HHS Finalizes Expanded Section 1557 Nondiscrimination Rules

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On May 6, 2024, the Department of Health and Human Services ("HHS") issued a final rule that broadens 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, whose definition does not explicitly include group health plans, these changes will impact some employer sponsored group health plans.

Background

As background, Section 1557 prohibits 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 the ACA was enacted in 2010. Regulations were (i) initially issued in May 2016, (ii) partially repealed by regulations issued in June 2020, and then (iii) new proposed regulations were issued in July 2022 (see our September 9, 2022 Bulletin). The 2024 final rule largely adopts the 2022 proposed rule with some notable changes. Additionally, there have been numerous court challenges under Section 1557, including those on religious grounds.

In July 2024, two federal courts blocked the May 2024 final regulations implementing Section 1557.

- In Tennessee v. Becerra, a federal court imposed a nationwide injunction prohibiting HHS from enforcing the final 1557 regulations extending discrimination on the basis of sex to include discrimination on the basis of gender identity. While the injunction is in effect, Covered Entities subject to 1557 (e.g., health care providers, carriers and TPAs who receive federal funding) are not subject to the federal nondiscrimination requirements as it related to care based on gender identity or sexual orientation.
- In Texas v. Becerra, a Texas federal court has stayed the entire final rule as it applies to Covered Entities in Montana and Texas.

This Bulletin only addresses details under the final rule that may apply to certain employers who sponsor group health plans. The final rule's effective date is July 5, 2024.

Summary of the Final Rule

The final rule reinstates the scope of Section 1557 to cover HHS's health programs and activities.

- The final rule broadens the situations where Section 1557 may apply, by mostly reverting back to the 2016 rule, and undoing the 2020 rule that narrowly applied to entities "principally engaged" in healthcare.

- For employer purposes, the final rule applies 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" means 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.

- For the first time, the final rule interprets Medicare Part B payments to be a form of federal financial assistance, which makes the final rule applicable to a broader range of health care providers and suppliers. However, Part B fund recipients who do not receive any other federal financial assistance (and were not previously subject to Section 1557) have a delayed compliance date of May 6, 2025.

The final rule clarifies the application of Section 1557 nondiscrimination requirements to health insurance issuers that receive federal financial assistance.

- The final rule sets aside the 2020 rule that narrowed applicability specifically to health insurance products for which an issuer received federal financial assistance.

- Under the final rule, any health insurance issuer receiving any federal financial assistance, such as through offering of Marketplace coverage, must 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.

- The final rule does 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 final rule, individuals covered by such plans may have certain rights and receive various communications from an issuer or TPA pertaining to Section 1557.

The final rule 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.

The final rule makes clear that discrimination on the basis of sex includes discrimination on the basis of pregnancy or related conditions, including "pregnancy termination."

- This reverses the 2020 rule that narrowly interpreted sex discrimination to exclude discrimination based on termination of pregnancy.

The final rule respects federal guarantees regarding religious freedom and conscience.

- The final rule states that no application of the rule will be required if it would violate federal protections for religious freedom and conscience. Under this rule, a recipient of federal financial assistance may simply rely on those protections or seek assurance of them from HHS.

Additional Requirements for Covered Entities

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

- *Create and implement civil rights policies and procedures.* Covered entities, in their health programs and activities, are 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, effective communication procedures and procedures for reasonable modifications for individuals with disabilities. Sample documents are expected.

- *Designate a Section 1557 coordinator.* Covered entities that employ 15 or more persons must designate at least one person as a coordinator to carry out the covered entity's responsibilities, including, but not limited to, receiving, reviewing, and processing grievances, coordinating the Covered entity's language access and communication procedures, and overseeing training of relevant persons.

- *Provide training.* Requires entities to give staff training on the required policies and procedures as soon as possible, but no later than 30 days following the implementation of the policies and procedures and no later than 300 days following July 5, 2024. Thereafter, new relevant employees must be trained within a reasonable period of time after their hire date.

