ACA COMPLIANCE BULLETIN

HHS ISSUES PROPOSED RULE ON ACA SECTION 1557 NON-DISCRIMINATION RULES

HIGHLIGHTS

- HHS issued a proposed rule revising the gender identity and language access protections in the Section 1557 final rule.
- The proposed rule was issued in response to a federal court injunction blocking enforcement of the final rule's gender identity and abortion provisions.
- These proposals will not take effect until finalized by HHS.

IMPORTANT DATES

January 1, 2017
Most Section 1557 provisions took effect for the first plan year beginning on or after Jan. 1, 2017.

May 24, 2019
HHS issued a proposed rule rolling back protections related to gender identity and language access.

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OVERVIEW

On May 24, 2019, the Department of Health and Human Services (HHS) issued a proposed rule to revise the Section 1557 nondiscrimination regulations under the Affordable Care Act (ACA). Specifically, the proposed rule would amend provisions related to gender identity and language access protections by:

- ✓ Eliminating the "definitions" section, effectively removing gender identity and termination of pregnancy from being included as "sex discrimination"; and
- ✓ Eliminating the requirement that regulated health companies distribute nondiscrimination notices and tagline translation notices in at least 15 languages to patients and customers.

This proposed rule was issued in response to a federal court injunction blocking enforcement of the Section 1557 nondiscrimination provisions related to gender identity or abortion. It represents a significant shift from the Obama administration's interpretation of Section 1557 protections. The proposals will not take effect until finalized.

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Overview of the Section 1557 Final Rule

ACA Section 1557 is the first federal civil rights law to broadly prohibit discrimination on the basis of sex in federally-funded health programs. Previously, civil rights laws enforced by the Office of Civil Rights (OCR) broadly barred discrimination based only on race, color, national origin, disability or age. The Section 1557 nondiscrimination protections apply to all health programs and activities that receive federal funding from HHS or that are administered by HHS, including both federally facilitated and state-based Exchanges.

On May 13, 2016, HHS issued a final rule implementing ACA Section 1557 regarding nondiscrimination in federally funded health programs. The final rule:

- ✓ Prohibits discrimination in health care on the basis of race, color, national origin, age, disability and sex (including discrimination based on termination of pregnancy, gender identity and sex stereotyping);
- ✓ Enhances language assistance for people with limited English proficiency; and
- ✓ Helps to ensure effective communication for individuals with disabilities.

In August 2016, five states and three Christian-affiliated health care groups filed a lawsuit challenging the Section 1557 final rule, arguing that the rule forces them to perform and provide insurance coverage for gender transition services and abortions against their religious beliefs and medical judgment, and violates the federal Administrative Procedures Act (APA), the Religious Freedom Restoration Act (RFRA) and certain protections in the U.S. Constitution.

On Dec. 31, 2016, the U.S. District Court for the Northern District of Texas issued an **injunction blocking enforcement of the Section 1557 nondiscrimination provisions related to gender identity or abortion**. The Court's injunction does not affect the Section 1557 provisions related to:

- ✓ Nondiscrimination on the basis of disability, race, color, age, national origin or sex (other than gender identity); and
- ✓ Enhanced language assistance for people with limited English proficiency.

The proposed rule is intended to maintain basic nondiscrimination protections on the basis of race, color, national origin, disability, age, and sex, while revising certain provisions of the current regulation that the federal court has said are likely unlawful.

These provisions have continued to be enforced by OCR. On July 10, 2017, the court placed this lawsuit on hold to allow HHS to reconsider the challenged provisions of the regulation.

The Proposed Rule

The proposed rule would revise the Section 1557 final rule to amend provisions related to gender identity and language access protections. According to HHS, the proposed rule is intended to maintain basic

nondiscrimination protections on the basis of race, color, national origin, disability, age, and sex, while revising certain provisions of the current Section 1557 regulation that the federal court has said are likely unlawful.

Specifically, the proposed rule would:

- **Revise provisions that were included in the federal court's preliminary injunction**—The proposed rule would eliminate the "definitions" section of the regulations, effectively removing gender identity and termination of pregnancy from being included as "sex discrimination." These definitions were preliminarily enjoined by the federal court in 2016, which found that they were unlawful and exceeded Congress's mandate. Under the proposed rule, HHS would enforce Section 1557 by returning to the government's longstanding interpretation of "sex" under the ordinary meaning of the word Congress used. HHS also proposes to ensure that the Section 1557 and Title IX regulations include language Congress enacted that protects religious entities, and that prevents Title IX from requiring performance of, or payment for, abortions.

- **Remove costly language access requirements**—The proposed rule would eliminate the requirement that regulated health companies distribute nondiscrimination notices and "tagline" translation notices in at least 15 languages in "significant communications" to patients and customers. According to HHS, these notices have cost the healthcare industry billions of dollars (a cost which is ultimately passed on to consumers and patients), and data does not show that the notices have yielded the intended benefit for individuals with limited English proficiency. However, the proposed rule retains the requirement to take reasonable steps to ensure meaningful access to its programs or activities by individuals with limited English proficiency.

