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HHS Proposes Rolling Back Section 1557 Discrimination Protections Related to Gender Identity

The Department of Health and Human Services (HHS) Office of Civil Rights (OCR) has released proposed regulations that would make significant changes to existing HHS guidance related to discrimination provisions contained in Section 1557 of the Affordable Care Act (ACA).

BACKGROUND

In 2016, HHS released final rules implementing ACA Section 1557, which prohibits certain types of organizations (called "Covered Entities") from discriminating in health programs on the basis of race, color, national origin, age, disability, or sex. These rules require Covered Entities to provide appropriate accommodations for disabilities, provide notices describing nondiscrimination requirements and taglines alerting individuals to language assistance available, and establish and coordinate grievance procedures. The rules also include requirements related to discrimination based on gender identity and sexual orientation.

MOST EMPLOYERS ARE NOT COVERED ENTITIES

The existing rules apply to Covered Entities. A Covered Entity is an organization that provides health programs and activities that receive federal financial assistance administered by HHS. Examples of covered entities include:

- Health insurance companies that offer health plans through a public (state or federal) Marketplace or that offer Medicare Advantage plans;
- Employer sponsored group health plans that receive Medicare Part D subsidies;
- Providers that accept Medicare and Medicaid.

The current rules apply to all operations of a Covered Entity. For example, the rule would apply to a group health plan offered to the employees of a medical provider subject to the rule.

Importantly, most employers are not a Covered Entity and are not directly subject to the rules. However, since most health insurance companies are considered a Covered Entity, employers purchasing fully insured plans will typically have plans that meet the requirements, including extending coverage for gender identity-related medical services and services related to termination of pregnancy.

PROPOSED CHANGES

The new rules proposed by HHS would reduce the number of organizations that would be considered a Covered Entity. A health insurer would be considered a Covered Entity only for the portions of its business that receive federal funding and therefore would not be required to comply for all lines of coverage sold or for third-party administration services. In addition, self-funded group health plans would have to comply only if the plan itself receives federal funding (e.g. Medicare Part D subsidies) or if the entity is principally engaged in providing or administering health care.

The proposed changes would also eliminate many of the requirements contained in the 2016 regulations, including nondiscrimination protections based on sex and gender identity, notice requirements (e.g. including nondiscrimination notices and taglines in other languages on notices), and protections against

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retaliation. HHS argues that the changes will save significant administrative expense, principally through the elimination of notice requirements.

SUMMARY

These proposed changes have very minimal impact on employers since most are not considered Covered Entities today. The principal impact of these proposed changes will be for medical providers, health insurance companies, and certain individuals as they try to access health services. HHS is taking comments on the proposed rules and expects to issue final regulations later this year. The current rules remain in effect until the final rules and an effective date are provided.

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