HHS Issues Proposed Rulemaking Drastically Revising ACA Section 1557 Nondiscrimination Regulations

PUBLISHED: July 16, 2019
AUTHORS: Jon Breyfogle, Lisa Campbell, Tamara Killion, Matthew Muma

On June 14, 2019, the Office for Civil Rights ("OCR") of the U.S. Department of Health and Human Services ("HHS") published a notice of proposed rulemaking ("Proposed Rule") extensively revising the current regulations implementing Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), the ACA's nondiscrimination provision. 84 Fed. Reg. 27846. Most strikingly, the Proposed Rule re-interprets Section 1557 to remove protections against discrimination based on gender identity. The Proposed Rule also reduces the scope of the current rule's applicability to health insurance issuers and administrators and eliminates the rule's language-related tagline and notice requirements.

Critical Revisions Proposed

- **Gender identity would no longer be protected.** The Proposed Rule reinterprets the scope of Section 1557's underlying civil rights statutes, including the scope of Title IX's prohibition of discrimination on the basis of sex. Currently, the rule explicitly forbids discrimination based on sex, including gender identity.

GROOM INSIGHT | OCR has been enjoined from enforcing the prohibition on discrimination based on gender identity requirement since the district court injunction in Franciscan Alliance, Inc. v. Burwell, 227 F.Supp.3d 660 (N.D. Tex. Dec. 31, 2016).

The scope of the underlying civil rights statutes, and therefore the proper interpretation of Section 1557 itself, remain the subject of active litigation, with a Supreme Court decision likely in the near future. If the Supreme Court follows several federal circuit panels in holding that existing civil rights law reaches gender identity, OCR could revise its interpretation again.

- **Notice and taglines would no longer be required.** The Proposed Rule eliminates covered entities' requirement to provide notices of language services and notices of nondiscrimination with all "significant" communications and publications. The Proposed Rule also modifies some of the proposed requirements for language assistance for individuals with limited English proficiency ("LEP").

GROOM INSIGHT | For many group health plans subject to the rule, the notice and tagline provisions have been the biggest compliance challenge. The Proposed Rule would still require that covered entities provide meaningful access to health programs and activities subject to Section 1557, including the provision of language access services (where required).

- **Health insurance would no longer be considered a "health program or activity."** For health insurance issuers and administrators receiving Federal financial assistance, the Proposed Rule would no longer apply Section 1557's nondiscrimination provisions to the issuer's entire operations, including its operations as a third party administrator ("TPA") or an administrative-services-only ("ASO") provider. Instead, "health insurance programs administered by entities not principally engaged in providing health care will only be covered by the [Proposed] Rule to the extent that those programs … receive Federal financial assistance from the Department." 84 Fed. Reg. at 27850. This revision would mean that issuers (and other covered entities) that administer self-funded plans would not be subject to Section 1557 in the services provided to the plan (although the self-funded plan may be itself a covered entity). Health care *providers* would remain subject to the rule regarding all of their operations, however.
- Bullet List **Clarifies claims and remedies available.** The preamble to the current rule broadly provides that a private cause of action is generally available for violations of Section 1557, and the federal courts have split as to whether Section 1557 provides for a new, uniform, cause of action or merely incorporates the causes of action in the underlying civil rights statutes. The Proposed Rule purports to settle this conflict by interpreting Section 1557 to incorporate only the causes of action and remedies available under the underlying statutes.[1]

---

[1] The scope of the claims and remedies available under Section 1557 have been, and are currently, subject to litigation. As a recent district court decision explained:

> Although these courts agree that a private right of action exists, they part ways on the appropriate standard for assessing § 1557 discrimination claims. *Rumble* concluded that § 1557 creates a "health-specific" anti-discrimination claim "subject to a singular standard, regardless of a plaintiff's protected class status." 2015 WL 1197415, at *11 (subjecting plaintiffs to different standards based upon the type of discrimination claim they bring would be "illogical"). *Gilead* and *York*, on the other hand, concluded that plaintiffs can only use the enforcement mechanism of the civil rights statute that corresponds to their claim, based upon § 1557's plain language. *Gilead*, 102 F.Supp.3d at

I. Background

Body Text | ACA Section 1557 provides that an individual shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (race, color, national origin), Title IX of the Education Amendments of 1972 (sex), the Age Discrimination Act of 1975 (age), or Section 504 of the Rehabilitation Act of 1973 (disability), under any health program or activity, any part of which is receiving Federal financial assistance, or under any program or activity that is administered by an executive agency or any entity established under title I of the ACA or its amendments. On May 18, 2016, OCR published a final rule implementing Section 1557. 81 Fed. Reg. 31376.

