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CLIENT BULLETIN

District Court Halts Implementation of Section 1557 Regulations Concerning "Gender Identity"

In *Benefit News Briefs 2016-34*, we reported on a final rule published by the Department of Health and Human Services (HHS) implementing Section 1557 of the *Affordable Care Act (ACA)* (Section 1557). Section 1557 prohibits entities that receive federal funds from HHS from discriminating on the basis of race, color, national origin, sex, age or disability, including discrimination based on pregnancy, gender identity and sex stereotyping in certain health programs and activities.

Regulations Highlights

The regulations expand the prohibitions on discrimination "on the basis of sex" to include prohibiting discrimination against *transgender* individuals by prohibiting discrimination on the basis of "gender identity." "*Gender identity*" is defined as an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth.

In addition to prohibiting discrimination on the basis of sex, the regulations also required certain notices and taglines and translation aids aimed at individuals with limited English proficiency.

Most of the regulations were set to be effective the first day of the first plan year beginning on or after January 1, 2017, except for certain notice requirements that were effective October 2016.

A Lawsuit Was Filed To Stop Implementation Of The Regulations

In response to the regulations, a lawsuit was filed by eight states and three religiously-affiliated or oriented private healthcare provider organizations *seeking a preliminary injunction to halt implementation of portions of the regulation that prohibit discrimination based on gender identity or termination of pregnancy*. Among other things, the Plaintiffs argued that because Section 1557 incorporates the statutory prohibition of sex discrimination in Title IX, its scope should be limited by Title IX's unambiguous definition of "sex" as the immutable, biological differences between males and females "as acknowledged at or before birth."

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Thus, Plaintiffs argued that "gender identity" should not form the basis of discrimination based on sex. Plaintiffs claim the regulations interpretation of sex discrimination pressures doctors to deliver healthcare in a manner that violates their religious freedom and thwarts their independent medical judgment and will require burdensome changes to their health insurance plans on January 1, 2017. The case is *Franciscan Alliance, Inc. et al v. Burwell*, No. 7:16-cv-00108-O.

To prevail on a preliminary injunction, the moving party (movant) must show: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest.

The District Court Issues a Preliminary Injunction

After weighing the factors, on December 31, 2016, the U.S. District Court for the Northern District of Texas issued an opinion preliminarily prohibiting HHS from enforcing, on a nationwide basis, the provisions of the regulation implementing Section 1557 concerning gender identity or termination of pregnancy. The regulations concerning certain required notices and taglines and translation aids aimed at individuals with limited English proficiency are not affected and are still in effect.

The matter may be appealed to the Fifth Circuit Court of Appeals, but it seems unlikely that the Court would reverse the District Court given the make-up of the Fifth Circuit. Until then the Section 1557 regulations concerning gender identity or termination of pregnancy are "on hold" and cannot be enforced by HHS. This does not mean that private litigants are prohibited from suing their health plan (or physician) for gender identity discrimination in the courts and argue that Title IX does include gender identity discrimination.

What Next?

In response to the Section 1557 regulations, multiemployer health plans that were covered by the statute and regulations due to receiving federal financial assistance from HHS modified their plans by removing "blanket exclusions" for all health services related to gender transition, such as sex change surgery. The question becomes "Do I still need to amend the Plan in light of the preliminary injunction?"

Our answer is "Consult Fund Counsel." Some may want to repeal the amendment removing gender transition exclusions pending the outcome of the case. Others may suggest a different course of action. In the interim, the Supreme Court has a case before it this term addressing discrimination under Title IX that may settle the matter conclusively.

We will report on future developments in this case as they transpire.

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