PUBLICATION

HHS Issues Final Rule on the ACA's Anti-Discrimination Provisions

Authors: Layna S. Cook Rush
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On May 18, 2016, the Department of Health and Human Services (HHS) issued a final rule (the Rule) implementing the prohibition on discrimination under Section 1557 of the Affordable Care Act (ACA). Section 1557 prohibits certain health care entities from discriminating in certain health programs and activities on the basis of race, color, national origin, age, disability and sex by reference to several other federal anti-discrimination laws – Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments of 1972 (Title IX), the Age Discrimination Act of 1975 (Age Act) and Section 504 of the Rehabilitation Act of 1973 (Section 504). Section 1557 is the first federal civil rights law to prohibit discrimination on the basis of sex in all health programs and activities receiving federal financial assistance. According to HHS, the Rule was enacted to help advance equity and reduce health disparities by protecting some of the populations that have been most vulnerable to discrimination in the health care context.

The Rule imposes a variety of specific and, in some instances, technical requirements to further the anti-discrimination goals of Section 1557. The Rule is effective as of July 18, 2016, but certain notices are not required to be sent out until October 24, 2016, and provisions that require changes to plan benefit design are effective in the first plan year beginning on or after January 1, 2017.

Application

All health programs or activities receiving federal financial assistance are subject to Section 1557, including those not funded through HHS. The Rule, however, is narrower and applies only to entities that provide health-related services or health-related insurance coverage and whose programs or activities receive federal financial assistance. The Rule covers:

- Any health program or activity, any part of which receives funding from HHS (such as hospitals that accept Medicare or doctors who accept Medicaid);
- Any health program that HHS itself administers; and
- Any entity created under Title I of the ACA including Health Insurance Marketplaces and issuers that participate in those Marketplaces.

The following are types of entities that must comply with the Rule if receiving the applicable federal financial assistance: laboratories, hospitals, clinics, public health centers, health-related education facilities and state Medicaid agencies. In addition, entities and physicians receiving Medicaid or Medicare (excluding Medicare Part B) are covered by the Rule. Moreover, if any part of an entity's health-related activities or programs receives federal financial assistance as defined by the Rule, then all of that entity's programs and activities are subject to the Rule's requirements.

Requirements

1. General Non-discrimination

The Rule prohibits denial of benefits and exclusion from participation in covered health care programs and discrimination under any health program or activity that receives the applicable federal financial assistance. While this prohibition is to be applied broadly, the Rule does include several limitations. For example, the Rule incorporates the exclusions in the Age Act, such that the anti-discrimination provisions will not apply to any age distinction contained in any law or ordinance which provides benefits or assistance based on age, establishes criteria for participation in age-related terms or describes intended beneficiaries to target groups in age-related terms. Second, the general prohibition does not apply to discrimination against employees by health care employers. Additionally, although HHS encourages covered health care programs to voluntarily implement non-discrimination policies on the basis of religion or sexual orientation, discrimination on these grounds are not prohibited by the Rule. Further, although HHS declined to include a blanket religious exception, compliance with the provision is not required if its application would violate applicable federal statutory protections for religious freedom. Lastly, the Rule permits sex-specific programs or activities where the covered health care program can show an "exceedingly persuasive justification." This means that a covered health care program must demonstrate that the exclusion of one sex is substantially related to the achievement of a health-related or scientific goal through objective evidence and empirical data.

2. Specific Application: Individuals with Limited English Proficiency (LEP)

The Rule requires covered health care programs to take reasonable steps to facilitate effective communications to individuals with limited English proficiency through language assistance. Language assistance must be provided through a qualified translator or interpreter, and reliance on unqualified staff or persons accompanying an individual with LEP for interpretation is prohibited (with the exception of emergencies). Similarly, automated translation is not permitted unless reviewed and edited as needed by a qualified translator. The required language assistance must be available in a timely manner; however, no specific time frame is provided in the Rule. HHS also encourages, but does not require, covered health care programs to implement a written language access plan that facilitates its ability to meet their obligations under the Rule, such as addressing how the entity will determine an individual's primary language, identifying a service for accessing qualified interpreters when the need arises, types of language assistance services that may be required under particular circumstances and documents for which translations should be routinely available.

