COMPLIANCE **ALERT**

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HHS Issues Final Rule Strengthening ACA Section 1557 Nondiscrimination Requirements

May 21, 2024

Action Required:

- **Covered entities should review their health plan documents and policies to ensure these documents do not discriminate based on the protected classifications outlined in Section 1557.**
- **Covered entities should also review any plan exclusions and limits on gender-affirming care to confirm their policies comply with these requirements.**

On May 6, 2024, the U.S. Department of Health and Human Services (HHS) published a final regulation ("Final Rule") under Section 1557 of the Affordable Care Act (ACA) designed to strengthen civil rights and nondiscrimination protections in healthcare for certain health plans receiving financial assistance from HHS ("covered entities"). HHS also published related FAQ guidance ("Guidance") summarizing and clarifying key provisions of the Final Rule. The Final Rule will become applicable to group health plans on the first day of the plan year beginning on or after January 1, 2025.

What Should Employers and Plan Sponsors Do Next?

Employers sponsoring group health plans that are covered entities should review their health plan's plan documents and policies, as well as employment policies pertaining to the health insurance coverage, including employee handbooks and collective bargaining agreements, to ensure that such policies do not discriminate on the basis of the protected classifications protected by Section 1557, including on the basis of sexual orientation and gender identity. Additionally, plan exclusions and limits on gender-affirming care should be reviewed carefully to ensure that they do not run afoul of Section 1557's requirements. ■

↓ Full Explanation Follows ↓

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How Will the New Final Rule Under ACA Section 1557 Change the Law?

The new Final Rule is intended to reinstate the power of Section 1557 of the ACA ("Section 1557") after the Trump Administration HHS stripped down Section 1557's nondiscrimination protections. Section 1557 prohibits discrimination in healthcare on the basis of race, color, national origin, disability, age, or sex.

As background, and as discussed in our prior E-Alert, Section 1557 has undergone quite a bit of change in the last decade. After President Obama signed the ACA into law in 2010, HHS (the entity that enforces Section 1557), first issued regulations implementing Section 1557 on May 18, 2016 (the "2016 Rule").

On June 14, 2019, the HHS under the Trump Administration published a Section 1557 notice of proposed rulemaking ("NPRM"), proposing to rescind and replace large portions of the 2016 Rule that the Administration argued had exceeded Section 1557's legislative authority. On June 19, 2020, HHS published the revised Section 1557 final rule (the "2020 Rule") in the Federal Register. The 2020 Rule significantly limited the reach of the 2016 Regulations, as it cut out prohibitions against sex stereotyping, gender expression, and gender identity. The 2020 Rule was then (just days later) largely nullified by the U.S. Supreme Court's decision in *Bostock v. Clayton County*, which interpreted Title VII of the Civil Rights Act of 1964 ("Title VII") as prohibiting discrimination in the workplace (including with regard to employee benefits) "on the basis of sex" as including discrimination on the basis of sexual orientation and gender identity.

On August 4, 2022, the Biden Administration HHS posted a new Section 1557 NPRM which, after thousands of comments, led to the current May 6, 2024 Final Rule.

Which Types of Health Plans are Subject to the Final Rule?

As clarified in the new FAQ Guidance, Section 1557 applies to health programs or activities that receive HHS funding, health programs or activities administered by HHS (such as the Medicare Part D program) and the health insurance Exchanges (and all plans offered by issuers that participate in those Exchanges that receive federal financial assistance).

What are Some of the Key Provisions of the New Final Rule?

What follows is an overview of the key provisions of the Final Rule pertaining to employer-sponsored group health plans:

Nondiscrimination Protections: The new Final Rule clarifies HHS' position on the following nondiscrimination protections:

- **Transgender Care/Gender-affirming Care**: Incorporating the ruling in *Bostock*, the new Final Rule attempts to establish that the federal prohibition against discrimination on the basis of "sex" includes discrimination on the basis of "gender identity," and attempts to preempt (invalidate) state laws that prohibit gender-affirming care.[1] Specifically, the Final Rule specifies that sex discrimination includes discrimination on the basis of "sex characteristics, including intersex traits . . . sexual orientation; gender identity; and sex stereotypes." As a result, even though the Final Rule does not expressly require covered entities to provide gender-affirming care, covered entities may have considerable difficulty justifying plan exclusions on such care, or other plan limits on such care, such as higher copays and other cost sharing, particularly where such exclusions and limits do not apply to other reproductive healthcare covered under the plan.
- **Pregnancy and Abortion:** The Final Rule also clarifies that "sex discrimination" includes discrimination related to pregnancy and pregnancy-related conditions. Further, while the new Final Rule does not address abortion, in the preamble to the Final Rule, HHS states that Section 1557's protections include discrimination in abortion coverage. However, the new Final Rule does not require that health plans cover abortion and there is no similar state preemption provision (that is, similar to the gender-affirming care-

1. The state of Florida has already filed a lawsuit to challenge this preemption provision.

related preemption provision). Under Section 1557, a decision not to provide abortions is discriminatory only if the decision is applied differently based on prohibited classifications.

- **Conscience Exemption:** Notably, the new Final Rule specifies that Section 1557 should not be construed to affect federal laws regarding conscience or religious protection. Covered entities can either rely on the federal protections for religious freedom and conscience laws or apply for a "conscience exemption" from HHS. It should be noted, however, that because the new Final Rule is directly applicable to covered entities, and not to plan sponsors, employers seeking a conscience or religious exemption from Section 1557 may not be able to rely on the Final Rule as the basis for such an exemption.

Does the Final Rule Require Employers and Plan Sponsors to Cover or Provide Gender-Affirming Care?

No. The Final Rule does not expressly require employers and plan sponsors to cover or provide gender-affirming care on their health plans, nor does it set forth any standard of care or course of treatment for adults or children with gender dysphoria. The Final Rule simply prohibits covered entities from excluding or limiting such care in a discriminatory way.

What Should Employers and Plan Sponsors Do?

Employers sponsoring group health plans that are covered entities should review their health plan's plan documents and policies, as well as employment policies pertaining to the health insurance coverage, including employee handbooks and collective bargaining agreements, to ensure that such policies do not discriminate on the basis of the protected classifications protected by Section 1557, including on the basis of sexual orientation and gender identity. Additionally, plan exclusions and limits on gender-affirming care should be reviewed carefully to ensure that they do not run afoul of Section 1557's requirements. ■

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.