- **Revise various enforcement-related provisions**—The proposed rule would return to the previous enforcement structure for each underlying civil rights law as provided by Congress, and would remove portions of the 2016 regulation that are duplicative of, or inconsistent with, longstanding regulations implementing Title VI, Title IX, Section 504 and the Age Act. In addition, the proposed rule would revise the 2016 regulation's interpretation of Section 1557 as applying to all operations of an entity, even if it is not principally engaged in health care. Instead, the proposed rule would apply Section 1557 to the health care activities of entities not principally engaged in health care only to the extent that they are funded by HHS. For example, the proposed rule would generally not apply to short-term limited duration insurance, because providers of those plans are not principally engaged in the business of health care, and those specific plans do not receive federal financial assistance.

- **Include conscience and religious freedom protections**—The proposed rule would add a requirement that Section 1557 be enforced consistent with the ACA's health care conscience protections (Section 1303 concerning abortion and Section 1553 concerning assisted suicide); health care conscience laws set forth in the Church, Coats-Snowe, Weldon, Hyde, and Helms Amendments; the Religious Freedom Restoration Act; and the First Amendment to the U.S. Constitution.

Application to Employers

Specifically, the Section 1557 final rule applies to:

- ✓ Any health program or activity that receives funding from HHS (such as hospitals that accept Medicare or doctors who receive Medicaid payments);
- ✓ State-based and federally facilitated Exchanges and issuers that participate in those Exchanges; and
- ✓ Any health program that HHS itself administers.

Questions have arisen as to how the Section 1557 nondiscrimination rules apply to employers that offer health benefits to their employees. According to the preamble to the final rule, an employer that receives federal funding and provides an employee health benefit program to its employees will be liable for discrimination in that employee health benefit program only in three defined circumstances:

1. If **the employer is principally engaged in providing or administering health services or health coverage** and receives federal funding, the employer would be subject to Section 1557 in its provision or administration of employee health benefit programs to its employees. (For example, if a hospital provides health benefits to its employees, it will be covered by Section 1557 not only for the services it offers to its patients or other beneficiaries, but also for the health benefits it provides to employees.)
2. If an entity **receives federal funding, the primary objective of which is to fund an employee health benefit program**, that entity's provision or administration of the health benefit program will be covered by Section 1557, regardless of the business in which the entity is engaged.
3. If an employer is not principally engaged in providing or administering health services or health insurance coverage, but **operates a health program or activity (that is not an employee health benefit program) that receives federal funding**, the employer will be covered for its provision/administration of an employee health benefit program, but only with regard to employees in the health program or activity. (For example, when a state receives federal funding for its Medicaid program, the state will be governed by Section 1557 in the provision of employee health benefits for its Medicaid employees, but not for its transportation department employees, assuming no part of the state transportation department operates a health program or activity.)

In summary, **unless the primary purpose of the federal funding is to fund employee health benefits, Section 1557 would not apply to an employer's provision of employee health benefits, if the provision of those benefits is the only health program or activity operated by the employer**. This is the case regardless of whether the employee health benefit program is self-insured or fully-insured by the employer.

The final rule also addresses situations involving employers that do not directly receive federal funding for employee health benefits, such as employers sponsoring self-insured plans that are administered by health insurance issuers offering coverage through an Exchange. The final rule **does not exclude third-party**

administrators (TPAs) providing administrative services to self-insured plans. However, it does adopt specific procedures to govern the processing of complaints in these cases.

The final rule recognizes that TPAs are generally not responsible for the benefit design of the self-insured plans they administer, and that ERISA (and likely the contracts into which TPAs enter with the plan sponsors) requires plans to be administered consistent with their terms. As a result, OCR will determine whether responsibility for the decision or other action alleged to be discriminatory rests with the employer or the TPA.

TPA Liability

Where the alleged discrimination is related to the plan administration by a TPA that is a covered entity, OCR will process the complaint against the TPA liability because the TPA is responsible for the decision or other action being challenged in the complaint. For example, OCR will proceed against the TPA in cases where a TPA:

- Denies a claim because the individual's last name suggests that he or she is of a certain national origin; or
- Threatens to expose an employee's transgender or disability status to his or her employer.

Employer Liability

OCR will typically address the complaint against that employer in cases where:

- **The alleged discrimination relates to a self-insured plan's benefit design** (for example, a plan that excludes coverage for all health services related to gender transition); and
- **OCR has jurisdiction over a claim against an employer under Section 1557 because the employer is separately subject to Section 1557** (for example, the employer is a hospital that receives federal funding and provides health benefits to its employees).

However, if OCR does not have jurisdiction over an employer responsible for benefit design, it typically will refer or transfer the matter to the Equal Employment Opportunity Commission (EEOC) and allow that agency to address the matter.