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HHS to Reconsider Rule Prohibiting Discrimination Based on Gender Identity, Pregnancy Termination

After temporarily blocking provisions of the Obama-era HHS regulation that prohibits certain health programs and activities from discriminating based on gender identity and pregnancy termination, a Texas federal court has put the case on hold indefinitely while HHS reconsiders these rules. The timeframe for agency review is not clear. Meanwhile, employers and plans that are covered entities should work with legal counsel to discuss how HHS reconsideration may affect risks associated with any coverage gaps for transgender health and abortion services.

Background

Section 1557 of the Affordable Care Act bars "covered entities" from discriminating in certain health programs and activities on grounds prohibited by four federal nondiscrimination statutes – including Title IX of the Education Amendments of 1972 (Title IX). Among the proscriptions Section 1557 expressly incorporates by reference is Title IX's prohibition against discrimination "on the basis of sex."

In May 2016, the Department of Health and Human Services (HHS) issued final regulations defining "covered entity" for purposes of Section 1557's nondiscrimination rules – a health program administered by an executive agency, a public marketplace, or a health program or activity that receives federal funding or assistance. They define "sex discrimination" to include discrimination based on gender identity or termination of pregnancy in covered programs. They also prohibit a "categorical coverage exclusion or limitation for all healthcare services related to gender transition" and denials of health coverage based on gender identity or sex stereotyping, requiring individuals to be treated consistent with their gender identity. See our September 7, 2016 *For Your Information* and our *FYI Alert* from May 17, 2016 to learn more about the final regulations and which employers and programs meet their definition of covered entities.

On December 31, 2016, the Northern District of Texas federal court entered a nationwide preliminary injunction ordering HHS not to enforce its ban on gender identity and termination of pregnancy discrimination. In doing so, it held that including gender identity discrimination in the final regulation's interpretation of sex

discrimination conflicts with Section 1557. (See our January 13, 2017 *For Your Information*.) While the case was pending a decision on the merits, HHS – now under the Trump administration – asked the court to hold off on further proceedings while the agency reconsiders the rule's prohibition on discrimination based on gender identity and pregnancy termination.

Back to HHS for Reconsideration

In a July 10, 2017 order, the court held that HHS provided "substantial and legitimate" concerns that merited a remand and stay – or hold – of the case while HHS reconsiders the contested aspects of the final rule. Specifically, it found that "courts ordinarily allow the rulemaking agency an opportunity to reconsider a rule when it cites serious and legitimate concerns, even in the absence of confessed error and before consideration of the merits" and determined that the most efficient approach would be to stay the case until HHS completes its review.

The timeframe for agency reconsideration of the rule is not clear.

Although the specific outcome of HHS reconsideration is unclear, many assume that the Trump administration will read the Section 1557 more narrowly than did the Obama administration – with the prohibition against discrimination on the basis of sex not extending to discrimination based on gender identity or termination of pregnancy.

Don't Forget the Other Aspects of Section 1557 Compliance

Even if HHS removes the protections against gender identity and pregnancy termination discrimination, covered entities must comply with other aspects of Section 1557. In addition to sex discrimination, Section 1557 prohibits discrimination based on race, color, and national origin, limited English proficiency, disability and age. Generally, in addition to ensuring substantive compliance with these prohibitions, covered entities must do the following:

Please contact your Conduent Health and Welfare consultant for a detailed checklist of Section 1557 compliance items.

- Submit an assurance of compliance form with HHS
- Satisfy specified notice requirements
- Designate an employee responsible for Section 1557 compliance
- Adopt grievance procedures to be used in connection with alleged Section 1557 violations

In Closing

This ruling furthers the state of limbo for the final regulations' protection against discrimination based on gender identity and pregnancy termination. Employers and plans that are covered entities should work with legal counsel to discuss risks associated with any coverage gaps for these services, and how HHS reconsideration of the final regulations may affect those risks. Covered entities should also consider factors like cost, corporate culture and employee population in assessing coverage for these services under their plans. Additionally, they should ensure compliance with other Section 1557 requirements.

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