



Issue Brief

Essential Health Benefits: Exceeding EHBs and the Defrayal Requirement

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ESSENTIAL HEALTH BENEFITS: EXCEEDING EHBs AND THE DEFRAVAL REQUIREMENT

Beginning in 2014, the federal Patient Protection and Affordable Care Act (ACA) required that most plans sold in the individual and small group markets offer a comprehensive set of benefits, called Essential Health Benefits (EHBs).¹ EHBs are 10 statutory categories of tests, treatments, and services for which coverage is required by federal regulation based on a state plan benchmark. Over time, states may wish to change the EHBs to include different tests, treatments, and services. States can do so by introducing new benefit mandates through state law or by adjusting the benchmark plan that sets EHBs in the state. If the state introduces a new benefit mandate that is not included in California's current definition of EHBs, the benefit might require defrayal, or state payment either directly to the patient or to the Qualified Health Plan (QHP) covering the benefit.

This issue brief explains:

- What defrayal is and what triggers defrayal;
- How defrayal costs are determined;
- How mandates may be introduced without triggering defrayal; and
- An example of two states that introduced the same mandate that exceeded EHBs in different ways.

This issue brief is part of a two-brief series produced by the California Health Benefits Review Program (CHBRP) that provides background on EHBs in California and how they could change in future years. See the companion issue brief, *Essential Health Benefits: An Overview of Benefits, Benchmark Plan Options, and EHBs in California*, for an overview of how EHBs are defined at the federal level and in California and the types of health insurance currently subject to EHBs in California.²

Defrayal in California

States can require, through health insurance benefit mandates, that health plans and policies subject to EHBs to cover additional benefits beyond EHBs.³ If the state does so, the state may be required by the ACA to make payments to defray the cost of the additionally mandated benefits, either by paying the enrollee directly or by paying the QHP. This is called defrayal.

What triggers defrayal?

For a state benefit mandate to exceed the definition of EHBs in California, thus triggering the requirement that the state defray the costs, the following must be true:

- The state benefit mandate would apply to QHPs sold through Covered California;
- The state benefit mandate is enacted after December 31, 2011;
- The state benefit mandate is not covered in the Kaiser Foundation Health Plan Small Group HMO 30 plan that is part of California's definition of EHBs;

¹ 42 U.S.C. § 18022

² See CHBRP's companion issue brief, *Essential Health Benefits: An Overview of Benefits, Benchmark Plan Options, and EHBs in California*, available at: <https://www.chbrp.org/other-publications/issue-briefs>.

³ 42 U.S.C. §18031(d)(3)(B).

- The state benefit mandate is not covered under basic health care services, as required by the Knox-Keene Health Care Service Plan Act of 1975; and
- The state benefit mandate is specific to care, treatment, and/or services, thus meeting the definition of a benefit mandate that would exceed EHBs.⁴

The federal definition of a state benefit mandate that can exceed EHBs is “specific to the care, treatment, and services that a state requires issuers to offer to its enrollees.”⁵ State rules around service delivery method (e.g., telemedicine), provider types, cost sharing, or reimbursement methods are not considered state benefit mandates that would trigger the requirement for the state to defray the costs even though plans and policies in a state must comply with these requirements.

For California, it is unclear which entity or person would be responsible for the determination of whether a benefit mandate requires defrayal. Federal guidance established the “State” as the entity that would identify when a state benefit mandate exceeds EHBs; however, the state entity would be subject to federal oversight.⁶ To date, there are no federal guidelines that specifically designate this responsibility. Additionally, California has not yet officially determined who or which agency would be the responsible party for determining whether a benefit exceeds EHBs.

How are defrayal costs determined?

For mandates that do exceed EHBs, federal guidance establishes QHPs as the responsible entities for calculating the marginal cost that must be defrayed. However, federal guidance leaves state flexibility in how this would be calculated, which should be based on the cost to QHPs of providing coverage for the newly mandated care, treatment, or service. Federal guidance states that calculation of defrayal can be based on “either a statewide average or each QHP issuer’s actual cost.”⁷ California has not yet had an instance in which defrayal has been required, and there is no available state guidance as to how California would calculate or administer defrayal payments.

As of August of 2023, two states, Utah and Massachusetts, have documented instances of benefits exceeding EHBs and thereby requiring defrayal. In Utah, Applied Behavior Analysis (ABA) Therapy for people with autism was determined to exceed EHBs in 2014.^{8,9} Following federal guidance, the state is paying the defrayal cost to each QHP, which is calculating the “insurer’s actual cost.”¹⁰ Documents from other states reference a benefit mandate in Massachusetts that requires defrayal; however, information about that benefit and how the cost is defrayed is not publicly available.¹¹

The California Health Benefits Review Program (CHBRP) has developed a methodology-approach of projecting the potential cost to the state of enacting a benefit mandate that would exceed EHBs, and would, therefore, require defrayal. When CHBRP analyzes a proposed health benefit mandate that may exceed EHBs, CHBRP what the statewide cost of defrayal would be. To calculate this estimate, CHBRP

⁴ Essential Health Benefits Final Rule. *Federal Register*, Vol. 87, No. 27. February 25, 2013. Available at: www.gpo.gov/fdsys/pkg/FR-2013-02-25/pdf/2013-04084.pdf.

