

Publications

Biden Administration Proposal Restores, Updates Obama-Era Affordable Care Act Section 1557 Rules

ATTORNEYS & PROFESSIONALS

Kathryn Bjornstad Amin

kamin@groom.com

202-861-2604

A. Xavier Baker

xbaker@groom.com

202-861-5419

Jon Breyfogle

jbreyfogle@groom.com

202-861-6641

Lisa Campbell

lcampbell@groom.com

202-861-6612

Tamara Killion

tkillion@groom.com

202-861-6328

Seth Perretta

sperretta@groom.com

202-861-6335

Ryan C. Temme

rtemme@groom.com

202-861-6659

PUBLISHED

10/06/2022

SOURCE

Groom Publication

SERVICES

Employers & Sponsors

- [Health & Welfare Programs](#)

Health Services

- [Federal Insurance Regulation](#)

On August 4, 2022, the Biden Administration published its long-anticipated [proposed rulemaking](#) on Affordable Care Act (“ACA”) Section 1557’s nondiscrimination in health programs and activities requirements (“Proposed Rule”). Strengthening civil rights protections and language access via Section 1557 is a centerpiece of the [Department of Health and Human Services’ Equity Action Plan](#), in furtherance of the Administration’s Inauguration Day [Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government](#), which identified health equity and nondiscrimination as a domestic policy priority. Comments on the Proposed Rule closed October 3, 2022.

Background

ACA Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability, for any health program or activity, any part of which receives federal funding or assistance, or under any program or activity that is administered by an executive agency or any program or activity administered by an entity established by title I of the ACA. In so doing, Section 1557 incorporates both the protections and the remedies available under title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973. The extent to which prior law for those four acts is incorporated or controlling for Section 1557 is addressed via both Section 1557’s implementing regulations and emerging case law.

Finalized in the 2016, [the Obama Administration’s Section 1557 regulations](#) created broad, detailed requirements for health insurance issuers, group health plans, third-party administrators (“TPAs”), and providers. The Trump Administration [took a narrower approach](#) in its 2020 rulemaking, reducing the scope of covered entities and lifting certain nondiscrimination requirements. Section 1557’s scope and meaning, as interpreted in regulations, are one of the most consequential and contested aspects of the ACA, with [legal challenges](#) to both the Obama Administration’s and the Trump

Administration's regulations. Now, as detailed below, the pendulum swings back toward a more expansive interpretation of Section 1557.

Summary of Select Provisions

Broad Application to Programs and Activities

The Proposed Rule would apply to every health program or activity any part of which receives federal financial assistance ("FFA"), directly or indirectly from HHS; every health program or activity administered by HHS, and every program or activity administered by an ACA Title I entity (Exchanges, both FFE and state-based, including those on the federal platform). FFA includes monetary and nonmonetary subsidies, but not all government payments to beneficiaries are FFA (for example, Social Security payments and veterans' pensions do not constitute FFA). The Proposed Rule includes the following non-exhaustive list of HHS programs providing FFA: Medicaid and CHIP, Medicare Parts A, B, C, and D, and HHS grant programs. The addition of Medicare Part B as FFA for purposes of 1557 and Title VI, Section 504, Title IX, and the Age Act is new in the Proposed Rule.

The Proposed Rule adopts a broad interpretation of "health program or activity," defined as:

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.

This includes "all of the operations of any entity principally engaged in the provision or administration of health projects, enterprises, ventures, or undertakings" described above. In contrast to the Trump Administration's narrower interpretation, the Proposed Rule applies to health insurance issuer operations, including when acting as a TPA for a group health plan.

Consistent with the Obama Administration rules, the Proposed Rule will apply to health insurance issuers' TPA operations for self-funded plans when the issuer is a recipient of FFA. Similarly, it "will engage in a fact-specific analysis to evaluate whether a third party administrator is appropriately covered under Section 1557 as a recipient of Federal financial assistance in circumstances where the third party administrator is legally separate from the issuer that receives Federal financial assistance." *See* 87 Fed. Reg. 47,876.