PUBLICATION

Three Things Health Care Employers Should Know About Affordable Care Act Section 1557

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Health care providers are likely familiar with the Affordable Care Act's (ACA) prohibitions on discriminating against the recipients of their services, but providers also must be mindful that the ACA may also make them directly liable for discriminatory conduct pertaining to the health benefits they provide to their employees. Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age, or disability for any health program or activity, any part of which receives certain federal funding or assistance. Thus, a health care provider who can be held liable as an employer under Section 1557 may not discriminate against its employees by taking any of the following actions on the basis of their membership in a protected class:

- denying or limiting health coverage;
- denying a claim;
- employing discriminatory marketing or benefit designs; and
- imposing additional cost sharing.

Considering these prohibitions under section 1557, health care providers should keep the following three things in mind:

Congress's Current Efforts to Repeal and Replace the Affordable Care Act Will Not Affect the Non-Discrimination Provisions of Section 1557

Although the American Health Care Act (AHCA), which was passed by the U.S. House of Representatives on May 4, 2017, and will now be considered by the Senate, has been described as a bill to repeal and replace the ACA, it actually does not repeal the non-discrimination provisions of section 1557. This is because the procedure by which the Senate would pass the bill, which requires only a simple majority vote, will permit only those changes to the ACA that have an impact on the federal budget. Therefore, even if the Senate passes and the President signs the AHCA as currently written, covered entities will still be subject to section 1557.

However, the U.S. Department of Health and Human Services (HHS) might amend its regulations interpreting section 1557 or otherwise change its approach to enforcing the statute. In fact, HHS has hinted that it is evaluating amendments to the regulations in a currently-pending lawsuit, *Franciscan Alliance v. Price*, No. 7:16-cv-00108-O (N.D. Tex.). In that suit, the court issued a nationwide preliminary injunction prohibiting HHS from enforcing the regulations' controversial provisions barring discrimination on the basis of gender identity and abortion. HHS did not appeal the injunction, but instead filed a May 2, 2017, motion asking the court to temporarily halt the litigation while keeping the injunction in place. HHS asserted that it wants to re-evaluate whether the provisions at issue are reasonable and necessary. The implication behind the motion is that the lawsuit may not be required, because HHS might voluntarily remove the regulations at issue. Regardless of how the court rules on the motion, this motion may be a sign that HHS is considering further amendments to its regulations.

Health Care Providers Who Receive Certain Federal Funds Can Be Sued By Employees for Section 1557 Violations Involving Their Health Benefits

Although employers generally are not directly exposed to liability for section 1557 violations, the statute creates an exception for health care providers (among others) who receive certain federal financial assistance. Thus, because section 1557 permits a private right of action by consumers harmed by discrimination, certain health care providers can be sued by their employees for discriminatory practices related to their health benefits. The extent to which such employers may be exposed to liability depends on the extent to which the provider offers health services.

For example, if the employer receives federal funding and is *principally* engaged in providing or administrating health services (or health insurance or other health coverage), then the employer is covered with respect to benefits it provides to *all* employees, regardless of whether the employees themselves provide health services. To illustrate, HHS has noted that because a hospital is principally engaged in providing health services, section 1557 covers the hospital with respect to the health benefits it provides to all employees, including employees who work in the cafeteria.

If the employer who receives federal funding provides a health program, but the employer is *not principally* engaged in providing or administering health services, health insurance, or other health coverage, then only employees who work for the health program would be covered by the rule. Thus, HHS advises that in the case of a housing program that receives federal financial assistance to operate a diabetes screening program for housing residents, but is not principally engaged in providing health services, the housing program's employee health benefits are covered by section 1557 only with respect to the employees of the diabetes screening program.

An additional way employers can become directly exposed to liability for section 1557 violations is if the employer receives federal financial assistance, a primary purpose of which is to fund the entity's employee health benefit program. This is not dependent upon whether the employer provides health services, health insurance, or other health coverage.

In light of their potential exposure, employers who provide health care services must evaluate whether and to what extent they are covered by section 1557 by determining the extent to which they are engaged in providing or administrating health services, health insurance or other health coverage and, if so, whether they receive federal funding. Covered employers will need to review their health benefit plan, policy and procedures to ensure that they are not facially discriminatory, and ensure that health benefit decisions are made on neutral, non-discriminatory grounds.

Section 1557 Requires More Than Non-Discriminatory Conduct

Aside from its prohibition on discrimination, section 1557 requires covered entities to provide notices to employees advising them about their rights. The notices must be provided in significant publications, and they must include taglines advising of the availability of free language assistance services in at least the top 15 non-English languages spoken in the state in which the covered entity is located. The regulations do not specify what constitutes a significant publication, though HHS suggests that such documents might include applications to participate in, or receive benefits or services from, the covered entity's health program or activity, as well as written correspondence related to an individual's rights, benefits, or services. Ultimately, however, HHS indicates that covered entities themselves are in the best position to determine which of their communications and publications are significant in the context of their own health programs and activities.

Covered entities are also required to take reasonable steps to provide meaningful access to individuals with limited English proficiency and to ensure communications with individuals with disabilities are as effective as with others. With respect to persons with limited English proficiency, reasonable steps to provide meaningful access may include providing oral language assistance or written translation. As for individuals with disabilities,

covered entities must make reasonable modifications to their policies, procedures, and practices to provide individuals with disabilities access to the covered entity's health programs and activities.

Finally, covered entities with 15 or more employees are also required to have a civil rights grievance procedure to address claims of noncompliance with the statute. The covered entity must incorporate due process standards in the grievance procedures and ensure that the procedures permit prompt and fair resolution of discrimination complaints.

Comments

Given the potential exposure to liability to employees for violations of section 1557, health care providers should review their employee health care plan, policy and procedures to ensure that they are not facially discriminatory, and ensure that health benefit decisions are made on neutral, non-discriminatory grounds. Additionally, providers should confirm that they are providing their employees the requisite notices of their rights, that procedures are in place to assist individuals with limited English proficiency or disabilities to ensure equal access to health programs and activities, and that grievance procedures are in place.