HALL RENDER
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HHS RECEIVES THOUSANDS OF COMMENTS ON PROPOSED REVERSAL OF CERTAIN DISCRIMINATION PROTECTIONS

On June 14, 2019, the U.S. Department of Health and Human Services ("HHS") published in the Federal Register a proposal to revise certain civil rights anti-discrimination regulations implementing and enforcing Section 1557 of the Affordable Care Act ("ACA") ("Section 1557 Rule") that HHS believes are inconsistent with pre-existing civil rights statutes and likely unlawful ("Proposed Rule"). Among the most controversial aspects of the Proposed Rule, HHS plans to walk back certain anti-discrimination protections for LGBTQ individuals and pregnant women who choose to terminate a pregnancy by limiting the Section 1557 Rule's expanded view of what it means not to discriminate on the basis of sex to conform with the "plain meaning" of the term "sex."[1] HHS estimates that the Proposed Rule would eliminate billions of dollars of unnecessary costs by reducing the agency's labor and litigation costs associated with grievances brought under the Section 1557 Rule's expanded definition of sex and by eliminating health care entities' obligation to send patients "notice and tagline" inserts.[2]

HHS believes Section 1557 of the ACA does not require implementing regulations because it incorporates the existing civil rights framework consisting of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972 ("Title IX"), the Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973 by making these laws' nondiscrimination provisions applicable to certain health care programs or activities to the extent they do not already apply. Further, HHS has stated that the Section 1557 Rule exceeded its authority under the ACA and adopted "erroneous and inconsistent interpretations of civil rights law."[3] On this basis, HHS proposes to gut significant protections for LGBTQ individuals and pregnant women finalized in the Section 1557 Rule. The Proposed Rule can be found here.

BACKGROUND

The Section 1557 Rule, finalized on May 18, 2016 and effective on July 18, 2016,[4] prohibits discrimination on the basis of race, color, national origin, disability, age and sex by any health program or activity receiving federal financial assistance ("Covered Entities"). The Section 1557 Rule specified that "sex discrimination" *included* discrimination based on: (i) an individual's sex; (ii) pregnancy, including termination of a pregnancy, childbirth and related medical conditions; (iii) gender identity; and (iv) sex stereotyping.

In August, 2016, five states and three religiously affiliated health care entities filed suit in the U.S. District Court for the Northern District of Texas challenging the Section 1557 Rule. The Plaintiffs in *Franciscan Alliance v. Azar*[5] argued that HHS's interpretation of "sex discrimination" to include discrimination based on gender identity and termination of pregnancy would violate the Plaintiffs' religious freedom and impact medical judgment. On December 31, 2016, the Court held that the Section 1557 Rule's gender identity and termination of pregnancy provisions violated the Administrative Procedures Act, Title IX and the Religious Freedom Restoration Act. The Court issued a nationwide preliminary injunction barring HHS from enforcing the prohibition against sex discrimination based on gender identity, sex stereotyping and termination of pregnancy.[6]

The injunction remains in place though the *Franciscan Alliance* Court never issued a decision on the merits of the case. The Trump administration has asked the Court to stay the proceedings until the Proposed Rule is finalized.[7]

PROPOSED RULE

HHS promulgated the Proposed Rule to address interpretations adopted in the Section 1557 Rule, which some courts have ruled exceeded HHS's statutory authority and which the current administration views as overbroad. The Proposed Rule repeals and replaces substantial portions of the Section 1557 Rule, including:

1. Removal of the Section 1557 Rule's definitions of "gender identity" and "sex stereotypes," including requirements that Covered Entities treat people consistent with their gender identity. This could have the effect of subjecting transgender people and people who do not conform to traditional sex stereotypes to discrimination.

2. Removal of provisions that prohibit differential coverage or cost sharing for services based on the fact that the person's sex assigned at birth, gender identity or gender otherwise recorded differs from the sex for which certain services are ordinarily or exclusively available.[8]

3. Elimination of individuals' private right of action to challenge potential violations of Section 1557 in court and to obtain monetary damages for such violations.
4. Elimination of provisions that prohibit a health plan from categorically or automatically denying or limiting coverage for gender transition services.[9]
5. Elimination of provisions that prohibit discrimination in health insurance issuance, coverage, cost-sharing, marketing and benefit design.[10]
6. Narrows the applicability of the Section 1557 Rule by excluding from its purview issuers of health plans not principally engaged in the business of providing health care except with respect to their ACA Marketplace health plans.
7. Limitation in the applicability of Section 1557 Rule so that regulations are no longer applicable to all HHS-administered programs.[11]

