



The ERISA Industry Committee

Driven By and For Large Employers

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James Gelfand, Senior Vice President, Health Policy

August 13, 2019

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Section 1557 NPRM, RIN 0945-AA11
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

RE: RIN 0945-AA11 (Proposed Regulations under Section 1557 of the ACA)

To Whom It May Concern:

The ERISA Industry Committee (“ERIC”) is pleased to respond to the request of the Department of Health and Human Services (the “Department”) for comments on the proposed regulations regarding Section 1557 of the Affordable Care Act (the “ACA”). The proposed regulations were published by the Department in the Federal Register on June 14, 2019.

ERIC’S INTEREST IN THE PROPOSED RULEMAKING

The ERISA Industry Committee (“ERIC”) is a national nonprofit organization representing the nation’s largest employers that sponsor employee benefit plans for their active and retired workers and their families. ERIC is the only national trade association that advocates exclusively on behalf of large employer plan sponsors on health, retirement, and compensation public policies on the federal, state, and local levels. ERIC supports the ability of its large employer members to tailor health, retirement, and compensation benefits to meet the unique needs of their workforce, providing benefits to millions of workers, retirees, and their families.

ERIC’s member companies offer comprehensive group health benefits to their employees in compliance with the myriad federal requirements placed upon group health plans subject to the Employee Retirement Income Security Act (“ERISA”) and other federal laws including Medicare. As such, ERIC members are keenly interested in the ongoing promulgation and enforcement of rules relating to these laws, in order to maximize compliance, minimize unnecessary costs and burdens, and ensure optimal health outcomes for the millions of beneficiaries ERIC companies insure.

BACKGROUND

Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in a health program or activity, any part of which is receiving federal financial assistance. As interpreted by the Department in the current section 1557 regulations,¹ this provision was expanded far beyond its statutory boundaries and inappropriately encumbered the design and day-to-day operation of employer group health plans that do not receive any form of federal financial assistance. For example, the current regulations suggest that health insurance issuers receiving federal financial assistance for one portion of their business are subject to

¹ 81 *Fed. Reg.* 31376 (May 16, 2016) (hereinafter “the current regulations”).

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels.

section 1557 with respect to *all* portions of their business (including third party administrative services performed for, or on behalf of, employers sponsoring group health plans).

The group health plans sponsored by ERIC's member companies do not discriminate against employees or their family members on the basis of race, color, national origin, sex, age, or disability. Employers and the group health plans they sponsor are already subject to a complex web of federal statutes and regulations that prohibit all these forms of discrimination. Moreover, employer-sponsored group health plans rarely, if ever, receive any form of federal financial assistance.² ERIC's member companies have been concerned that the current regulations do not adequately reflect the ways in which group health plans are designed and administered, potentially disrupt the administration of these plans, invite litigation regarding plan benefits, and increase the potential for costly new mandates. Taken together, these problems are likely to increase health care costs for employers and employees alike without adding any additional protections against discrimination.

ERIC member companies are relieved that the Department has reconsidered and is now proposing substantive revisions to the current regulations. The proposed clarifications will eliminate many legal and administrative problems identified by ERIC members under the current regulations. This is particularly true with respect to the proposed changes regarding the scope of section 1557 (e.g., restricting the application of the provision to entities principally engaged in the business of providing health care) and the proposed changes regarding certain section 1557 disclosure requirements (e.g., eliminating taglines, nondiscrimination notices and the use of language access plans). We offer the following comments.

COMMENTS

I. SCOPE OF SECTION 1557

The proposed regulations clarify that section 1557 applies only to entities that are "principally engaged in the business of providing health care that receive federal financial assistance" and notes explicitly that an entity in the business of providing health insurance is not considered to be so engaged.³ The preamble to the proposed regulations goes further and notes that ERISA self-funded group health plans are also not considered to be "principally engaged in the business of providing health care."⁴

These clarifications eliminate a major concern of ERIC member companies; namely, that third party administrators of self-funded group health plans might become subject to section 1557 merely because they receive federal financial assistance in connection with a different portion of their business. This concern was compounded by the Department's stated position that it would "engage in a case-by-case inquiry to evaluate whether" an entity is "appropriately subject to" section 1557.

While the proposed regulations are helpful, we urge the Department to make several specific clarifications:

- First, we recommend that the regulations include an explicit exception stating that ERISA group health plans (whether self-funded or fully insured) are not entities "principally engaged in the business of providing health care." ERIC member companies voluntarily adopt ERISA group health plans for their workers and design those plans consistent with the requirements of ERISA and other federal laws. Many of these plans include both self-insured and fully-insured options (such as PPOs and HMOs), but the rationale for the exception is the same. *ERISA group health plans don't provide health care directly but*

² A few large employers sponsor "employer group waiver plans" that provide prescription drug benefits to retirees and receive subsidies under Medicare Part D. Similarly, some large employers may receive "premium assistance" payments from State Medicaid and/or CHIP programs on behalf of Medicaid- or CHIP-eligible employees or dependents. In both cases, the payments are received by the employers and not by their group health plans.

³ 84 Fed. Reg. at 27891, to be codified at 45 C.F.R. §92.3(b) and (c).

⁴ 84 Fed. Reg. at 27863.

provide only reimbursement of covered health care expenses, just as a health insurance issuer provides reimbursement of covered health care expenses under a health insurance contract. Providing an explicit section 1557 exception for ERISA group health plans would be consistent with the Department’s position that section 1557 doesn’t apply to entities providing health insurance.

