Keenan HealthCare

BRIEFING
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HEALTH CARE REFORM: NONDISCRIMINATION IN HEALTH PROGRAMS AND ACTIVITIES

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs or activities that receive federal financial assistance from **any** federal agency. The Office of Civil Rights (OCR) in the Department of Health and Human Services (HHS) has been enforcing Section 1557 since the ACA was signed into law in 2010.

On May 13, 2016, OCR released final regulations detailing how HHS applies the standards of Section 1557 to health programs and activities funded or administered by HHS.

COVERED ENTITIES

The regulations apply only to Covered Entities, which include:

1. Entities operating a health program or activity that receives federal financial assistance from HHS. Examples include but **are not limited to** hospitals, skilled nursing facilities, ambulatory surgical centers, health clinics, laboratories and physician practices receiving Medicare (excluding Part B) or Medicaid payments and health-related schools or educational organizations receiving grant awards to support health professional training programs.

2. Health Insurance Marketplaces.

3. Health programs and activities administered by HHS.

If any part of a health care entity receives federal financial assistance from HHS, then all of its programs and activities are subject to the discrimination prohibition.

NONDISCRIMINATION IN HEALTH PROGRAMS AND ACTIVITIES

The regulations prohibit discrimination in health programs and activities on the basis of race, color, national origin, age, sex or disability. Protections include:

- Individuals cannot be denied health care or health coverage based on their sex, including their gender identity and sex stereotyping;

- Categorical coverage exclusions or limitation for all health care services related to gender transition are discriminatory;

- Individuals must be treated consistent with their gender identity, including access to facilities;

- Providers may not deny or limit treatment for any health services that are ordinarily or exclusively available to individuals of one gender based on the fact that a person seeking such services identifies as belonging to another gender;

- Covered Entities must take reasonable steps to provide meaningful access to each individual with limited English proficiency likely to be served or encountered in its health programs and activities. Reasonable steps include providing language assistance services, such written or oral translation; and

- Covered Entities must take appropriate steps to ensure communications with individuals with disabilities are as effective as communications with others in its health programs and activities. Appropriate steps include providing auxiliary aids and services, such as sign language interpreters.

The regulations do not resolve whether discrimination on the basis of sexual orientation is a prohibited form of sex discrimination under Section 1557. OCR will evaluate complaints alleging sex discrimination related to an individual's sexual orientation on a case-by-case basis to determine if they can be addressed under Section 1557.

Does this Guidance Impact Employer Benefit Plans?

A Covered Entity principally engaged in providing health care services is subject to the regulations not only for the services it offers to patients but also for the benefits it provides to its employees. The discrimination prohibition applies to all components of the benefit plan, including wellness programs, limited scope dental and vision plans, on-site clinics, disease-specific insurance and fixed-indemnity plans.

Effective Date and Next Steps

The regulations are effective July 18, 2016 except for provisions affecting group health plan benefit design, which will not take effect until the first day of the plan year beginning on or after January 1, 2017. Covered Entities need to take the following steps now:

- **Designate a responsible employee and adopt grievance procedures.** Covered Entities with 15 or more employees must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Section 1557, including the investigation of any grievances. Entities must also adopt grievance procedures that provide for prompt and fair resolution of the grievance.

- **Post notices and taglines**. Within 90 days of the effective date of the regulations, each Covered Entity must post a notice that it does not discriminate on the basis of race, color, national origin, sex, age or disability in its health programs or activities. The notice must also alert individuals with disabilities or limited English proficiency of the availability of communication assistance services. Covered Entities must also post taglines in the top 15 languages spoken by individuals with limited English proficiency in the states in which the Covered Entity operates that advises them of the availability of free language assistance services. OCR has provided a sample notice and taglines that are available at

  http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html.

- **Review benefit plans and make changes, if necessary.** Review plan documents for any discriminatory provisions, including any categorical exclusions or limitations related to gender transition. These provisions are facially discriminatory and must be replaced by coverage that is not discriminatory. Not all services related to gender transition need be covered, however, so it is best to start planning immediately and determine the types of coverage to make available. If changes are required, then they must be made by the first day of the plan year starting on or after January 1, 2017.

RESOURCES

Additional information on Section 1557, including Factsheets on Key Provisions and Frequently Asked Questions on the Final Rule can be found on the HHS website at:

http://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html.

Health care entities that are Covered Entities should consult with their legal counsel to ensure they are in compliance with the final regulations with respect to all of their programs and activities.

Please contact your Keenan HealthCare Account Manager for questions regarding changes to your benefit plans or if you require any additional information regarding the Affordable Care Act.