Mar 07, 2017

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Tax Law Defined™ Blog

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ACA Nondiscrimination Casts Wide Net, But Portion Has Been Enjoined

The Department of Health and Human Services (HHS) released final regulations on Section 1557 of the Affordable Care Act (ACA) in May 2016. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability by any entity that operates a health program or activity, any part of which receives federal financial assistance. This includes entities which provide, administer, or assist in obtaining health-related services or health-related insurance coverage.

Since other federal law generally prohibits discrimination for many of the same reasons, the major impact of these regulations is to prohibit discrimination related to gender identity and termination of pregnancy. It is these aspects of the regulation that were challenged on the basis they violate the Religious Freedom Restoration Act and thwart the independent medical judgment of physicians.

A Texas federal court agreed and issued a nationwide injunction on December 31, 2016, as further described at the end of this article. As noted by the Texas court, only the prohibition of discrimination on the basis of "gender identity" and "termination of pregnancy" is enjoined. **Employers covered by these regulations are still required to comply with the remaining requirements of these regulations, including the notice requirements detailed below**.

The regulations will apply to almost any entity in the health care industry (such as hospitals, health clinics, health insurers, community health centers, physician practices, home health care agencies, pharmacies, etc.), almost all insurers (including those which administer self-insured group health plans), and any group health plan that receives, or whose sponsor receives, federal financial assistance. These entities are referred to as "covered entities" in the regulations.

"Federal financial assistance" includes any grant, loan, credit, subsidy, contract, or other arrangement where the federal

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government provides funds, services of federal personnel, or real or personal property, including payments from Medicare (including Medicare Part D subsidies), Medicaid, and the State Children's Health Insurance Program (SCHIP).

Nondiscrimination

The regulations prohibit discrimination based on an individual's race, color, national origin, sex, age, or disability, so that an individual cannot be excluded from participation, denied benefits or otherwise be subject to discrimination under any health program or activity. Notably, unlike other laws prohibiting discrimination, the regulations require that covered entities "treat individuals consistent with their gender identity" and specifically prohibit the implementation of categorical coverage exclusions or limitations for all health services related to gender transition. The regulations also prohibit denying or limiting coverage for a transgender individual for any health services that are ordinarily applicable to individuals of one sex on the basis that the person's sex assigned at birth is different from the one for which such health services are ordinarily available.

Language Services and Auxiliary Aids and Services

The regulations require a covered entity to provide language assistance services free of charge, including offering qualified oral interpreters or written translators to limited English proficiency individuals, when such services are necessary to provide meaningful access to that individual. Communications with individuals with disabilities must also be as effective as communications with non-disabled individuals (this requirement is targeted mainly at blind and deaf individuals.)

Notice Requirements

Covered entities must notify affected individuals of the various requirements of the regulations including (i) the entity's nondiscrimination policy, (ii) that the entity provides appropriate auxiliary aids and services where necessary (free of charge), (iii)

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that the entity provides language assistance services, and (iv) how to obtain auxiliary aids and language assistance services. Covered entities are also required to post short statements (called "taglines") written in the top 15 non-English languages spoken in the state in which the entity is located to alert individuals with limited English proficiency to the availability of language assistance services, free of charge and how the services can be obtained.

The notices and non-English language taglines described above must be published in all of a covered entity's significant publications and communications, as well as in a conspicuous location on the covered entity's website, and in a conspicuous physical location where the covered entity interacts with the public.

Model notices can be found here.

Penalties for Violation

Covered entities determined to have violated the regulations face the loss of federal funding, debarment from doing business with the government, and false claims liability. In the case of an employer group health plan where the employer is not a "covered entity" under the regulations, HHS may refer any alleged discrimination to the EEOC, who could then bring an investigation against the employer.

Texas District Court Decision

A group of plaintiffs, including eight states, three private healthcare providers and a group of physicians, filed suit in a Texas Federal District Court in 2016 challenging the portion of the regulations defining discrimination "on the basis of sex."

Since Section 1557 of the ACA defines sex discrimination to include discrimination based on gender identity, the regulations provide that individuals cannot be denied healthcare services or health insurance coverage based on gender identity, and any insurance or group health plan coverage exclusions for all gender transition services are considered discriminatory under the regulations. The regulations also define discrimination "on the basis of sex" to include "termination of pregnancy," but the regulations do not

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define the term "termination of pregnancy."

In the Texas case, the plaintiffs challenged the regulation's definition of discrimination "on the basis of sex" and argued that including gender identity and termination of pregnancy in that definition could require them to perform, and provide insurance coverage for, gender transition services and abortions regardless of their contrary religious beliefs or medical judgment.

In its decision issued on December 31, 2016, the Texas Federal District Court noted that ACA Section 1557 incorporates the prohibited sex discrimination provision in Title IX of the Education Amendments of 1972. The Court then stated that it had previously concluded in a case decided earlier in 2016 that the meaning of "sex" in Title IX unambiguously referred to "the biological and anatomical differences between male and female students as determined at their birth" holding that "Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute." The Court determined that Congress intended to prohibit sex discrimination on the basis of the biological differences between males and females. Thus, the Court concluded that HHS' expanded definition of sex in the regulations to include "gender identity" exceeded what Congress intended in enacting Section 1557.

The Court also found that the failure to include Title IX's religious exemptions rendered this portion of the regulations contrary to law, and that the private (non-state) plaintiffs demonstrated a substantial likelihood of success on their claim that the challenged regulation violated the federal Religious Freedom Restoration Act.

Finding that the plaintiffs demonstrated a substantial threat of irreparable harm, the Court granted a nationwide preliminary injunction, prohibiting HHS from enforcing the regulation's prohibition against discrimination on the basis of gender identity or termination of pregnancy. Due to the recent change in the leadership of HHS, it is possible that HHS may not object to the court's injunction. The ACLU is currently attempting to intervene in the case and is expected to challenge the court's injunction ruling if the intervention request is granted.

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For more information, please contact Michael Bindner, Carl Lammers or any other attorney in Frost Brow Todd's Employee Benefits Law practice.

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