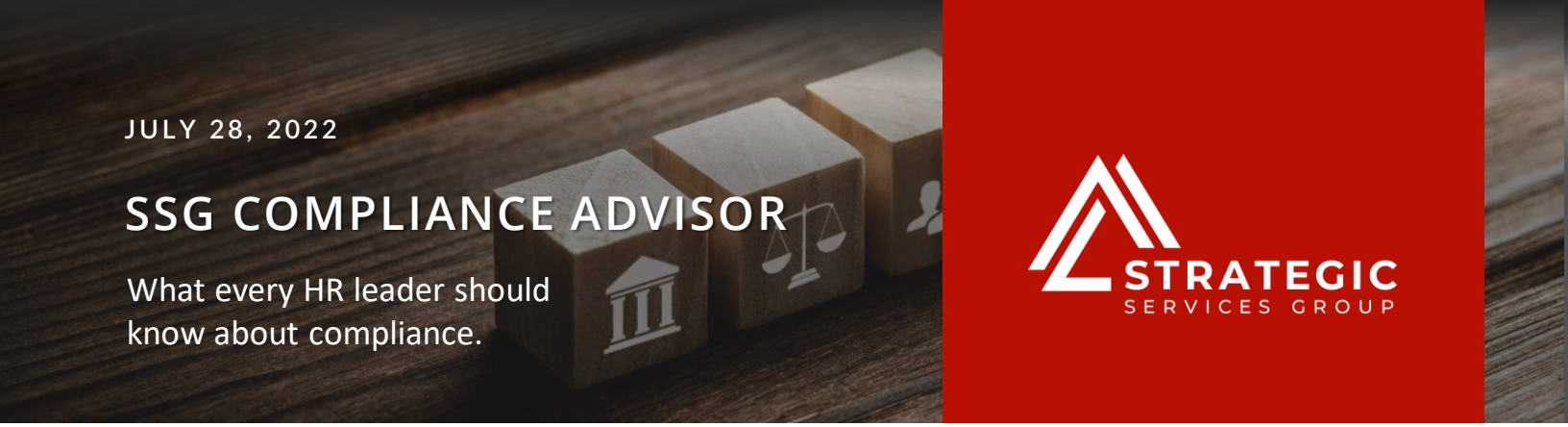

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SSG COMPLIANCE ADVISOR

What every HR leader should know about compliance.

Proposed Rules Under ACA Section 1557 to Clarify Scope of Discrimination Protections

The U.S. Department of Health and Human Services (HHS) has announced a proposed rule (Proposed Rule) implementing Section 1557 of the Affordable Care Act (ACA) that prohibits discrimination on the basis of race, color, national origin, sex, age, and disability in certain health programs and activities. The Proposed Rule is the latest turn in a series of events that has expanded and contracted – and led to great confusion regarding – the application and enforcement scope of Section 1557. According to HHS, the Proposed Rule intends to restore protections for patients and consumers in certain federally funded health programs and HHS programs.

The Proposed Rule affirms protections against discrimination on the basis of sex, including sexual orientation and gender identity consistent with the U.S. Supreme Court's holding in *Bostock v. Clayton County*, and reiterates protections from discrimination for seeking reproductive health care services. HHS has issued the rule to further initiatives President Biden outlined in recent executive orders on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation, Protecting Access to Reproductive Healthcare Services, and Advancing Racial Equity and Support for Underserved Communities.

The Proposed Rule is subject to a public comment period that will close in late September, and the substance of the subsequent final rule could change. However, fully insured group health plan sponsors, particularly those whose primary business is health care, should be aware that changes to their plans and procedures are likely to be required by as soon as later this year.

BACKGROUND

On May 18, 2016, HHS published a final rule titled "Nondiscrimination in Health Programs and Activities" ("Final Rule"), which sought to clarify and codify the nondiscrimination requirements of Section 1557, particularly with respect to the prohibition of discrimination on the basis of sex.

The Final Rule prohibited discrimination by any health program or activity receiving federal financial assistance on the grounds prohibited under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975. Failure to comply could have meant losing federal funding, debarment from doing business with the government, and false claims liability.

The Final Rule applied to every health program or activity receiving HHS funding, all health programs or activities administered by HHS (e.g., Indian Health Service or Medicare), and every health program or activity administered by an entity created by Title I of the ACA (e.g., Marketplace). Given the broad definition of covered entity, virtually every healthcare provider would have been required to comply with the Final Rule.

The Final Rule took partial effect on July 18, 2016; however, a federal court issued a nationwide preliminary injunction that barred enforcement of antidiscrimination protections pertaining to transgender and abortion health services and insurance coverage under Section 1557.

In June 2020, HHS reissued final regulations ("Final Rule II") repealing and replacing significant portions of the Final Rule. The Final Rule II effectively exempted entities not principally engaged in providing health care (such as most insurers) from Section 1557 regulation except where their health care activities were funded by HHS. The Final Rule II also did not apply to employer-sponsored group health plans that receive funding from HHS but are not principally engaged in the business of providing health care. Lastly, the Final Rule II repealed sections of the Final Rule that defined discrimination "on the basis of sex" to include discrimination based on gender identity or termination of a pregnancy and added a provision stating that Section 1557 will be enforced consistent with federal health care conscience protections (e.g., the ACA's protections concerning abortion and assisted suicide) and religious freedom protections.

The Final Rule II met immediate legal challenges which continue to be fought based on the U.S. Supreme Court's ruling that Title VII's prohibition of employment discrimination "because of sex" applies to discrimination based on sexual orientation or gender identity. Thus, HHS announced in May 2021 that it will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity.

