of HIV drugs at the same time.<sup>4</sup> Combination treatments box the virus into a corner, decreasing the amount of the virus in the body to undetectable levels and allowing the immune system to function more normally.<sup>5</sup> Based on this insight, clinicians now combat the virus by prescribing a combination of the following types of antiretroviral drugs:<sup>6</sup> Nucleoside and Nucleotide Reverse Transcriptase Inhibitors (NRTIs), Protease Inhibitors (PIs), Non-nucleoside Reverse Transcriptase Inhibitor (NNRTIs), Entry Inhibitors (EIs), Fusion Inhibitors (FIs), and Integrase Inhibitors (IIs).

HHS guidelines describe the current “state of knowledge” and establish the medical standard of care for the “optimal use” of antiretroviral (ARV) agents for the treatment of HIV infection in adults and adolescents in the United States.<sup>7</sup> The guidelines are a living document that is updated as new treatments become available or new research studies are published. The guidelines include “recommended” regimens and “alternative” regimens<sup>8</sup> and are available online at: <http://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-treatment-guidelines/0>.<sup>9</sup>

- Most regulators will not be familiar with current HIV standards
- This section provides an overview of HHS guidelines, giving regulators a clear benchmark for evaluating the health care access offered by insurers



# ANTI-DISCRIMINATION MANDATES

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## The DOI Must Take Action to Enforce Non-Discrimination Mandates

The DOI must ensure that none of the plans offered through the state health insurance exchange is employing a discriminatory benefit design or engaging in discriminatory marketing practices. In fact, a state should not approve for sale on its exchange any health plans that do not provide essential health benefits (EHB).<sup>29</sup> An issuer does not provide EHB if its benefit design, or the implementation of its benefit design, discriminates 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*.<sup>30</sup> The HHS Notice of Benefit and Payment Parameters for 2016 prohibits plans that discourage individuals with chronic health issues from enrolling. Pursuant to the notice, plans that place drugs for certain conditions on the highest cost tiers discriminate in their plan design: "...if an issuer places most or all drugs that treat a specific condition on the highest cost tiers, we believe that such plan designs effectively discriminate against, or discourage enrollment by, individuals who have those chronic conditions."<sup>31</sup> The regulations also state, "[w]e also caution issuers to avoid discouraging enrollment of individuals with chronic health needs. For example, if an issuer refuses to cover a single-tablet drug regimen or extended-release product that is customarily prescribed and is just as effective as a multi-tablet regimen, we believe that, absent an appropriate reason for such refusal, such a plan design effectively discriminates against, or discourages enrollment by, individuals who would benefit from such innovative therapeutic options."<sup>32</sup> This proscription on discriminatory benefit designs—or implementation of benefit designs—applies to the design or implementation of a drug formulary<sup>33</sup>, selection of pharmacy networks<sup>34</sup>, and the use of medical management techniques.<sup>35</sup> In addition to this very specific prohibition on discriminatory benefit designs, the ACA and its implementing regulations impose more general prohibitions against discrimination based on disability,<sup>36</sup> and HIV is a qualifying disability even in its asymptomatic stage.<sup>37</sup>

- This section discusses federal anti-discrimination regulatory language and explains that state DOIs are responsible for enforcing these regulations
- Again, these regulations may be subject to change

# CONSUMER AND OTHER DOI TEMPLATES

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- The Consumer DOI Template is intended for use by consumers who may not feel as comfortable with some of the scientific and legal language of the DOI template
- The Consumer DOI Template:
  - Is shorter (three v. seven pages)
  - Has minimal citations
  - Has an extremely abbreviated standard of care section
  - Has a shortened anti-discrimination mandates section
- Consumers are welcome to use the longer DOI Template, if they feel comfortable with it
- CHLPI is working on several other, related, DOI Templates, including:
  - A hepatitis C specific template
  - A generic, non-disease specific, template
  - Template appeals letters for providers to use with insurers

# CONCLUSION

NEXT STEPS, FINAL TIPS, AND QUESTIONS



# FINAL TIPS FOR USING THE DOI TEMPLATES

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- Always download a fresh copy of the DOI Template (consumer or provider) from [chlpi.org](http://chlpi.org), [hivhealthreform.org](http://hivhealthreform.org) or HIVMA's website
  - These templates may be subject to changes, especially if new federal regulations are issued
- Consider contacting CHLPI when using the DOI Template
  - We may be able to better tailor the Template for your needs
  - We may be able to give you insight into what other providers, advocates, and consumers in your state have done
- Let CHLPI know you are using the DOI Template, even if you don't wish to consult with us
  - It will be helpful to know who is using the DOI Template and what sort of pressure regulators are facing in each state
- Please share this resource widely
  - The more letters, the more powerful the impact!

# NEXT STEPS AFTER USING THE DOI TEMPLATES

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- Consider sending your complaint electronically and in hardcopy
  - A hardcopy can be a good follow up to a PDF'ed letter electronically sent to the appropriate regulators
- Follow up within a few weeks and offer to meet with regulators to discuss
- Let insurers know you are sending information to regulators so that they will feel pressure
  - Can cc insurers on these letters or send separate letters
  - Offer to meet with insurers
- Consider a litigation strategy in tandem with regulatory complaints and appeals
  - You do not have to choose one over the other
  - Litigation can be slower and costlier than regulatory complaints



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