The 2016 final rule was challenged in several cases; in one case, a group of states and health care providers challenged the rule's interpretation of "sex"—specifically, that in "redefining" sex to include gender identity, HHS violated the Administrative Procedure Act ("APA"). Further, the failure to include a religious exemption from the prohibitions against discrimination on the basis of sex violated Title IX and the Religious Freedom Restoration Act ("RFRA"). The groups also argued that HHS' treatment of "sterilization and sterilization-related services" violated various conscience-protection laws and argued that the rule violated several Constitutional Amendments.

On December 31, 2016, the U.S. District Court for the Northern District of Texas issued a preliminary injunction, concluding that the regulation violated the APA and likely violated RFRA as applied to the private plaintiffs. The court prohibited HHS from enforcing the rule's "prohibition against

---

698–99; *York*, *738 slip op. at 34–35.

Briscoe v. Health Care Serv. Corp., 281 F. Supp. 3d 725, 737–38 (N.D. Ill. 2017).

Also unclear is whether any or all of the underlying statutes permit disparate impact discrimination claims. The Sixth Circuit recently held that claims of unlawful discrimination based on disability under Section 1557 (claims that are based on the Rehabilitation Act Section 504) cannot be brought under a disparate impact theory. *Doe v. BlueCross BlueShield of Tenn., Inc.*, No. 18-5897 (June 4, 2019)("Because *Choate* did not decide the issue either way, and in fact expressed reservations about the effects of disparate-impact liability in this area, we remain free to hold that § 504 does not cover disparate-impact claims.") *But see Doe One v. CVS Pharmacy, Inc.*, 348 F. Supp. 3d 967, 982 (N.D. Cal. 2018)(finding plaintiffs had not sufficiently alleged disparate impact, but observing that "Section 504 protects persons with disabilities from both intentional and disparate-impact discrimination.") The preamble to the proposed rule says that "[m]ultiple Federal courts have held that Section 1557, or the statutes underlying it, do not permit private rights of action for disparate impact claims of discrimination on the basis of race or sex and there is a split on the question with respect to disability …." 84 Fed. Reg. at 27851.

discrimination on the basis of gender identity or termination of pregnancy." The case was eventually stayed, with the preliminary injunction remaining in effect, pending further rulemaking by HHS.[2]

Deadline for Comments

Comments are due August 13, 2019.

II. Key Revisions in the Proposed Rule

The Proposed Rule, if finalized, would completely replace the current rule. As of publication of the Proposed Rule in the Federal Register, HHS stated that it has suspended the application of all current sub-regulatory guidance inconsistent with the Proposed Rule.

Keeping with Trump Administration priorities, the Proposed Rule greatly loosens the requirements applicable to health insurance issuers, health care providers (including pharmacies and health clinics), and some group health plans. We summarize several key revisions below.

Definitions

The Proposed Rule eliminates the current rule's definition Section. However, certain key terms are effectively defined throughout the Proposed Rule. Only health programs or activities that receive Federal financial assistance are subject to Section 1557's nondiscrimination provision; therefore, the definitions of "health program or activity" and "Federal financial assistance" are critical to appreciate the rule's breadth. Entities that are subject to the rule are referred to as "covered entities."

Health program or activity: Under the current rule, a "health program or activity" generally includes any entity providing or administering health-related services or health-related insurance coverage (*e.g.*, the operations of health insurance issuers) or providing assistance in obtaining health-related services or health-related insurance coverage. Critically, all of the operations of an entity principally engaged in providing or administering health services or health insurance coverage are considered "health programs or activities" under the current rule.

---

[2] Plaintiffs successfully moved to lift the stay in December of 2018 and parties began filing motions in early 2019. Following HHS's May 24, 2019 release of the text of the proposed rule, plaintiffs in the Northern District of Texas continue to demand a permanent injunction from the court, arguing (among other things) that the rule does not adopt the litigants preferred definition of "biological sex" and that because the proposed rule "relies heavily" on the preliminary injunction, a permanent injunction from the court would "provide necessary guidance to HHS in formulating the final rule." Intervenors to the district court litigation have stated that they will challenge the new Proposed Rule if it is finalized. *See* https://www.aclu.org/press-releases/aclu-responds-proposed-changes-health-care-rights-law.

