CLIENT ALERT

Trump Administration Scales Back Obama-era Healthcare Nondiscrimination Regulations

Jun.16.2020

On Friday, June 12, 2020, the U.S. Department of Health & Human Services (HHS) issued for public inspection a final rule with sweeping revisions to Affordable Care Act (ACA) Section 1557's nondiscrimination regulations ("Final Rule"). The Final Rule revises in part and repeals in part the watershed 2016 nondiscrimination regulations at 45 C.F.R. Part 92 ("2016 Regulations"). The Final Rule eliminates or modifies significant provisions of the 2016 Regulations as follows:

- Eliminates the entirety of the 2016 Regulations definitional provision, repealing, *inter alia,* definitions for gender identity, sex stereotyping, national origin, and individual with limited English proficiency—thereby removing gender identity, sex stereotyping, and termination of pregnancy from discrimination on the basis of sex;
- Eliminates the requirement for covered entities to issue nondiscrimination notices and non-English taglines in the top-15 languages spoken by individuals with limited English proficiency in their state;
- Narrows the scope of who is considered a covered entity and Section 1557's applicability telescoping from the 2016 Regulations' applicability to a more focused subset of health programs or activities administered under ACA Title I and any health program or activity, any part of which receives Federal financial assistance provided by HHS. Note, however, that for entities *not* "principally engaged in the business of providing healthcare," such as health insurance issuers, they must comply with the Final Rule only to the extent that any operation receives Federal financial assistance from HHS.
- Eliminates provisions that recognize the right of private individuals and entities to file lawsuits in federal court to directly challenge alleged violations of Section 1557—instead, HHS "no longer intends to take a position in regulations" as to "whether Section 1557 provides a private right of action"; and
- Eliminates the requirement that each covered entity appoint a compliance director.

The 2016 Regulations, hailed in some circles for extending nondiscrimination protections and improving access to healthcare, were excoriated in others as costly regulatory overreach that exceeded statutory authority. In the preamble to the Final Rule, HHS frames key portions of its rationale in decisions of the U.S. District Court for the Northern District of Texas in *Franciscan Alliance, Inc. v. Burwell* in 2016 and *Franciscan Alliance v. Azar* in late 2019. Those decisions concluded that the 2016 Regulations exceeded HHS's statutory authority by extending the prohibition of discrimination "on the basis of sex" to include discrimination based on gender identity and termination of pregnancy. Consistent with those cases, the new rule removes gender identity, sex stereotyping, and termination of pregnancy protections from discrimination "on the basis of sex", effectively turning back the clock to nondiscrimination requirements that existed prior to the 2016 rules. As discussed below, the Final Rule preceded by a few days a decision by the U.S. Supreme Court that may undermine the reasoning of these decisions and thus, potentially, the Final Rule.

Following on the Administration's Inauguration Day commitment to minimize the burdens on private companies of compliance with regulatory requirements, HHS proposed in June 2019 to scale back the 2016 regulatory framework. The proposal drew nearly 200,000 comments, including forceful criticism from civil rights proponents threatening legal challenges. HHS largely finalized the rule as proposed, and we expect litigation challenging the Final Rule is imminent. HHS's press release with this Final

Rule cited an estimate that these revisions will save a total $2.9 billion in regulatory costs over the next five years. The Final Rule will take effect 60 days after it is officially published in the Federal Register, which is scheduled for June 19.

Background on Section 1557 and Scope of Applicability

ACA Section 1557 incorporates by reference and applies the following federal civil rights laws to health programs or activities any part of which receive Federal financial assistance:

- Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d ("Title VI");
- Education Amendments of 1972, Title IX, 20 U.S.C. § 1681 (education only) ("Title IX");
- Age Discrimination Act of 1975, 42 U.S.C. § 6101 ("Age Act"); and
- Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794 ("Section 504").

Section 1557 prohibits any covered entity from discriminating on the basis of race, color, national origin, sex, age, and disability based on those statutes.

The 2016 Regulations generally applied nondiscrimination requirements at the entity level. That is, any entity that received Federal financial assistance for a health care program or activity it operated was a "covered entity" subject to the full scope of the nondiscrimination restrictions and requirements. The Final Rule repeals the full set of definitions used under the 2016 Regulations, including the definition of a covered entity, and applies nondiscrimination requirements to "[a]ny health program or activity, any part of which is receiving Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by [HHS]" as well as programs and activities established under Title I of the ACA.

The regulation distinguishes between entities that are "principally engaged in the business of providing healthcare" and those that are not, and applies to "all of the operations" of entities that are principally engaged in the business of providing healthcare. For other entities, the requirements apply to the entity's operations only to the extent such operation receives federal financial assistance. In essence, the nondiscrimination requirements will continue to apply to all operations of health care providers if they participate in Medicare, Medicaid, or other health programs or activities that receive Federal financial assistance, but only the lines of business receiving federal dollars for other health care entities like health insurance companies. Thus, health insurance issuers no longer will have to comply with ACA Section 1557's implementing regulations across their entire operations. For example, if an issuer offers large group health plans and participates in Medicare Advantage, the Final Rule will apply to only its Medicare Advantage operations. The preamble to the Final Rule also confirms that the Final Rule does not apply to short-term, limited duration insurance because those insurers are not "principally engaged in the business of providing healthcare" and there is no Federal financial assistance involved.

Discrimination on the Basis of Sex: Elimination of Gender Identity, Sex Stereotyping, and Termination of Pregnancy Protections

The 2016 Regulations defined discrimination on the basis of sex to include "discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity." The Final Rule repeals this definition, as well as specific restrictions and requirements related to gender identity and sex stereotyping. In so doing, the Final Rule attempts to distinguish discrimination on the basis of sex protections in

healthcare, via Section 1557's incorporation of Title IX of the Education Amendments Act of 1972, as distinct from employment-based protections under Title VII of the Civil Rights Act of 1964. The Final Rule explains that, "the binary biological character of sex (which is ultimately grounded in genetics) takes on special importance in the health context."