- *Provide notice of nondiscrimination.* Requires covered entities to provide a notice of nondiscrimination to participants, beneficiaries, enrollees, and applicants of its health programs and activities, and members of the public. The notice must be provided annually, upon request, in a conspicuous location on the covered entity's health program or activity website and in clear and prominent physical locations, in no smaller than 20-point sans serif font, where it is reasonable to expect individuals seeking service from the health program or activity to be able to read or hear the notice.

- *Provide notice of availability of language assistance services and auxiliary aids and services.* Requires covered entities to provide a notice of availability of free language assistance and auxiliary aids and services to participants, beneficiaries, enrollees, applicants, and the public. The notice must be made available in English and translated into the 15 most prevalent non-English languages in the applicable state or states. Distribution is the same as for the notice of nondiscrimination, however, this notice must also accompany the following electronic and written communications:
    - Notice of nondiscrimination;
    - Notice of privacy practices required by HIPAA;
    - Application and intake forms;
    - Notices of denial or termination of eligibility, benefits or services, including an Explanation of Benefits, and notices of appeal and grievance rights;
    - Communications related to an individual's rights, eligibility, benefits or services that require or request a response from a participant, beneficiary, enrollee or applicant;
    - Communication related to a public health emergency;
    - Consent forms and instructions related to medical procedures or operations, medical powers of attorney, or living wills;
    - Discharge papers;
    - Communication related to the cost and payment of care, including medical billing and collections materials and good-faith estimates;
    - Complaint forms; and
    - Patient and member handbooks.
- *Protect against discrimination resulting from artificial intelligence (AI) decision support tools.* Explicitly prohibits discrimination in the use of AI, clinical algorithms, predictive analytics, and other tools 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 limited English proficiency (LEP) individuals and individuals with disabilities.

Effective Dates for Certain Provisions

Section 1557 Requirement and Provision	Date by which covered entities must comply
§ 92.7 Section 1557 Coordinator	Within 120 days of effective date (anticipated November 2, 2024).
§ 92.8 Policies and Procedures	Within one year of effective date (anticipated July 5, 2025).
§ 92.9 Training	Following a covered entity's implementation of the policies and procedures required by § 92.8, and no later than 300 days of effective date (anticipated May 1, 2025).
§ 92.10 Notice of Nondiscrimination	Within 120 days of effective date (anticipated November 2, 2024).
§ 92.11 Notice of Availability of Language Assistance Services and Auxiliary Aids and Services	Within one year of effective date (anticipated July 5, 2025).
§ 92.207(b)(1)-(5) Nondiscrimination in health insurance coverage and other health-related coverage (benefit design changes)	For health insurance coverage or other health-related coverage that was not subject to this part as of the date of publication of this rule, by the first day of the first plan year (in the individual market, policy year) beginning on or after January 1, 2025.
§ 92.207(b)(6) Nondiscrimination in health insurance coverage and other health-related coverage (benefit design changes)	By the first day of the first plan year (in the individual market, policy year) beginning on or after January 1, 2025.
§ 92.210(b), (c) Use of patient care decision support tools	Within 300 days of effective date (anticipated May 1, 2025).

Update: In July, two federal courts blocked the May 2024 final regulations implementing Section 1557. Briefly:

- In Tennessee v. Becerra, a federal court imposed a nationwide injunction prohibiting HHS from enforcing the final 1557 regulations extending discrimination on the basis of sex to include discrimination on the basis of gender identity. While the injunction is in effect, Covered Entities subject to 1557 (e.g., health care providers, carriers and TPAs who receive federal funding) are not subject to the federal nondiscrimination requirements as it related to care based on gender identity or sexual orientation.

- In Texas v. Becerra, a Texas federal court has stayed the entire final rule as it applies to Covered Entities in Montana and Texas.

These issues will continue to be litigated and unresolved for the foreseeable future. Note, employers remain subject to Title VII of the Civil Rights Act and discriminatory practices in a group health plan (like excluding services related to gender identity or sexual orientation) may be impermissible discrimination on the basis of sex.

Employer Action

Under the final rule, employers that are covered entities are again subject to certain HHS Section 1557 nondiscrimination rules and other requirements. Non-covered entities with employer-sponsored health plans are not 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 final rule, OCR will 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 AI decision support tools are not being used; and
- Confirming services offered via telehealth are accessible to LEP individuals and individuals with disabilities.