The Proposed Rule revises this interpretation so that, for entities not engaged in the actual provisioning of health care services, only those programs and activities actually receiving Federal financial assistance are subject to the final rule. Moreover, the Proposed Rule specifically provides that health insurers are *not* considered to be principally engaged in the business of providing health care. The Proposed Rule would continue to apply to "all operations" of an entity that receives Federal financial assistance and that is "principally engaged in the business of health care." Examples of entities principally engaged in the business of providing health care include hospitals, nursing facilities, hospices, community health centers, and physical therapists.

Federal financial assistance: The Proposed Rule removes the current definition of Federal financial assistance, but Federal financial assistance is "described" in revised Section 92.3(a)(1) as "Federal financial assistance (including credits, subsidies, or contracts of insurance) provided by the Department." The Proposed Rule would no longer include language specifying that Federal financial assistance includes assistance HHS "plays a role" in administering. Limiting Federal financial assistance in this way initially appeared quite important to issuers that offer coverage through an Exchange, as the proposed rule would "no longer cover issuers of Exchange plans solely on the basis that HHS plays a role in administering tax credits." 84 Fed. Reg. at 27861. However, the preamble further explains that qualified health plans ("QHPs") nonetheless continue to be subject to Section 1557 because QHPs sold on the Exchanges are sold through a program established under Title I of the ACA and are subject to regulation by HHS.

The Proposed Rule illustrates "Federal financial assistance" with a less expansive set of terms than the current rule, which includes any grant, loan, credit, subsidy, contract (other than procurement contracts), or any other arrangement where the federal government provides funds, services of federal personnel, or real or personal property.

GROOM INSIGHT | The Proposed Rule applies to "Federal financial assistance" received directly from HHS. The statute is not so limited, applying to Federal financial assistance generally. Potential covered entities should carefully assess their programs to ascertain whether they still receive financial assistance under the Proposed Rule.

Covered entity: The Proposed Rule also removes the definition of "covered entity." But the Proposed Rule continues to use the term, and revised Section 92.3 "Scope of application" clarifies that the following entities are covered by the Proposed Rule: (1) Any health program or activity, any part of which is receiving Federal financial assistance provided by HHS; (2) Any program or activity administered by HHS under Title I of the Patient Protection and Affordable Care Act; or (3) Any program or activity administered by any entity established under such Title.

GROOM INSIGHT | This language makes explicit that the rule applies to health program or activities administered by recipients of Federal financial assistance from HHS. Note, however, that under the statute, other agencies and departments may also implement rules enforcing Section 1557 and that private plaintiffs may sue for violations of the statute.

Notices and Taglines

The Proposed Rule reduces covered entities' duties to provide notices of nondiscrimination and taglines alerting individuals that language assistance services are available. The current rule requires that covered entities provide these notices and taglines with all "significant publications and significant communications" larger than postcards or small brochures. The Proposed Rule eliminates this requirement and only requires that covered entities "take reasonable steps to ensure meaningful access to such programs or activities by limited English proficient individuals."

OCR asks specifically for comments on the notification of beneficiaries, enrollees, applicants, patients, and/or members of the public about their rights and responsibilities under civil rights laws.

Applicability to Health Insurers and TPAs

The current rule applies to: (1) all health programs or activities, any part of which receives Federal financial assistance from HHS; (2) health programs and activities administered by HHS, including the Federal Marketplaces; and (3) health programs and activities administered by entities under title I of the ACA, including the State Marketplaces.

Therefore, entities subject to the current rule include health insurance issuers that offer QHPs on the Marketplaces, issuers with health plans that participate in Medicare Advantage and Medicaid, group health plans that receive Medicare Part D subsidies, and providers that accept Medicare (except for Part B) and Medicaid. For these entities, the current rule's nondiscrimination requirements apply to ***all of the operations*** of the entity (e.g., TPA services), not just the part of the business receiving federal funding.