3. Specific Application: Individuals with Disabilities

The Rule specifies several sets of requirements geared towards ensuring equal health care access for the disabled. First, covered health care programs are required to provide disabled individuals with accessible buildings and facilities. Second, disabled individuals must be provided with effective communication, such as through auxiliary aids and services, which includes the provision of qualified interpreters, qualified readers, audio recordings and Braille materials. Additionally, all health programs or activities provided through electronic and information technology, such as online booking and electronic billing, must be made available to individuals with disabilities. HHS does not provide specific accessibility standards, but encourages covered health care programs to consider the standards set forth in the Web Content Accessibility Guidelines (WCAG) 2.0. Exemplar standards include providing text alternatives for any non-text content, creating content that can be presented in different ways and making it easier for users to see and hear content.

Covered health care programs are also required to make reasonable modifications to avoid discrimination based on disability, except where modifications would fundamentally alter the nature of the health program or activity, or would be an undue financial or administrative burden.

4. Specific Application: Equal Program Access on the Basis of Sex

The Rule also requires that covered health care programs provide individuals with equal access to health programs and activities without discrimination on the basis of sex. The term "on the basis of sex" is defined to include gender identity, which refers to an individual's internal sense of gender, whether or not that gender is the same as the gender the individual was assigned at birth. Covered health care programs must treat individuals consistent with their gender identity. Single-sex access facilities, such as restrooms, are not prohibited, but covered health care programs must treat individuals consistent with their gender identities. Additionally, covered health insurance issuers cannot categorically exclude coverage for all health services related to gender transition, although the Rule does not mandate coverage for gender transition services.

As noted, the Rule does not prohibit discrimination based on sexual orientation. However, HHS stated in the Rule's preamble that it supports prohibiting sexual orientation discrimination as a policy matter and will continue to monitor legal developments before explicitly including the prohibition of such discrimination in a rule. In the meantime, the Office of Civil Rights (OCR) will evaluate complaints based on sexual orientation discrimination to determine whether the complaint involves discriminatory sex stereotyping.

Notice

The Rule requires that each covered health care program take steps to provide notice to its beneficiaries, enrollees, applicants and the public of its compliance with the Rule's various policies and requirements, as well as how to file grievances and a complaint with the HHS OCR. Appendix A to the Rule provides a sample notice and a sample non-discrimination statement. Additionally, covered health care programs must post short statements in the top 15 non-English languages spoken in the state in which the entity is located or does business (referred to as taglines) to notify individuals with limited English proficiency that free language services are available in these languages. By October 16, 2016 (90 days after the Rule's effective date), covered health care programs must post the required notices and taglines in applicable and significant publications and communications, conspicuous physical locations and a conspicuous location on its website. In addition, notices and taglines in at least the top two non-English languages in the relevant state must be posted in significant publications and communications that are small-sized, such as postcards and tri-fold brochures. Appendix B to the Rule provides a sample tagline.

Enforcement and Penalties

To promote compliance, covered health care programs employing 15 or more people are required to designate at least one employee to coordinate its efforts to comply with the Rule, including the investigation of communicated grievances and adoption of grievance procedures for alleged violations of the Rule. Appendix C to the Rule provides a sample grievance procedure. HHS stated in the preamble to the Rule that covered health care programs are not required to train their employees on compliance with Section 1557 and the Rule, but training is encouraged and the OCR will make a training curriculum available.

Several enforcement mechanisms are provided for under the Rule. First, each covered health care program must keep records and compliance reports to submit to the OCR as the OCR deems necessary. If an entity fails to provide the OCR with the requested information in a timely, complete and accurate manner, the OCR may penalize the entity by suspending or terminating its federal financial assistance. Second, HHS may file an administrative enforcement action against a covered health care program. Third, an individual may file a complaint with the OCR for a violation of the prohibition against discrimination, and the OCR will then initiate an investigation. Finally, the Rule allows for a private cause of action; an individual or entity may bring a civil action to challenge a Section 1557 violation in federal court. Compensatory damages are available for Section 1557 violations and attorney's fees may also be appropriate.

Conclusion

The final Rule which implements ACA Section 1557's anti-discrimination provisions is expansive, as it applies to all health programs and activities that receive federal financial assistance through HHS, including Medicaid, most providers that accept Medicare and issuers of Marketplace plans. Because the Rule extends sex discrimination protections to health care programs and activities, and includes gender identity as a prohibited basis of discrimination, covered health care programs need to review their current policies to ensure that they are in compliance and make any necessary modifications. Furthermore, because of the detailed requirements for providing notice to individuals with disabilities or with limited English proficiency, covered health care programs should evaluate and make the necessary changes to comply with the Rule's notice provisions.

For more information about these provisions or other related matters, please contact Layna Cook Rush or any of the attorneys in the Firm's Health Law Group.