⁵ *Ibid*.

⁶ Frequently Asked Questions on Defrayal of State Additional Required Benefits. *Centers for Medicare and Medicaid Services*. October 23, 2018. Available at: <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQ-Defrayal-State-Benefits.pdf>.

⁷ Essential Health Benefits Final Rule. *Federal Register*, Vol. 87, No. 27. February 25, 2013. Available at: www.gpo.gov/fdsys/pkg/FR-2013-02-25/pdf/2013-04084.pdf.

⁸ Utah Admin. Code R590-283-1 – Authority.

⁹ Utah State Bulletin. Vol. 2019, No. 22. Rule R590-283 - Defrayal of State Required Benefits. Available at: <https://rules.utah.gov/publicat/bulletin/2019/20191115/44181.htm>.

¹⁰ Essential Health Benefits Final Rule. *Federal Register*, Vol. 87, No. 27. February 25, 2013. Available at: www.gpo.gov/fdsys/pkg/FR-2013-02-25/pdf/2013-04084.pdf.

¹¹ Maine Bureau of Insurance. *A Report to the Committee on Health Coverage, Insurance, and Financial Services 131st Maine Legislature. Concerning LD 1539: An Act to Provide Access to Fertility Care*. January 2023. Available at: <https://legislature.maine.gov/doc/9670>.

estimates the premium cost of a mandated benefit at the per member per month level, then applies this premium increase equally across all enrollees in plans and policies subject to EHBs. Table 1 shows an example of such calculations from CHBRP's analysis of Senate Bill 635 (2023), which would have required coverage of hearing aids for enrollees under age 22 years. CHBRP does not factor in offsets should coverage of the specified test, treatment, or service lead to an increase or reduction in related health care utilization. CHBRP assumes that defrayal would also be required for the portion of enrollees who had coverage without mandate - not just those for whom benefit coverage would change

Table 1. Example of Estimated State-Defrayal Costs for Portion of Mandate, SB 635 (2023)

	DMHC-Regulated		CDI-Regulated		TOTAL
	Small Group	Individual	Small Group	Individual	
Enrollee counts					
Total enrollees in plans/policies subject to state mandates	2,212,000	2,618,000	35,000	127,000	4,992,000
Number of enrollees in QHPs (a)	2,047,000	2,561,000	35,000	71,000	4,714,000
Premium cost of mandated benefit					
Estimated per member per month premium cost of mandated benefit (b)	\$0.25	\$0.15	\$0.27	\$0.19	\$0.20
Estimated annual state-responsibility for portion of mandate that is in excess of EHB					
Full estimated cost (e) = (a) x (b) x 12	\$6,250,000	\$4,746,000	\$112,000	\$159,000	\$11,268,000

Source: California Health Benefits Review Program, 2023.

Notes: (a) States are required to defray the costs of state-mandated benefits that are in excess of the EHB for QHPs. QHPs are a subset of the plans offered in the individual and small group markets.

(b) Estimated full cost of the mandated benefit without offsets for reduction in costs for related benefits that are EHBs.

Key: CDI = California Department of Insurance; DMHC = Department of Managed Health Care; EHB = essential health benefit; QHP = qualified health plan.

Can new mandates be introduced without triggering defrayal?

As previously mentioned, new health benefit mandates do not require defrayal when they do not exceed the state's definition of EHBs. Premiums, however, may increase as a result of a new benefit mandate.

Additionally, new benefit mandates through state law are not the only way in which states can alter what QHPs are required to cover. States may also update their EHB benchmark plan. As discussed in *Essential Health Benefits: An Overview of Benefits, Benchmark Plan Options, and EHBs in California*, states can adopt a new benchmark plan or revise the existing one, resulting in a change in EHBs. Adding benefits through introduction of a new benchmark plan does not trigger defrayal.^{12, 13} Premiums, however, may increase as a result of setting a new benchmark plan.¹⁴

Importantly, if a benefit mandate established after December 31, 2011 already requires defrayal, inclusion of that benefit in a new benchmark plan does not change the defrayal requirement. The state must continue to defray costs for that benefit.¹⁵ As a result, the method in which a new EHB is added by the

¹² See CHBRP's companion issue brief, *Essential Health Benefits: An Overview of Benefits, Benchmark Plan Options, and EHBs in California*, available at: <https://www.chbrp.org/other-publications/issue-briefs>.