The Proposed Rule dramatically revises the rule's scope to exclude most health insurers' and administrators' programs and activities that do ***not*** receive federal funding, though the Proposed Rule continues to apply to all the operations of health care providers. Therefore, regarding some of their commercial insurance programs and TPA activities, many issuers and TPAs would be excluded from the Proposed Rule.[3] The preamble to the Proposed Rule states that it would not apply to self-funded

[3] Under the current rule, discriminatory actions specifically include: (1) denying or limiting health coverage; (2) denying a claim; (3) employing discriminatory marketing or benefit designs; and (4) imposing additional cost sharing. The Proposed

plans subject to ERISA, Medicare Part B, short-term limited duration insurance, and the Federal Employees Health Benefits Program so long as these plans do not receive Federal financial assistance.

GROOM INSIGHT | The revision to the Proposed Rule's scope would appear to give most insurance issuers and TPAs more flexibility in certain plan designs. Nonetheless, issuers and TPAs should exercise caution: first, all health programs and activities that receive Federal financial assistance from HHS will still be subject to the Proposed Rule. Second, there is no guarantee that the federal courts will agree with OCR's re-interpretation if it is challenged. Finally, plaintiffs could still potentially sue under Section 1557 itself, arguing that the statute reaches certain issuer and TPA conduct even if OCR disagrees.

Furthermore, the Proposed Rule's preamble does not include language in the current rule's preamble that would have protected TPAs' activities in certain instances. Under the current rule, OCR stated that, where a TPA adopts procedures for its processing of complaints, when reviewing a complaint brought against a TPA, OCR will "determine whether responsibility for the decision or other action alleged to be discriminatory rests with the employer or with the third party administrator." 81 Fed. Reg. at 31432. Under the current rule, if the conduct is related to the administration of the plan (e.g., timing of claim processing), then OCR will process the complaint against the TPA (assuming the TPA is a covered entity). Otherwise, OCR would take other steps. Likely because OCR no longer feels this safe harbor is necessary, the Proposed Rule's preamble makes no provision for this situation.

Health programs or activities must continue to comply with HHS's preexisting rules implementing:

- Title VI (*see* 45 CFR § 80.3(b)(1) through (6));
- Title IX (*see* 45 CFR § 86.31(b)(1) through (8));
- Section 504 of the Rehab Act (*see* 45 CFR §§84.4(b), 84.21 through 84.23(b), 84.31, 84.34, 84.37, 84.38, and 84.41 through 84.52(c) and 84.53 through 84.55); and
- The Age Act (*see* 45 CFR § 91.11(b)).

Sex Discrimination

The current rule provides that the prohibition on discrimination on the basis of sex includes sex discrimination related to an individual's sexual orientation where evidence establishes that the discrimination is based on gender stereotypes.

Rule eliminates the provision containing these specified categories, 45 C.F.R. § 92.207, just as it would eliminate the rule's application to insurance and administration in many instances.

The Proposed Rule explicitly disavows this position, bringing OCR's interpretation in line with the decision in *Franciscan Alliance* and the general Executive Branch position under President Trump.

GROOM INSIGHT | Enforcement of the current rule's application to gender identity has been enjoined nationwide since the Franciscan Alliance decision. Nonetheless, the actual status of gender identity discrimination under federal civil rights law remains disputed. Several Federal Circuit Court panels have found that Title VII of the Civil Rights Act reaches gender identity discrimination. See, e.g., Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) cert granted, No. 17-1623 (U.S. Apr. 22, 2019); Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017). Section 1557 does not incorporate Title VII, but it does incorporate Title IX, and judicial analysis under Title IX tends to follow that under Title VII. See, e.g., Jennings v. University of North Carolina, 482 F.3d 686, 695 (4th Cir. 2007); DOJ, Title IX Legal Manual (August 6, 2015), https://www.justice.gov/crt/title-ix. As the Proposed Rule notes, the Supreme Court is likely to address this issue shortly.

Employer Liability for Discrimination in Employee Health Benefit Programs

Under the current rule, a covered entity (a health program or activity that receives Federal financial assistance) may be subject to the rules with respect to its own "employee health benefit program" under certain circumstances. The Proposed Rule eliminates the provision specific to these programs, but may nonetheless affect such programs under certain circumstances.

For example, if the covered entity is principally engaged in providing health services, the covered entity would appear to be liable for violations of the rule with respect to its own employee health benefit program. Therefore, providers and provider-owned entities that receive Federal financial assistance would generally have to comply in providing health benefits to their employees.

Alternatively, if a covered entity receives Federal financial assistance, a primary objective of which is to fund the entity's employee health benefit program, the covered entity would also seem likely to remain liable for violations of this rule with respect to its employee health benefit program.