- Second, we recommend that the regulations include a similar explicit exception stating that group health plans sponsored by governmental and/or church employers (whether self-funded or fully insured) are not entities “principally engaged in the business of providing health care.” Governmental and church employers are not subject to ERISA, but group health plans sponsored by these entities are subject to many comparable ACA requirements.⁵ *Like ERISA group health plans, the group health plans of governmental and church employers don’t provide health care directly but provide only reimbursement of covered health care expenses.* Providing an explicit section 1557 exception for these non-ERISA group health plans would be consistent with the Department’s position that section 1557 doesn’t apply to entities providing health insurance.
- Third, we recommend that the regulations include an explicit exception stating that ACA excepted benefit plans and programs are not entities “principally engaged in the business of providing health care.” Many ERIC member companies offer employee assistance programs, onsite clinics, limited supplemental or wrap-around coverage, and/or other benefits that are excluded from the ERISA and ACA definitions of a “group health plan” (and, thus, wouldn’t be protected by the two exceptions described above). Providing an explicit section 1557 exception for ACA excepted benefit plans and programs would be consistent with the Department’s position that section 1557 doesn’t apply to entities providing short term limited duration insurance.⁶

To be clear, we ask that these exceptions be expressed unambiguously as clear-cut and objective rules *in the section 1557 regulations themselves* and not merely in the preamble. These exceptions deserve the full strength of regulatory guidance and including them in the Code of Federal Regulations avoids the challenges of searching for guidance in preambles not easily found.

We believe these explicit exceptions are necessary to ensure the Department’s stated goals of finality, predictability, administrability, consistency, relief of burdens, and clarity. It is in the mutual interest of the Department, employer plan sponsors, and covered employees and dependents to clarify the scope of section 1557. Without these exceptions, ERIC member companies believe they will face continued uncertainty about whether, and the extent to which, the section 1557 nondiscrimination requirements apply to employer-sponsored group health plans.

II. DISCLOSURE REQUIREMENTS

The current regulations impose costly and confusing disclosure requirements on entities subject to section 1557. These requirements include, among other things, detailed nondiscrimination notices and non-English “taglines” (in at least 15 languages) describing the availability of free language assistance services. The current regulations require these notices and taglines to be included with all “significant” publications and communications sent to applicants, enrollees, and members of the public.

The proposed regulations would eliminate the requirements for section 1557 entities to include additional unnecessary notices, and non-English taglines in significant communications. ERIC member companies strongly endorse the Department’s decision to eliminate these section 1557 disclosure requirements. In practice, these requirements have created consternation, annoyance, and confusion among group health plan beneficiaries who receive various communications from third party administrators (in particular, explanations of benefits

⁵ See the group health plan requirements of the Internal Revenue Code (26 U.S. Code, Chapter 100) and the Public Health Service Act (42 U.S. Code, Chapter 6A, Subchapter XXV)

⁶ 84 *Fed. Reg.* at 27863.

statements). While language assistance is appropriate in certain circumstances, the current 1557 requirements have been counterproductive in meeting this objective.

Having said that, ERIC member companies would urge the Department (along with the other departments that share ACA jurisdiction) to go further and review similar disclosure requirements with an eye to conforming and simplifying those requirements. For example, ERISA group health plans are already subject to a detailed disclosure regime and those federal disclosure requirements already provide extensive protections for individuals with limited English proficiency (“LEP”). Specifically:

- **Summary plan descriptions.** ERISA group health plans must provide participants with a “summary plan description” that explains their rights and benefits under the plan. If ten percent or more of the plan participants are literate only in the same non-English language, the summary plan description must display a notice in the non-English language offering assistance that will give the participants a reasonable opportunity to become informed of the plan’s provisions.⁷
- **Summary of benefits and coverage.** ERISA group health plans must provide participants with a “summary of benefits and coverage” that presents required information in a manner that is “culturally and linguistically appropriate.”⁸ When the summary of benefits and coverage is delivered to any address in a county where ten percent or more of the population is literate only in the same non-English language, the summary must include a statement notifying the recipients that the summary is available upon request in the non-English language.⁹
- **Claim procedures.** ERISA group health plans must provide notices of “adverse benefit determinations” for initial claims and appeals in a “culturally and linguistically appropriate manner.”¹⁰ When these notices are delivered to any address in a county where ten percent or more of the population is literate only in the same non-English language, each notice must include a statement explaining that the notice is available upon request in the non-English language.¹¹ The notice must also offer oral language services (such as a telephone customer assistance hotline) in the non-English language that will answer the participant’s questions and provide assistance with filing claims.¹²

The ERISA disclosure requirements for LEP individuals are the tip of the iceberg. As the Department is well aware, there are a myriad of disclosure requirements for LEP individuals scattered through various statutory and regulatory provisions.¹³ The time is ripe to review these requirements and, where possible, to conform the requirements to a set of uniform standards.

⁷ 29 C.F.R. § 2520.102-2(c)(2).

⁸ 29 C.F.R. § 2590.715-2715(a)(5).

⁹ *Id.*

¹⁰ 29 C.F.R. § 2590.715-2719(b)(2)(ii)(E).

¹¹ 29 C.F.R. § 2590.715-2719(e).

¹² *Id.* at § 2590.715-2719(e)(2).

¹³ See the list of federal and state requirements at footnote 83 of the proposed regulations (84 *Fed. Reg.* at 27859).

ERIC appreciates the opportunity to provide feedback at this time. We believe the comments laid out above will assist the Department in improving the administration of section 1557. If you have questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

A handwritten signature in blue ink that reads "James P. Gelfand". The signature is written in a cursive, flowing style.

James P. Gelfand
Senior Vice President, Health Policy