

PUBLICATION

HHS Seeks to "Address Gaps" in Section 1557 Rule with New Proposed Rulemaking

Authors: Jennifer L. Curry, Melodie Hengerer

August 04, 2022

On August 4, 2022, the U.S. Department of Health and Human Services (HHS) published in the Federal Register a notice of proposed rulemaking (NPRM) designed to "address gaps" in prior iterations of one of the agency's civil rights rules, Section 1557 of the Affordable Care Act, and ensure that recipients of federal financial assistance comply with federal civil rights laws. The proposed rule changes the rule's prior interpretations of "sex" to expand coverage under the rule's sex nondiscrimination provisions so that it is in line with recent legal and regulatory developments. It also proposes concrete steps to ensure that Section 1557's protections reach more individuals whose civil rights are to be protected by the rule. Comments on the proposed rule are due on or before October 3, 2022.

Most significantly, the NPRM seeks to align HHS' regulatory requirements with the Supreme Court's 2020 *Bostock v. Clayton County* opinion and related case law, as well as subsequent federal agency interpretations, to prohibit sex discrimination in several areas, including as it relates to marital, family, or parental status; sexual orientation and gender identity; and pregnancy or related conditions, including "termination of pregnancy." The proposed rule further applies the provisions of Title VI to administrative enforcement actions against recipients of federal financial assistance and State Exchanges based on race, color, national origin, sex, disability, and age, consistent with regulations governing Section 504 of the Rehabilitation Act and Title IX.

In addition, HHS proposes adopting a process to allow recipients of federal financial assistance to inform HHS if they have concerns that application of a specific provision or provisions of Section 1557 would violate federal conscience or religious freedom laws, so that HHS may determine whether those recipients should be exempted from or allowed a modification of application of the provision(s).

The proposed rule further clarifies that 1557's civil rights protections apply not only to HHS health programs and activities, but to many health insurance issuers, so that discrimination in health insurance and other health-related coverage is prohibited. The NPRM also proposes to include providers receiving payments under the Medicare Part B program as recipients of "federal financial assistance," which would increase the number of providers covered by Section 1557.

Under the proposed rule, employers with more than 15 employees are required to take certain steps to ensure that individuals with complaints based on race, color, national origin, sex, age, and/or disability do not have to follow different procedures based on their type of complaint to have their concerns addressed. For example, these employers are required under the proposed rule to have policies and procedures in place to support Section 1557 compliance, including requiring the development of grievance procedures and designating a responsible employee to manage the process; training on the policies and procedures for relevant staff; and the affirmative provision of civil rights notices. The NPRM also proposes the implementation of significant protections, including staff training on providing language assistance services to individuals with limited English proficiency (LEP), to ensure that each LEP person has meaningful access to covered programs and activities.

Baker Donelson is assisting companies and organizations in preparing for the implementation of the new Section 1557 provisions and in responding to HHS Office of Civil Rights enforcement actions as effectively as

possible. For specific guidance or more information about this alert, please contact [Jennifer Curry](#), [Melodie Hengerer](#), [Alison Schurick](#), [Stefanie Doyle](#), [Chaitra Gowda](#), or any member of Baker Donelson's Gender Identity Litigation & Compliance Team.