OCR asks for comments specifically about employee benefit programs.

Language Services and Auxiliary Aids and Services

The current rule requires a covered entity to provide language assistance services free of charge, and the services must be accurate, timely, and protect the privacy of LEP individuals. The Proposed Rule retains this basic requirement in modified form, requiring covered entities to take "reasonable steps to ensure meaningful access" for LEP individuals according to a set of facts-and-circumstances criteria. The Proposed Rule, consistent with the current rule, requires covered entities to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others in such health programs or activities, and revises the provisions detailing effective

communication for individuals with disabilities to include provisions that were previously definitional in the substantive provisions.

Abortion-Related Services

The current rule does not include a blanket religious exemption, though it does provide that if applying the rule would "violate applicable Federal statutory protections for religious freedom and conscience, such application shall not be required." 45 CFR § 92.2(b)(2). The *Franciscan Alliance* court found that the current rule as written was likely insufficient to comply with the RFRA, and the Proposed Rule contains a specific religious exemption regarding abortion-related services.

GROOM INSIGHT | It is unclear what practical difference this particular change makes given that by its own terms, the current rule does not purport to violate RFRA. But the Proposed Rule makes explicit the Administration's intention to allow covered entities to opt out of abortion-related services requirements on religious grounds, in keeping with this Administration's general priorities and another final rule recently issued by OCR, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, which would allow a larger number of health care providers and institutions to decline to pay for or provide abortions on religious or moral grounds. 84 Fed. Reg. 23170 (May 21, 2019). Like many other rules, the Conscience Protection rule is subject to active litigation. See San Francisco v. Azar, 19-cv-2405 (N.D. Cal., filed May 2, 2019).[4]

Assurances

The Proposed Rule retains the current rule's requirement that each entity applying for Federal financial assistance, each issuer seeking certification to participate in a Marketplace, and each state seeking approval to operate a State Marketplace must submit an assurance that its health programs and activities will be in compliance with Section 1557.

Grievance Procedures

The Proposed Rule repeals provisions requiring designation of a responsible employee and adoption of grievance procedures. OCR states that provisions in the current rule are duplicative of, inconsistent with, or may be confusing in relation to the pre-existing civil rights regulations. OCR seeks comments on such provisions proposed for repeal.

---

[4] As a result of the litigation, the effective date of the Conscience Protection rule is delayed by four months, until November 22, 2019.

GROOM INSIGHT | If OCR repeals these provisions in a Final Rule, covered entities would only be required to designate responsible employees and adopt a grievance procedure if required under Title VI, Title IX, Section 504 of the Rehab Act, and the Age Act.

Enforcement

The Proposed Rule specifies that the enforcement mechanisms provided for, and available under, the four underlying civil rights statutes apply to Section 1557. The Proposed Rule thus purports to clarify that Section 1557 does not create new causes of action or remedies. Instead, for example, claims for disparate impact discrimination would only be available where these claims are available under the underlying statute – which may exclude disparate impact claims for sex discrimination.[5]

GROOM INSIGHT | The Proposed Rule purports to clarify that the underlying claims and remedies apply, but, as with other provisions in the Proposed Rule, there is no guarantee that federal courts will agree with this approach. Plaintiffs may continue to sue under the statute itself.

III. Conclusion

The Administration's proposed changes to the Section 1557 rule would deliver on a number of Trump Administration priorities. While the controversy over Section 1557's application to gender identity is likely to be decided by the Supreme Court, other revisions are likely to have a large impact, in particular the decisions to eliminate the notices and taglines requirement and to restrict the rule's scope to either those covered entities that are principally engaged in the business of providing health care or only those specific programs and activities that receive Federal financial assistance.

Nonetheless, if finalized, the Proposed Rule is sure to be challenged in court, and courts may not defer to the Administrations re-interpretation of the rule, either in the context of a lawsuit challenging the Proposed Rule itself or a plaintiff suit brought under Section 1557 itself. Interested entities should consider commenting when the Proposed Rule is published in the Federal Register.

* * *

Please contact any of the attorneys in the Health Services Practice Group at Groom Law Group or your regular Groom Law Group attorney for further information on this Proposed Rule.

---

[5] See 84 Fed. Reg. at 27873 for a preamble discussion of court cases that have analyzed disparate impact claims for sex discrimination under Section 1557.