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LEGAL ALERT

HHS Proposes Revisions to ACA Section 1557 Regulations

At the end of May, the Department of Health and Human Services (HHS) released a [proposed rule](#) to revise regulations previously released under Section 1557 of the Affordable Care Act (ACA). The HHS goal with the proposed rule is to remove what the department views as redundancies and inconsistencies with other laws, as well as reduce confusion.

Changes in Compliance with Section 1557 Proposed Rule

ACA Section 1557 applies to “covered entities” – i.e., health programs or activities that receive “federal funding” from HHS (except Medicare Part B payments), including state and federal Marketplaces. Examples include hospitals, health clinics, community health centers, group health plans, health insurance issuers, physician’s practices, nursing facilities, etc.

Under current rules, “covered entities” include employers with respect to their own employee health benefit programs if the employer is principally engaged in providing or administering health programs or activities (i.e., hospitals, physician practices, etc.), or the employer receives federal funds to fund the employer’s health benefit program. Group health plans themselves are subject to the rule if they receive federal funds from HHS (e.g., Medicare Part D Subsidies, Medicare Advantage). In other words, employers who aren’t principally engaged in providing health care or health coverage generally aren’t subject to these rules directly unless they sponsor an employee health benefit program that receives federal funding through HHS, such as a retiree medical plan that participates in the Medicare Part D retiree drug subsidy program.

The most prominent proposed change is to the provision in Section 1557 which provides protections against discrimination on the basis of race, color, national origin, sex, age, and disability in certain health programs or activities. HHS’ proposed regulation would revise the definition of discrimination “on the basis of sex” that currently includes termination of pregnancy, sex stereotyping, and gender identity. The proposed rule, if finalized, would remove gender identity, stereotyping, and pregnancy termination as protected categories under Section 1557—though they will remain protected under other civil rights laws and regulations.

Certain compliance requirements on covered entities will also change, including the narrowing the scope of who Section 1557 regulates. Entities *not* principally engaged in healthcare will be subject to Section 1557 only to the extent they are funded by HHS. Entities whose primary business is providing

healthcare will also be regulated if they receive federal financial assistance. A “health program or activity” specifically would not include employee benefit programs, including short-term plans and self-funded ERISA plans as long as they do not receive funding from HHS. The proposed rule also regulates insurance carriers only with respect to products for which the carrier receives federal financial assistance; the current rule regulates all products if the carrier received federal funding for at least one product.

Additionally, more flexible standards concerning individuals with limited English proficiency are proposed, including revising the “tagline” requirement. The tagline requirement requires distributing certain notices in 15 different languages in every “significant” publication associated with a health plan (anything larger than a brochure or postcard). HHS views this requirement as being too costly without data to back up that the taglines are beneficial. If the proposed rule is finalized, the tagline requirement will be eliminated.

Although there are provisions and definitions that will be changed or eliminated, parts of Section 1557 will remain intact. Likewise, HHS expects other agencies and departments to oversee and enforce nondiscrimination laws that will no longer be under HHS purview.

What to Expect Next

HHS is required to allow public comments of the proposed rule until approximately July 23, 2019. Once public commenting is closed and considered, HHS will likely release a final rule with answers to certain comments unless there are major changes to the proposed rule.

Until the proposed rule is finalized, employers who are covered entities (or whose plans are covered entities) should continue to treat termination of pregnancy, sex stereotyping, and gender identity as protected categories in relation to health programs and activities. Likewise, all other areas of Section 1557 should continue to be followed, including who is regulated and the tagline requirement. States and localities may give greater protections so it is important to keep in mind that there may be further requirements under those local laws and regulations.

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