MY BENEFIT ADVISOR

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HHS Proposes Expanded Section 1557 Nondiscrimination Rules

On July 25, 2022, the Department of Health and Human Services ("HHS") issued a proposed rule that intends to broaden the interpretation and application of the nondiscrimination rules under Section 1557 of the Affordable Care Act ("ACA") to include:

- Reinstatement of protections on the basis of gender identity,
- Expanding who is subject to Section 1557, and
- Reinstating certain notice requirements.

While Section 1557 generally applies to covered entities, these changes may impact some employer sponsored group health plans.

Background

Section 1557, which has been in effect since the ACA was enacted in 2010, prohibits discrimination in certain health care programs and activities on the basis of race, color, national origin, sex, age, or disability. Initial regulations issued in May 2016 were partially repealed under current regulations issued in June 2020. There have also been numerous court challenges under Section 1557, including those on religious grounds.

This article only addresses details under the proposed rule that would likely apply to employers who sponsor group health plans. If finalized as is, the new rule's effective date would generally be 60 days after publication in the Federal Register. However, it appears provisions applicable to plans would be effective as of the next plan year.

Highlighted Changes to the Rule

The related HHS press release highlights changes under the rule, as follows (with additional commentary added):

» Reinstates the scope of Section 1557 to cover HHS' health programs and activities.

- This would broaden the situations where Section 1557 may apply, by mostly reverting back to the 2016 rule, and undoing the 2020 rule that narrowly applies to entities "principally engaged" in healthcare.

- For employer purposes, the proposed rule would generally apply to every health program or activity, any part of which receives federal financial assistance, directly or indirectly, from HHS.

- "Covered entities" are recipients of such assistance and could include state or local health agencies; hospitals; health clinics; health insurance issuers; physician's practices; pharmacies; community-based health care providers; nursing facilities; and residential or community-based treatment facilities.

- A "health program or activity" will mean any project, enterprise, venture or undertaking to provide or administer health-related services, health insurance coverage, or other health-related coverage; provide assistance to persons in obtaining health-related services, health insurance coverage, or other health-related coverage; provide clinical, pharmaceutical, or medical care; engage in health research; or provide health education for health care professionals or others.

» Clarifies the application of Section 1557 nondiscrimination requirements to health insurance issuers that receive federal financial assistance.

- This would undo the 2020 rule that narrows applicability specifically to health insurance products for which an issuer received federal financial assistance.

- Any health insurance issuer receiving any federal financial assistance, such as through offering of Marketplace coverage, would have to comply with nondiscrimination requirements for all its health insurance business, including when it serves as a TPA for self-insured group health plans.

    - The Office of Civil Rights (OCR) can hold TPAs responsible for discriminatory action the TPAs control with respect to plan design and administration.

- Most significantly, the proposed rule would not apply Section 1557 to an employer's employment practices, including its health benefits programs, even if offered by a covered entity such as a health care provider.

    - For a discriminatory self-insured plan design controlled by a plan sponsor, whether or not a covered entity, OCR can refer complaints to the EEOC or the DOJ, such as for possible violations of Title VII of the Civil Rights Act of 1964.

    - Though employers sponsoring employee health benefit plans may not be directly subject to the proposed rule, individuals covered by such plans may have certain rights and receive various communications from an issuer or TPA pertaining to Section 1557.

» Aligns regulatory requirements with Federal court opinions to prohibit discrimination on the basis of sex including sexual orientation and gender identity.

- This is consistent with the Supreme Court conclusion in Bostock v. Clayton County, GA, and HHS' previously announced interpretation and enforcement of Section 1557 pursuant to that case.

» Makes clear that discrimination on the basis of sex includes discrimination on the basis of pregnancy or related conditions, including “pregnancy termination.”

- This would reverse the 2020 rule that narrowly interprets sex discrimination to exclude discrimination based on termination of pregnancy.

Additional Requirements for Covered Entities

In addition, the proposed rule lays out several requirements that specifically apply to covered entities. Briefly, this includes:

- Create and implement civil rights policies and procedures. Covered entities, in their health programs and activities, would be required to adopt and implement a nondiscrimination policy, grievance procedures (only if employing 15 or more persons), language access procedures, auxiliary aids and services procedures, and procedures for reasonable modifications for individuals with disabilities. Sample documents are expected.

- Implement a Section 1557 coordinator and training. Requires entities to give staff training on the provision of language assistance services for individuals with limited English proficiency (LEP), and effective communication and reasonable modifications to policies and procedures for people with disabilities. Initial training would be required as soon as practicable, but no later than one year after the effective date of a final rule; new relevant employees must be trained within a reasonable period of time after hire date.

- Provide notice of nondiscrimination. Requires covered entities to provide a notice of nondiscrimination along with a notice of the availability of language assistance services and auxiliary aids and services.

- Explicitly prohibits discrimination in the use of clinical algorithms to support decision-making in covered health programs and activities.

- Expand language access in telehealth. Clarifies that nondiscrimination requirements applicable to health programs and activities include those services offered via telehealth, which must be accessible to LEP individuals and individuals with disabilities.

- Interprets Medicare Part B as federal financial assistance. This would make the proposed rule applicable to a broader range of health care providers, and not just those obtaining federal financial assistance under Medicare Part A.

- Refines and strengthens the process for raising conscience and religious freedom objections. Provides recipients the ability to raise their views on application of conscience or religious freedom laws to HHS.

Employer Action

Under the proposed rule, if finalized as is, employers that are covered entities will again be subject to certain HHS Section 1557 nondiscrimination rules and other requirements. Non-covered entities with employer-sponsored health plans will not be directly subject to 1557 nondiscrimination rules and other requirements. However, carriers and TPAs that administer health insurance coverage may be subject to these requirements. Further, the guidance serves as a reminder to all employers that discriminatory practices in a group health plan may raise issues under other federal laws, including Title VII of the Civil Rights Act.

Employers should review and consider removing exclusions or limitations based on a member's sexual orientation or gender identity – for example, limiting services to only a single gender based on a participant's gender at birth or otherwise excluding transgender services. Under the proposed rule, OCR may refer plans to the EEOC or DOJ if it finds discriminatory terms that are not enforceable under 1557 but may be under other federal employment laws. As described above, covered entities, such as hospitals, physician groups and entities providing health research and health education, should consult with their employment and/or healthcare legal counsel regarding steps for compliance, including:

- Applicability of HHS Section 1557 regulations, particularly those receiving federal financial assistance primarily through Medicare Part B;
- Drafting and implementation of civil rights policies and procedures;
- Creating and providing staff training on the provision of language assistance services for LEP individuals, and effective communication and reasonable modifications to policies and procedures for people with disabilities;
- Creating and distributing a notice of nondiscrimination along with a notice of the availability of language assistance services and auxiliary aids and services;
- Evaluating decision-making processes in covered health programs and activities to ensure clinical algorithms are not being used; and
- Confirming services offered via telehealth are accessible to LEP individuals and individuals with disabilities.