



CLIENT ALERT

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SUMMARY OF KEY CHANGES TO RULES IMPLEMENTING ACA NONDISCRIMINATION PROVISIONS

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On June 19, 2020, the Department of Health and Human Services (“HHS”) released its final ruleⁱ (the “Final Rule”) revising its enforcement of Section 1557 of the Patient Protection and Affordable Care Act (“ACA”).ⁱⁱ In this rule, HHS reversed many of the requirements of the prior rule issued in 2016 (the “2016 Rule”).ⁱⁱⁱ For example, the Final Rule revoked many of the definitions of the 2016 Rule, including the definition of “on the basis of sex.” It also revoked enforcement mechanisms in the 2016 Rule and revised application of the nondiscrimination provisions.

I. WHAT IS THE ACA’S NONDISCRIMINATION PROVISION?

The ACA’s general nondiscrimination provision (“Section 1557”) prohibits discrimination on the basis of race, sex, age, and disability by prohibiting covered entities from engaging in conduct made illegal by four federal nondiscrimination laws. Generally, the prohibitions in Section 1557 apply to health programs or activities that receive Federal financial assistance. Section 1557 states:

[A]n individual shall not, on the ground prohibited under “[title VI of the Civil Rights Act of 1964 (“Title VI;” prohibiting discrimination on the basis of race, color, or national origin), title IX of the Education Act of 1972 (“Title IX;” prohibiting discrimination on the basis of sex), the Age Discrimination Act of 1975 (“Age Act;” prohibiting discrimination on the basis of Age), or Section 794 of the Rehabilitation Act (“Rehabilitation Act;” prohibiting discrimination on the basis of disability)] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

II. UNDER THE FINAL RULE, WHAT ENTITIES DOES SECTION 1557 APPLY TO?

Some of the major changes from the 2016 Rule to the Final Rule were the rules discussing who was prohibited from discriminating under Section 1557. The old 2016 Rule made Section 1557 applicable to (1) all health programs and activities of a covered entity, when any part of it received Federal financial assistance; (2) health programs and activities administered by HHS, including the Federal marketplaces; and (3) health programs and activities administered by entities established under Title 1 of the ACA, including the State-based markets.^{iv} Additionally, the 2016

Rule applied to the overall operations of an entity that receives federal financial assistance and was principally engaged in health services, health insurance coverage, or other health coverage, even if only part of the entity receives Federal financial assistance. Finally, the 2016 Rule applied the prohibitions in Section 1557 to entities that provide or administer health-related insurance or other health-related coverage.^v

Under the new Final Rule, Section 1557 still applies to any health program or activity, any part of which is receiving Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by HHS. However, unlike the prior regulations, for those entities that are not principally engaged in the business of providing healthcare, the nondiscrimination provisions apply to such entity’s operations only to the extent any such operation receives Federal financial assistance. Additionally, the nondiscrimination provisions apply to any programs or activities taking place on the Federal or State-level marketplaces, established under Title I of the ACA. The Final Rule also makes clear that health insurance companies are not considered to be principally engaged in the provision of healthcare solely because they sell health insurance, if not doing so through one of the marketplaces. Due to this change, many health insurers will likely argue that when the rule changes take effect, Section 1557 no longer applies to them, or if it does, only to a small portion of its program. Benefits administrators may or may not be able to make a similar argument.

III. DISCRIMINATION ON THE BASIS OF SEX

Among the prohibitions of Section 1557 is discrimination on the basis of sex. That general prohibition did not change with the Final Rule. However, the 2016 Rule stated this prohibited discrimination on the basis of sexual orientation, gender identity, and on the basis of “pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.”^{vi} The 2016 Rule defined “gender identity” as “an individual’s internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual’s sex assigned at birth.”^{vii} As a result, many providers and health insurance companies were required to provide or cover services related to gender transition. Additionally, the inclusion of “termination of pregnancy” meant that women could not be discriminated against on the basis of having had an abortion.

The Final Rule removed the definition of “on the basis of sex.” Accordingly, discrimination on the basis of sexual orientation, gender identity, and termination of pregnancy is no longer explicitly within the nondiscrimination prohibitions of the ACA. In a press release discussing the new Final Rule, HHS stated that it will “enforce Section 1557 by returning to the government’s interpretation of sex discrimination according to the plain meaning of the word “sex” as male or female and as determined by biology.”^{viii}

IV. WHAT ABOUT THE ENFORCEMENT MECHANISMS?

The Final Rule repealed certain enforcement provisions of the 2016 Rule.^{ix} The prior 2016 Rule provided for compensatory damages if an entity violated Section 1557. The new Final Rule removes the rule allowing compensatory damages for all violations of Section 1557 and instead incorporates the enforcement mechanisms contained in the statutes and implementing regulations of the underlying four nondiscrimination statutes (Title VI, Title IX, the Age Act, or the Rehabilitation Act)^x. The Department cited the prior 2016 Rule as having confusing and inconsistent enforcement mechanisms, and contended that by incorporating the enforcement mechanisms of the underlying statutes, it would “minimize the patchwork effect of the 2016 Rule by using a familiar regulatory regime...”^{xi}

V. CONCLUSION

HHS’s change to the rules implementing Section 1557 will have many effects felt in the healthcare and insurance industries. While the Department contends these changes are positive and will result in a cost savings of \$2.6 billion over the next 5 years, many civil rights groups contend the changes are detrimental to vulnerable individuals.

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- i. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020).
 - ii. 42 U.S.C. § 18116.
 - iii. 81 FR 31375 (May 18, 2016).
 - iv. *Id.* at 31378.
 - v. *Id.* at 31428.
 - vi. 81 Fed. Reg. at 31387.
 - vii. 45 C.F.R. § 92.4.
 - viii. <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>
 - ix. 45 C.F.R. §§ 92.301-303.
 - x. 85 Fed. Reg. at 37245.
 - xi. 85 Fed. Reg. at 37202.