FYI® Alert
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HHS Finalizes Regulations on ACA Nondiscrimination in Health Programs and Activities

HHS has issued final regulations that prohibit "covered entities" from discriminating based on race, color, national origin, sex, age or disability in their health programs and activities. The guidance, among other things, clarifies that although an issuer receiving federal financial assistance through participation in an ACA marketplace is subject to the rules even when acting as a TPA to a self-funded group health plan, the rules do not apply to the employer sponsoring the group health plan — unless the employer is itself a covered entity. Where the employer is not a covered entity, HHS's Office of Civil Rights typically will refer the matter to the appropriate federal agency.

Background

Section 1557 of the Affordable Care Act (ACA) prohibits covered entities from discriminating in certain health programs and activities on the basis of race, color, national origin, sex, age or disability. Specifically, it prohibits individuals from being excluded from participation in, denied the benefits of, or subjected to discrimination under health programs and activities that receive federal financial assistance, programs administered by a federal executive agency, and entities established under Title I of the ACA (the ACA marketplaces).

In September 2015, the Department of Health & Human Services (HHS) proposed regulations implementing Section 1557. Under the proposed rules, covered entities would have to provide assurances and notices of nondiscrimination, designate a responsible employee for coordinating compliance with the rules, and adopt grievance procedures. The proposed rules include specific protections against sex discrimination in general, and for transgender individuals in particular. (See our January 7, 2016 *For Your Information.*)
HHS received almost 25,000 comments on the proposed guidance.

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Final Rule is Here

On May 13, 2016, HHS released its final rule, accompanied by a fact sheet and summary. Consistent with the proposed rule, the final rule defines a "covered entity" as:

- An entity that operates a health program and activity that receives federal financial assistance through HHS (for example, a hospital that accepts payments under Medicare Part A)
- An entity established under Title I of the ACA that administers a health program or activity, including state-based marketplaces
- The HHS and the programs it administers, including federally run marketplaces

The Section 1557 nondiscrimination rules apply only to these covered entities and extend to their employee health benefit programs.

Also like the proposed rule, the final rule prohibits discrimination in health programs and activities based on race, color, national origin, age, disability and sex — including pregnancy, gender identity and sex stereotyping. Additionally, it bans discrimination against individuals with limited English proficiency, and requires reasonable accommodations that ensure effective communications to individuals with disabilities.

Covered Entities Include TPAs Servicing Self-Funded Group Health Plans

The proposed rules generally provided that a health insurance issuer receiving federal financial assistance through participation in an ACA marketplace is a covered entity subject to these rules, even when acting in its capacity as a third-party administrator (TPA) for a self-funded group health plan. This caused considerable concern for employers sponsoring self-insured plans that might not otherwise be subject to the Section 1557 rules.

Acknowledging that TPAs are generally not responsible for the benefit design of self-insured plans, and that ERISA requires plans to be administered according to their terms, the final rules make it clear that the rules applicable to the TPA do not apply to the employer and its self-insured health plan, unless the employer is itself a covered entity. When a claim of discrimination arises, the HHS's Office of Civil Rights (OCR) will first determine whether the TPA or the employer is responsible for the alleged discriminatory action. If the TPA is responsible, OCR will process the complaint — for example, where the TPA denies a claim because an individual's last name suggests a particular national origin. If the employer is responsible — except where OCR has jurisdiction over the employer as a covered entity — OCR typically will refer or transfer the matter to the appropriate federal agency. For example, if OCR lacks jurisdiction over an employer responsible for a plan that excludes coverage for all health services related to gender transition, OCR might refer the matter to the Equal Employment Opportunity Commission (EEOC).

Definition of Sex Discrimination Does not Explicitly Include Sexual Orientation Discrimination

The final rule does not resolve whether discrimination on the basis of sexual orientation status alone is a form of sex discrimination under Section 1557. Instead, it provides that OCR will "evaluate complaints alleging sex discrimination related to an individual's sexual orientation to determine whether they can be addressed under Section 1557." Additionally, the provisions of the final rule do not apply where application would violate federal protections for religious freedom and conscience.

In Closing

The final rule is effective and applicable on July 18, 2016, except that provisions affecting health insurance plan benefit design are effective the first day of the first plan year beginning on or after January 1, 2017. We intend to discuss the HHS's guidance in detail in a future *For Your Information* publication.

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