

HHS Nondiscrimination Rule: Impact on Large Employers

The ERISA Industry Committee
FocusOn Call

October 7, 2015

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ACA Section 1557

- ACA § 1557 prohibits discrimination in “any health program or activity, any part of which is receiving Federal financial assistance”

- ACA § 1557 is modeled on four other statutes that prohibit discrimination in federally-funded programs:
 - Title VI of the Civil Rights Act of 1964 (race, color, national origin)
 - Title IX of the Education Amendments Act of 1972 (sex)
 - The Age Discrimination Act of 1975 (age)
 - Section 504 of the Rehabilitation Act of 1973 (disability)

HHS Proposed Regulation

- HHS regulation proposed in September adopts a very expansive interpretation of ACA §1557
- HHS interpretation is consistent with the Civil Rights Restoration Act of 1987, which expanded the reach of the four predecessor statutes
- HHS says its goal is to include “the most robust set of protections supported by the courts on an ongoing basis”

Rules Apply to TPAs Administering Self-Insured Plans

- If an entity is principally engaged in providing or administering health coverage, and any part of its activities receive federal funding, the nondiscrimination rules apply to all of its activities
- What does this mean for self-insured plans?
 - Most TPAs will be covered by the rules if they offer insurance through an ACA Marketplace
 - If an entity is covered by the rules, it must comply when it acts as TPA as well as when acts as insurer
- Possible exception for separately-incorporated entities

Rules Apply to Retiree Prescription Drug Plans

- The nondiscrimination rules also apply to group health plans that receive federal health funding
 - An employer group waiver plan (“EGWP”) or other Medicare Part D plan
 - A retiree prescription drug plan, if the employer receives the retiree drug subsidy

- If a retiree prescription drug plan receives federal subsidies, how far will the nondiscrimination rules extend?
 - To the retiree prescription drug benefit only?
 - To the entire retiree health plan?
 - To all retiree health plans maintained by the same employer?
 - To all group health plans (active and retiree) maintained by the same employer?

Limited Exception for Employers

- If an employer is not principally engaged in providing or administering health coverage,
- but it operates a federally-funded health activity (other than a group health plan),
- it is subject to the nondiscrimination rule only with respect to employees engaged in the federally-funded activity.
 - Example: state government operates a Medicaid program: nondiscrimination rule applies only to state employees who administer the Medicaid program

Limited Exception for Employers (continued)

- If an employer is not principally engaged in providing or administering health coverage,
- and it does not operate a federally-funded health activity other than a group health plan,
- it is not subject to the nondiscrimination rule.
 - Example: employer receives federal grant to conduct weapons research and uses part of the grant to provide health benefits to employees working in the grant program: nondiscrimination rule does not apply.
- Even if an exception applies to the employer, the nondiscrimination rule might apply separately to the TPA or to the group health plan

No Discrimination Based on Gender Identity

- Discrimination based on gender identity constitutes prohibited sex discrimination
- A covered entity may not automatically exclude or limit coverage for all health services related to gender transition
- A covered entity may not deny or limit coverage for specific services related to gender transition if denial or limitation results in discrimination against transgender individual
 - Does not require plans to cover specific procedures, but
 - Prohibits plan from covering procedures for other purposes but not for gender transition

No Discrimination Based on English Proficiency

- Discrimination based on English proficiency constitutes prohibited national origin discrimination
- A covered entity must provide (at no additional charge) meaningful access to health programs for individuals with limited English proficiency, possibly including
 - translation services
 - qualified oral interpreter
 - communications in non-English languages

New Notice Requirements

- A covered entity must take initial and continuing steps to notify participants and beneficiaries of applicable nondiscrimination requirements
- Must post an English-language notice that provides specific information about the requirements, including how to file a complaint
- Must provide “taglines” in top 15 languages spoken nationally by individuals with limited English proficiency, notifying them of language assistance services
- Regulations include model notices
- HHS will provide taglines in the requisite 15 languages

Possible ERIC Comments

- The rules should not apply to TPAs administering self-funded plans
- The rules should not apply to Medicare Part D plans
- The rules should apply separately to separate entities, even if they are related
- The rules should apply only to the portion of a group health plan that receives federal funding
- Group health plans should not be subject to new benefit mandates
- Group health plans should not be subject to additional notice or foreign-language requirements

Questions?

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