PRACTICAL TAKEAWAYS

The comment period for this Proposed Rule ended on August 13, 2019. More than 130,000 comments were submitted, many of them critical of the proposed changes.[12] Commenters included the American Medical Association, the American Hospital Association, a coalition of 22 state Attorneys General, America's Essential Hospitals and the Association for Community Affiliated Plans, all of whom opposed the Proposed Rule that would eliminate vital anti-discrimination protections.[13]

Given the opposition to the Proposed Rule voiced by important stakeholders, it is uncertain whether the Proposed Rule will be finalized as is. Notwithstanding, health care providers should prepare for what a walk-back of anti-discrimination protections might mean for certain vulnerable patient populations, including pregnant women and LGBTQ individuals. Specifically, providers may face:

- Potential increased barriers to care for patients with respect to gender transition services and care;
- Potential increased barriers to care for patients with respect to abortion services and care;
- Categorical exclusion by insurers of coverage for certain health care services;
- Differential treatment by insurers of certain vulnerable patient populations, including LGBTQ individuals and HIV-positive individuals, with respect to certain benefits.

Hall Render will follow any developments on the Section 1557 Rule and provide future updates.

If you have questions or would like additional information about this topic, please contact:

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ADDITIONAL RESOURCES

For additional articles addressing Section 1557 Rule's anti-discrimination provisions see: HHS Final Rule on Nondiscrimination in Health Programs and Activities – Part I: Sex Discrimination and Section 1557: Federal Court Issues Nationwide Injunction Against HHS Sex Discrimination Rules.

[references]

[1] HHS Office of Civil Rights Director Roger Severino stated: "'When Congress prohibited sex discrimination, it did so according to the plain meaning of the term, and we are making our regulations conform… The American people want vigorous protection of civil rights and faithfulness to the text of the laws passed by their representatives… The proposed rule would accomplish both goals.'" *HHS Proposes to Revise ACA Section 1557 Rule to Enforce Civil Rights in Healthcare, Conform to Law, and Eliminate Billions in Unnecessary Costs* (May 24, 2019) found at: https://www.hhs.gov/about/news/2019/05/24/hhs-proposes-to-revise-aca-section-1557-rule.html.

[2] The current Section 1557 rule requires Covered Entities to provide "notice and tagline" inserts in numerous foreign languages. The

Proposed Rule eliminates this requirement with respect to languages that have not been shown to accomplish their intended goal of ensuring non-English speakers receive information in a language they understand.

[3] 84 Fed. Reg. 27846, 27849 (June 14, 2019).

[4] https://www.govinfo.gov/content/pkg/FR-2016-05-18/pdf/2016-11458.pdf

[5] *Franciscan Alliance, Inc., et al.* v. *Burwell, et al.,* 227 F. Supp. 3d 660 (N.D. Tex. 2016)

[6] A Federal District Court for the District of North Dakota has agreed with the reasoning of *Franciscan Alliance* in *Religious Sisters of Mercy, et al. v. Burwell, et al., Nos. 3:16-cv-386 & 3:16-cv-432 (D.N.D. Order of January 23, 2017).*

[7] It should be noted that while the injunction prohibits HHS from enforcing the disputed provisions of the Section 1557 Final Rule, private individuals have brought suit alleging Section 1557 violations and courts have granted relief under the ACA versus the implementing Section 1557 Final Rule. M. Musumeci et al., **HHS's Proposed Changes to Non-Discrimination Regulations Under ACA Section 1557 found at** https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/ citing *Flack v. Wis. Dep't of Health Servs.,* 328 F. Supp. 3d 931 (W.D. Wis. 2018)

[8] M. Musumeci et al., **HHS's Proposed Changes to Non-Discrimination Regulations Under ACA Section 1557 found at** https://www.kff.org/disparities-policy/issue-brief/hhss-proposed-changes-to-non-discrimination-regulations-under-aca-section-1557/; 45 CFR Section 92.206.

[9] M. Musumeci et al., supra n.8.

[10] M. Musumeci et al., supra n.8.

[11] M. Musumeci et al., supra n.8.

[12] Joanne Finnegan, HHS Proposal to Roll Back Nondiscrimination Protection Draws 130K Comments, FierceHealthcare (Aug. 13, 2019) found at: https://www.fiercehealthcare.com/practices/more-than-130-000-comments-trump-administration-s-rule-would-rollback-nondiscrimination.

[13] Id.

[/references]