On Monday, June 15, the Supreme Court of the United States issued a landmark opinion in *Bostock v. Clayton County, Georgia*, 590 U.S. ___ (2020), holding that Title VII of the Civil Rights Act of 1964 prohibits an employer from intentionally firing an employee on the basis of sex—including sexual orientation and gender identity. Although *Bostock* is a Title VII case and ACA Section 1557 *does not* incorporate Title VII, nevertheless the ruling may prove significant in potential challenges to the Final Rule. Title VII sex discrimination case law often is used to interpret Title IX, which is referenced in Section 1557. Indeed, the Ninth Circuit has held that the legislative history of Title IX "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII." *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012); *see also Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d Cir. 1994). Thus, challengers to the Final Rule may cite *Bostock* in support of arguments that discrimination on the basis of sex does include gender identity. It remains to be seen whether OCR's prophylactic attempt to distinguish Section 1557's and Title IX's interpretation of "sex" from Title VII's will be sufficient in the face of legal challenges in a post-*Bostock* world.

The Final Rule also contains "conforming amendments to CMS regulations" that implement changes to ten other regulations, each of which was promulgated independently from the 2016 Regulation and not based on Section 1557. Indeed, unlike the Section 1557 regulations, which are enforced by OCR, each of the regulations targeted by the "conforming amendments" is enforced by CMS. The "conforming amendments" modify existing CMS interpretations to eliminate anti-discrimination protections based on sexual orientation and gender identity. The Final Rule explains these changes are made "to ensure uniformity" within HHS for regulations that apply to "many of the same entities"—each of which is either established under ACA Title I, administered under ACA Title I, or a health program or activity that receives Federal financial assistance from HHS.

The federal government's abandonment of prior anti-discrimination protections may create a vacuum to be filled by state legislation. Already California, long the foe of Trump Administration regulatory pronouncements, reminded health plans regulated by the Department of Managed Health Care (DMHC) of their obligations to comply with state anti-discrimination laws. In a June 15, 2020 All Plan Letter, "APL 20-022 – Compliance with California nondiscrimination requirements," DMHC reiterated that all California-licensed health plans must refrain from discrimination on the basis of, *inter alia*, gender identity and sexual orientation. The All Plan Letter also explained that all California-licensed health plans must provide free language assistance services to LEP individuals, including the top 15 languages spoken by LEP individuals in California. Other states may follow suit with similar reminders or new protections.

Notices and Taglines

The 2016 Regulations required covered entities to issue a notice of nondiscrimination indicating that the entity does not discriminate, how an individual may file a complaint if he or she believes discrimination has occurred, and certain nondiscrimination assistance services available to the individual, among other things. The regulations also required taglines, or brief statements of nondiscrimination, to be posted in the top 15 non-English languages spoken by individuals with limited English proficiency (LEP) in the state or states where the entity operates.

The Final Rule eliminates both of those requirements. Covered entities still are required to provide a notice of nondiscrimination based on the regulations implementing Title VI, Title IX, the Age Act, and Section 504. Instead of broadly requiring taglines for all significant communications, the Final Rule requires covered entities to provide taglines when "necessary to ensure meaningful access" by LEP individuals, to be determined using a four-factor test:

- The number or proportion of LEP individuals eligible to be served or likely to be encountered;
- The frequency with which LEP individuals come in contact with the program, activity, or service;
- The nature and importance of the program, activity, or service; and
- The resources available to the entity and costs.

The Final Rule also preserves the 2016 Regulations' prohibition on requiring an LEP individual to provide an interpreter or relying on an accompanying adult to interpret or facilitate communication, except in limited circumstances.

HHS stated that a significant portion of the estimated $2.9 billion savings would be generated by the elimination of these requirements.

Enforcement Mechanisms

The Final Rule repeals several sections of the 2016 Regulations that provided mechanisms for both governmental and private parties to enforce the nondiscrimination requirements. HHS explains that much of the enforcement authority the Final Rule repeals was duplicative of existing authority under the nondiscrimination statutes incorporated by Section 1557 of the ACA, and that the creation of central discrimination remedies by the 2016 Regulations constituted a "patchwork" enforcement regime. Confusingly, the Final Rule defaults instead to the separate enforcement mechanisms of those underlying nondiscrimination laws to resolve this issue.

Of particular note, the 2016 Regulations directly supported the existence of a private right of action for individuals to enforce Section 1557 and the rules, and provided for compensatory damages to be available in such actions. The Final Rule repeals these provisions. Although administrative fiat would not be sufficient to create or remove a right of action, HHS states that it now takes no position on whether the ACA granted it, and further explains that such an action would arise under the statute itself and not under the regulations.

Individuals may still file complaints with HHS's Office of Civil Rights for investigation and enforcement. Although the Final Rule repeals HHS's right to audit an entity to enforce Section 1557 and the regulations, the preamble states that such authority already existed under the incorporated nondiscrimination laws.

The 2016 Regulations also included prohibitions of retaliation or intimidation related to the enforcement of nondiscrimination laws. The Final Rule repeals these provisions, and HHS again contends that the underlying laws include sufficient protections.

* * * * *

Given the current public health emergency, sustained civil unrest in pursuit of social justice, and upcoming election we expect litigation and public controversy surrounding the Final Rule. Crowell and Moring's team will continue to monitor state and federal developments responding to this important rulemaking.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Joe Records
Counsel – Washington, D.C.
Phone: +1 202.624.2709
Email: jrecords@crowell.com