¹³ Centers for Medicare & Medicaid Services. *Frequently Asked Questions on Defrayal of State Additional Required Benefits*. 23 October 2018. Available at: <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQ-Defrayal-State-Benefits.pdf>.

¹⁴ *Ibid.*

¹⁵ Turner W, Hernández-Delgado H, and Miller E. *Advancing Health Equity Through Essential Health Benefits*. National Health Law Program. 21 November 2022. Available at: https://content.naic.org/sites/default/files/call_materials/Advancing%20Health%20Equity%20Through%20Essential%20Health%20Benefits.pdf

state – by legislative mandate or by benchmark-plan setting – determines the cost to the state of requiring coverage of the new benefit.

Case study: Utah and South Dakota

States have used multiple approaches to updating their EHBs. These options are illustrated by the difference between how the states of Utah and South Dakota added mandated coverage of Applied Behavior Analysis (ABA) Therapy for people with autism.

In 2014, Utah passed legislation requiring coverage for ABA therapy for QHP enrollees, and the law was expanded in 2019. Because this was a new benefit added after December 31, 2011 that was not included in Utah's benchmark plan, the state was required to defray the cost for QHPs that cover EHBs. Each year, QHPs that offer insurance on the state's marketplace can request defrayal from the insurance commissioner to cover the cost of ABA Therapy.^{16, 17} In 2020, the cost of defrayal for the whole market was estimated to likely be between \$700,000 and \$2,800,000.¹⁸ As a result of the defrayal, premiums in the individual market will decrease by 0.003% to 2.1%, depending on the QHP.

In 2019, South Dakota proposed a new definition of EHBs for plan year 2021 that was approved by CMS. The new benchmark plan includes coverage of ABA Therapy. Because South Dakota updated their benchmark plan prior to passing legislation to mandate ABA Therapy coverage, the requirement did not trigger defrayal. Premiums for QHPs in South Dakota may increase as a result, but the state will not be required to offset the cost.

Utah is required to pay defrayal because their legislature introduced a new benefit mandate without changing its definition of EHBs, while South Dakota is not subject to payments due to their updated benchmark plan. Utah would not have been required to pay defrayal if they had updated their benchmark plan to include ABA Therapy instead of passing a legislative mandate.¹⁹ States may consider these options when deciding how to introduce new benefit mandates.

Conclusion

Defrayal costs are required when a state enacts a new health benefit mandate that is not included in the benchmark plan. Defrayal costs are determined by the cost to the market of providing the benefit. States may opt to update their benchmark plan to add new EHBs rather than add them through legislative mandates in order to avoid the requirement to defray costs. California does not currently have any benefit mandates that require defrayal, nor has California updated its benchmark plan since the passage of the ACA. California may consider these options as policymakers decide to implement new benefit mandates.

¹⁶ Utah Admin. Code R590-283-1 – Authority.

¹⁷ ABA Therapy is currently the only state-required benefit in Utah that requires defrayal (Utah State Bulletin. Vol. 2019, No. 22. Rule R590-283 - Defrayal of State Required Benefits. Available at: <https://rules.utah.gov/publicat/bulletin/2019/20191115/44181.htm>).

¹⁸ Utah State Bulletin. Vol. 2019, No. 22. Rule R590-283 - Defrayal of State Required Benefits. Available at: <https://rules.utah.gov/publicat/bulletin/2019/20191115/44181.htm>

¹⁹ Turner W and Hernández-Delgado H. Essential Health Benefits: Best Practices in State Benchmark Selection. National Health Law Program. 22 July 2022. Available at: <https://healthlaw.org/wp-content/uploads/2022/07/Essential-Health-Benefits-Best-Practices-plus-appendix-7.26.2022.pdf>.

ABOUT CHBRP

The California Health Benefits Review Program (CHBRP) was established in 2002. As per its authorizing statute, CHBRP provides the California Legislature with independent analysis of the medical, financial, and public health impacts of proposed health insurance benefit-related legislation. The state funds CHBRP through an annual assessment on health plans and insurers in California.

An analytic staff based at the University of California, Berkeley, supports a task force of faculty and research staff from multiple University of California campuses to complete each CHBRP analysis. A strict conflict-of-interest policy ensures that the analyses are undertaken without bias. A certified, independent actuary helps to estimate the financial impact. Content experts with comprehensive subject-matter expertise are consulted to provide essential background and input on the analytic approach for each report. Detailed information on CHBRP's analysis methodology, authorizing statute, as well as all CHBRP reports and other publications are available at <http://www.chbrp.org/>

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CHBRP assumes full responsibility for the issue brief and the accuracy of its contents. All CHBRP bill analyses and other publications are available at www.chbrp.org.

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