Beyond the Bathroom: The ACA Nondiscrimination Rules' Effect on Healthcare Services and Health Insurance

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Background

Section 1557 of the Affordable Care Act ("**ACA**") prohibits covered entities from discriminating in certain healthcare programs and activities on the basis of race, color, national origin, sex, age, or disability. The U.S. Department of Health and Human Services ("**HHS**") issued final rules under Section 1557, which specify gender identity discrimination and sexual stereotyping as forms of sex discrimination. The rules' financial impact should be small, but they will affect a number of businesses regarding the delivery of healthcare and coverage.

A "covered entity" under Section 1557 is:

1. An entity that operates a health program or activity, any part of which receives federal financial assistance (*e.g.*, healthcare systems or providers who accept Medicare Part A or Medicaid and insurance carriers and third party administrators ("**TPA**") receiving federal funding through participation in the health insurance marketplace);
2. An entity established under ACA Title I that administers a health program or activity (*e.g.*, a state-run health insurance marketplace); and
3. Health programs or activities administered by HHS itself (*e.g.*, the federal health insurance marketplace).

A covered entity does not include an employer who merely provides benefits to its own employees but is not primarily engaged in the business of providing or administering a health program or activity. So, who is affected and how?

Healthcare systems and providers as covered entities

Healthcare systems and providers who accept Medicare Part A and/or Medicaid are covered entities, and, as such, must provide transgendered individuals equal access to facilities and services and must treat transgendered individuals consistent with their gender identity. Hospitals and providers are not required to expand the services provided to patients, but are prohibited from denying transgendered individuals medically necessary services within their scope of practice without a compelling justification. For example, a physician who performs breast examinations cannot refuse to perform a clinical breast examination for a transgendered man with a BRCA mutation.

Impact on employer health coverage

The rules will impact employer health coverage in several ways:

1. Covered entities are subject to the Section 1557 rules for the benefits offered to their own employees. This means a hospital which accepts Medicare Part A and/or Medicaid must comply with the rule with respect to the benefits offered to its own employees. This also applies to insurance carriers and TPAs who participate in the health insurance marketplace.
2. An insurance carrier who is a covered entity must comply with the rules with respect to the health insurance policies it issues to employers, so many employers may notice plan design or other administrative changes to their insurance policies beginning in 2017.
3. HHS does not have the authority to pursue an employer whose self-insured plan design may be discriminatory under Section 1557 and intends to refer these matters to agencies such as the Equal Employment Opportunity Commission ("**EEOC**") who will determine if a situation meets the requirements for an EEOC charge. A TPA is not responsible for an employer's self-insured plan design decisions beyond the TPA's control, although it is liable for administrative actions within its control. Many employers may receive recommendations and some pressure from TPAs, who are frequently also insurance carriers, with respect to their self-insured plans.
4. If an employer is not primarily engaged in providing or administering a health program or activity but maintains an identifiable health program or activity receiving federal financial assistance that isn't solely an employee benefit program, the employer must comply with respect to the employees within that identifiable program or activity. A good example would be a pharmacy operated within a CVS or Walgreens, as these receive payments from Medicare Part D.

There are still questions under the rules. It is not clear what happens if a provider is a covered entity and provides health coverage to its employees through a policy issued by an insurance carrier who is not a covered entity and who does not comply with Section 1557. Can Section 1557 be used to compel the provider to contract with an insurance carrier who does comply?

What does nondiscrimination mean for employer health coverage?

The rules: (i) do not require coverage for any particular treatment; (ii) indicate that reasonable medical management techniques may be used if evidence-based and nondiscriminatory, but they will be subject to careful scrutiny; and (iii) state that a blanket exclusion of all services related to gender dysphoria or transition is discriminatory.

The rules seem to suggest a type of parity requirement through which the plan should provide coverage for services related to gender dysphoria or transition if the plan already covers those services for non-transgendered participants. The rules discuss a hysterectomy as an example, and the same logic should apply to hormone therapy. While plans generally must cover breast reconstruction in connection with a mastectomy, this does not extend to the construction of breasts where none previously existed. Most plans exclude breast implants under other circumstances as cosmetic surgery, barring accident or deformity, so it seems reasonable to believe that a plan would not be required to cover breast implants in relation to gender transition. Similarly, sexual reassignment surgery and tracheal shaves (absent a laryngeal issue) should be excludable.

Religious exemption

The rules do not contain an exemption mechanism for religious organizations and indicate that the ability to object on religious grounds is available under existing laws such as the Religious Freedom

Restoration Act. A religious organization that does not intend to comply should consider documenting its objection and the basis for its exemption from Section 1557.

Effective Date and Enforcement

The rules are generally effective on July 18, 2016, but rules that may require changes to a covered entity's health plan design are effective the first plan year beginning on or after January 1, 2017. In addition to enforcement actions and penalties by HHS, individuals may file suit to enforce the provisions of ACA Section 1557 and seek compensatory damages.