

Health Reform WK-EDGE Wrap Up

ACCESS TO HEALTH CARE SERVICES —FINAL RULES: Final rule eyes equity and an end to discrimination in health care, (May 18, 2016)

By Bryant Storm, J.D.

Individuals are protected from sex discrimination in health care under a Final rule issued by HHS to implement Section 1557—a nondiscrimination provision—of the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148). In addition to prohibiting health care discrimination based on pregnancy, gender identity, or sex stereotyping, the new regulations impose new requirements for communication with disabled individuals and support enhanced language assistance for individuals with limited English proficiency (LEP). The new regulations also specify that individuals can seek remedies for sex discrimination under Section 1557. The regulations take effect on July 18, 2016 (*Notice*, 81 FR 31376, May 18, 2016).

Previous law. Previous civil rights laws enforced by the HHS Office for Civil Rights (OCR) prohibited health care related discrimination based on race, color, national origin, disability, or age. Section 1557 of the ACA added sex to that list. Although Sec. 1557 has been in effect since the enactment of the ACA, the Final rule implements the statutory section and clarifies the outlines of the nondiscrimination policy. Danielle Capilla, Chief Compliance Officer at United Benefit Advisors, explained that the rule "further clarifies a grey area, and provides teeth and specificity to poorly understood or enforced rules."

Proposed rule. The language of the Final rule does diverge in some places from the agency's Proposed rule—by adding definitions and clarifying issues raised in comments—however, the Final rule largely adopts the content of the proposal (see *HHS moves towards health care equity, proposes to leave sex discrimination behind*, September 9, 2015).

Section 1557. The Final rule is designed to protect access to health care for all individuals, regardless of their sex or conformity with sex stereotypes. Specifically, the Final rule extends nondiscrimination protections to lesbian, gay, bisexual, and transgender (LGBT) people in health facilities, programs, and activities receiving federal funding. The new regulations disallow an individual's sex or gender identity from serving as a basis to deny coverage, limit access to facilities, or provide relatively limited care. The prohibitions on gender identity discrimination also eliminate categorical exclusions on coverage of all care related to gender transition and gender dysphoria.

Health plans. The impact of the Final rule reaches beyond health care providers. Capilla noted that "the implication on group health plans is huge." She explained that "the rules would apply to the employee benefits programs of an employer that is principally or primarily engaged in providing or administering health services or health insurance coverage, or employers who receive federal financial assistance to fund their employee health benefit program or health services." Capilla said that affected employers can and will likely include: hospitals, nursing homes, home health agencies, laboratories, community health centers, therapy service providers (physical, speech, etc.), physicians' groups, health insurers, ambulatory surgical centers, and end-stage renal dialysis centers.

Sexual orientation. The extent of some of the protections afforded by the rule is unclear. HHS admits that "the Final rule does not resolve whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Sec. 1557." Instead, HHS said that the OCR will evaluate complaints of sex discrimination to determine if they are the sort of discrimination that can be addressed under Sec. 1557.

Objections. Due to the fact that the Final rule deals with issues impacting faith-based organizations and religious beliefs, the regulations could lead to objections on religious grounds. Capilla noted that "because the Religious Freedom Restoration Act (P.L. 103-141) and its implications for religious employers has been so highly litigated in the past 5 years, it is likely that we will see challenges from those employers and organizations through the court system, if only to further define the scope of the RFRA for future regulators and statutory drafting." The regulations also impact controversial transgender issues. Capilla said that the Final rule "will add further layers to the ongoing national discussion of transgender rights, and without a doubt we will see legal challenges from providers and employers that disagree with the underlying premise of these rules as it relates to the transgender community."

Communication and disabilities. The Final rule also formally adopts the principle that covered entities must take steps to provide reasonable access for individuals with LEP. For example, covered entities must offer a qualified interpreter to an individual when oral interpretation is necessary to provide meaningful access to an individual with LEP. The Final rule also requires covered entities to take steps to provide effective communication and facility access for individuals with disabilities. The access requirements include a mandate that health programs or activities provided through electronic and information technology are accessible to individuals with disabilities, unless such access would be unduly burdensome.

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