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# Section 1557 Nondiscrimination Final Rule

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On June 12, 2020, the Department of Health and Human Services ("HHS") issued a final rule which narrows the interpretation and application of the nondiscrimination rules under Section 1557 of the Affordable Care Act ("ACA") by removing protections on the basis of gender identity, further specifying who is subject to Section 1557 and removing certain notice requirements.

Generally, the 1557 rules prohibit discrimination in certain health care programs and activities on the basis of race, color, national origin, sex, age, or disability. Section 1557 has been in effect since 2010. Regulations issued in 2016 extended 1557 rules to most insured group health and some self-funded group health plans. These rules were challenged, and a nationwide injunction prohibited HHS from enforcing nondiscrimination rules related to gender identity and pregnancy. Aspects of the 2016 rules have been vacated and these final rules issued.

Briefly, the final rules:

- Clarify that Section 1557 applies to entities principally engaged in healthcare, as well as to the healthcare activities of other entities to the extent those activities are funded by HHS. This effectively narrows those entities subject to these rules. Specifically,
    - A health insurance carrier is not principally engaged in the business of providing health care and its operations would only be pulled under these rules for the portion that receives federal financial assistances. For example, a carrier that offers policies outside of the Exchange Marketplace that do not receive federal financial assistance would not be subject to this rule.

    - An employer-sponsored health plan will not be subject to Section 1557 provided no federal funding is received from HHS and the employer is not principally engaged in the business of providing health care.

- Remove the notice requirements that required health companies to distribute nondiscrimination notices and "taglines" translation notices in at least fifteen languages within all "significant communications" to patients and customers.

- Repeal provisions of the prior regulations that defined sex discrimination to include discrimination based on sexual orientation and gender identity.

Notably, the final rules narrowly interpret sex discrimination to exclude discrimination based on gender identify or termination of pregnancy. The rule was issued three days before the Supreme Court held that sex discrimination under Title VII of the Civil Rights Act includes discrimination based on an individual's sexual orientation or gender identity. A lawsuit challenging the final rule has been filed and it will be interesting to see whether the definition of discrimination under these Section 1557 rules will stand considering the Supreme Court's ruling.

## Employer Action

Under the final rule, most employer sponsored health plans (including their insurance carriers and TPAs) will not be subject to the 1557 nondiscrimination rules. However, in light of the Supreme Court's recent decision and other state and federal employment laws, employers should proceed with caution around exclusions or limitations in health benefit programs (or other employee benefit plans) based on sexual orientation or gender identity. Employers intending to restrict certain services to only a single gender based on a participant's gender at birth or otherwise excluding transgender services from their group health plans should consult with counsel to understand potential ramifications.

For the fact sheet, visit https://www.hhs.gov/sites/default/files/1557-final-rule-factsheet.pdf