2022 PROPOSED RULE

The Proposed Rule seeks to address gaps HHS identified in prior regulations to:

- Reinstate the scope of Section 1557 to cover wide-ranging HHS health programs and activities.
- Align regulatory requirements with Federal court opinions to prohibit discrimination on the basis of sex including sexual orientation and gender identity.
- Make clear that discrimination on the basis of sex includes discrimination on the basis of pregnancy or related conditions, including "pregnancy termination."
- Require covered entities to give staff training on the provision of language assistance services for individuals with limited English proficiency (LEP), and effective communication and reasonable modifications to policies and procedures for people with disabilities.
- Require covered entities to provide a notice of nondiscrimination along with a notice of the availability of language assistance services and auxiliary aids and services.
- Specify that nondiscrimination requirements applicable to health programs and activities include those services offered via telehealth, which must be accessible to LEP individuals and individuals with disabilities.
- Interpret Medicare Part B as federal financial assistance.
- Refine and strengthen the process for raising conscience and religious freedom objections.

Discrimination. The Proposed Rule codifies protections against discrimination on the basis of sex as including discrimination on the basis of sexual orientation and gender identity. These protections are consistent with the U.S. Supreme Court's holding in Bostock v. Clayton County, and HHS's subsequent Notice that Section 1557 would be enforced consistent with that decision that sex discrimination includes discrimination on the basis of sexual orientation and gender identity. In addition, the proposed rule clarifies that sex discrimination includes discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; and pregnancy or related conditions including pregnancy termination.

Language Assistance. The Proposed Rule requires recipients of federal financial assistance, HHS's health programs and activities, and State Exchanges to implement Section 1557 anti-discrimination policies and procedures to give staff clear guidance on the provision of language assistance services for limited English proficient (LEP) individuals, and effective communication and reasonable modifications to policies and procedures for people with disabilities. Covered entities will also be required to train relevant staff on these policies and procedures.

The Proposed Rule requires covered entities to provide notice of the availability of language assistance services and auxiliary aids and services in English and at least the 15 most common languages spoken by LEP persons of the relevant state or states. These notices must also be provided in alternate formats for individuals with disabilities who require auxiliary aids and services to ensure effective communication. Covered entities would be required to provide these notices on an annual basis, upon request, in prominent physical locations, and in a conspicuous location on their websites. The proposed rule also allows individuals to opt out of receiving an individualized notice on an annual basis.

Complaint/Examination Process. The Proposed Rule provides a process for recipients of federal financial assistance to notify the Office for Civil Rights (OCR) of their belief that the application of a specific provision or provisions of Section 1557 would violate their rights under federal conscience or religious freedom laws. OCR clarifies that when it receives such a notification from a recipient, it shall promptly consider those views in responding to any complaints or otherwise determining whether to proceed with any investigation or enforcement activity regarding that recipient's compliance with the relevant provisions of the regulation. Any ongoing relevant investigation or other enforcement action regarding the recipient shall be delayed until a determination is made as to whether a recipient is exempt from, or entitled to a modification of, a provision of the rule.

Additionally, if there are enough supporting facts after receiving notice, OCR may at any time determine whether a recipient is wholly exempt from or should receive an exemption or modification from certain provisions of the rule.

Telehealth Services. The Proposed Rule clarifies that covered entities have an affirmative duty to not discriminate in their delivery of such services through telehealth. This duty includes ensuring that such services are accessible to individuals with disabilities and providing meaningful program access to LEP individuals. Such services would include communications about the availability of telehealth services, the process for scheduling telehealth appointments (including the process for accessing on-demand unscheduled telehealth calls), and the telehealth appointment itself.

Medicare Part B Included. The Proposed Rule announces HHS's position that Medicare Part B is federal financial assistance for the purpose of coverage under the federal civil rights statutes the Department enforces. HHS stated that it believes that previous rationales provided for the Medicare Part B exclusion are not the best reading of the civil rights laws given the purpose and operation of the Medicare Part B program.

Right to Private Civil Action. Individuals who are discriminated against have the right to bring private actions against employers covered by Section 1557. Employers who violate Section 1557 can also be required to submit compliance reports and may no longer be eligible for federal financial assistance. The matter may also be referred to the Department of Justice. Moreover, even if the employer is not covered by Section 1557, the rules state that if HHS does not have jurisdiction over an employer, it can refer or transfer the matter to the Equal Employment Opportunity Commission (EEOC).

SCOPE OF PROPOSED RULE

The Final Rule II limited "covered entities" to only those entities "principally engaged in the business of providing healthcare" or, for entities outside of that scope, entities that receive direct HHS funding of the particular activity. So, if a health insurer is not principally engaged in the business of providing health care, only its Marketplace plans are covered, and any plans it offers outside the Marketplace are not subject to Section 1557. It also effectively exempted short-term limited duration insurance, employer-sponsored group health plans, self-insured church plans, the Federal Employees Health Benefits Program, and non-federal governmental plans, as long as coverage is offered by an entity that is not principally engaged in the business of providing healthcare and does not receive federal financial assistance.

The Proposed Rule seeks to expand the scope of "covered entity" again, so employers will soon need to examine whether they could be deemed to be covered entities subject to greater requirements if the Proposed Rule becomes final.

Also, Section 1557 complaints and disputes still could arise via EEOC activity. Thus, group health plan sponsors will likely need to be prepared to review written policies and procedures to ensure Section 1557 compliance and to check that plan terms do not specifically exclude benefits based on a participant's sex. Certain plan sponsors might soon need to provide notice to participants informing them of their Section 1557 rights, and to coordinate with issuers and service providers to ensure that plans are properly interpreted and applied to comply with Section 1557.