Compliance Insights

Alliant

September 2024

Section 1557 Final Rule and the Impact on Self-Funded Plans

Overview

The US Department of Health and Human Services (HHS) recently issued new final regulations on Section 1557, the nondiscrimination provision of the Affordable Care Act (ACA). Section 1557 makes it unlawful for health care providers, including doctors' practices and hospitals that receive federal financial assistance from HHS ("covered entities"), to refuse to treat—or to otherwise discriminate against—an individual on the basis of their race, color, national origin, sex, age, or disability. Section 1557 imposes similar requirements on health insurance issuers that receive federal financial assistance and the health insurance Marketplaces. This means that Section 1557 applies to healthcare providers and facilities, and insurance carriers who process payments from Medicare or Medicaid and applies to both in-person and telehealth care. This includes healthcare related employers that receive such payments, or employers that receive the Retiree Drug Subsidy (RDS) or are designed as an Employer Group Waiver Plan (EGWP). Other employers (those not receiving federal financial assistance or reimbursements for health programs or activities from HHS) that sponsor health and welfare plans are not subject to section 1557. However, insurance carrier third party administrators (TPAs) *may* more broadly apply the principles of section 1557 to self-funded plan designs that they administer. Importantly, 1557 covered entities will have significant compliance obligations that affect most if not all aspects of their business operations and that will require coordination between multiple departments (e.g., the 2024 regulations require the covered entity to implement policies and training and appoint a "Section 1557 Coordinator" to ensure compliance). Section 1557's impact on a covered entity's group health plan is relatively minor given the breadth of the law. As such, 1557 covered entities will need to work with outside counsel to develop comprehensive approach to compliance. Only issues specific to a 1557 covered entity's group health plan compliance are addressed here.

Background

Section 1557 took effect upon the enactment of the ACA on March 23, 2010, but has seen numerous versions of proposed and final regulations issued under different administrations, as well as constant litigation challenging those regulations and the applicability of the law. The 2016 regulations imposed (among other things) specific notice and disclosure requirements designed to assist individuals with limited English proficiency and provided express protection against discrimination on the basis of gender identity, sex stereotyping, and termination of pregnancy. However, a federal court enjoined and then vacated large portions of the 2016 regulations. Next, 2020 regulations repealed and replaced additional portions of the 2016 regulations as duplicative of other federal non-discrimination protections. Those 2020 rules also covered fewer programs and services, and further limited nondiscrimination protections for individuals. The 2024 final rule, which replaces the 2020 regulations and largely mirrors the 2022 Notice of Proposed Rulemaking, now seeks to expand nondiscrimination protections based on gender identity, sexual orientation, pregnancy-related conditions, as well as discrimination based on other protected characteristics. The new rule also recognizes the importance of nondiscrimination protections in the use of telehealth and patient care decision support tools, including artificial intelligence and machine learning. Lastly, it reinstates but modifies certain notice requirements.

The Final Rule's Impact on Group Health Plans

Notice Requirements

The final rule brought back the notice requirement for 1557 covered entities to post and provide a nondiscrimination notice as well as a notice of language assistance services (referred to as "taglines" in earlier rules) in the top 15 languages spoken by individuals with limited English proficiency in their state.

Covered entities must post at physical locations and on websites (the details of which are outside the scope of this piece) and provide these two notices annually and upon request to participants, beneficiaries, enrollees and applicants of their health programs and activities, in addition to making these notices publicly available. Covered entities may provide individuals with the option to opt out of the receipt of these notices on an annual basis. Importantly, this means that 1557 covered entities will once again need to include these notices in their annual Open Enrollment materials (meeting annual notice requirement) and new hire enrollment and special enrollee enrollment materials.

The notice of language assistance services must also be incorporated into a wide variety of other notices, documents, and materials. In the group health plan context this includes, but is not limited to, the HIPAA notice of privacy practice and in notices of denial or termination of eligibility, benefits or services, including Explanations of Benefits, and notices of appeal. It will be important to work with benefits administration partners, TPAs, and human resources teams to ensure that this notice is added to other documents and notices as prescribed by the final rule. Again, compliance will largely fall outside of the scope of the group health plan.

Sample notices of nondiscrimination and language assistance services can be found here. Note these notice requirements do not apply to employer plan sponsors who are not otherwise directly subject to the rule.

Compliance with section 1557 is significantly larger than an employer's group health plan. Alliant can provide limited support through template open enrollment materials and notices. 1557 covered entities will need to work with outside counsel to develop a comprehensive approach to compliance.

Problematic Plan Designs

The final rule recognizes protections against discrimination on the basis of sex include sexual orientation and gender identity consistent with the U.S. Supreme Court's holding in *Bostock v. Clayton County* (holding that Title VII of the Civil Rights Act prohibits discrimination on the basis of an individual's sexual orientation or gender identity). It also provides for nondiscrimination protections based on pregnancy-related conditions, including pregnancy termination, and transgender care and coverage. Thus, a section 1557 covered entity should understand that self-funded plan designs with categorical exclusions for services like gender-affirming care or pregnancy termination are likely problematic under the rule. The rule, however, does not require the coverage of pregnancy termination and is not intended to override any state-specific laws regarding abortion.

As noted above, the final rule technically does not apply to employer plan sponsors (not receiving federal financial assistance for health programs or activities), but may impact insurance carriers acting as TPAs, which could indirectly affect group health plans. TPAs may be unwilling to administer a plan design that potentially violates section 1557, for example by including categorical exclusion of surgical treatment for gender dysphoria. Notably, a TPA may avoid liability if a discriminatory design originated with the employer plan sponsor (but HHS may refer a complaint to the EEOC or DOJ for potential investigation of the employer). This portion of the rule doesn't necessarily reflect the marketplace where TPAs often maintain self-funded plan designs that employer plan sponsors largely adopt unaltered. Where an employer plan sponsor does not adopt the TPA's plan design, but instead insists upon the type of exclusions implicated by the final rule, TPAs may refuse to administer those exclusions or seek indemnification from the employer plan sponsor. Note, a TPA may also avoid 1557 liability if it is "legally separate" from the section 1557 covered carrier, but that determination requires a fact intensive analysis that considers whether any "separation" was created to avoid the applicability of civil rights laws and is generally not within the purview of the employer plan sponsor to determine.

Religious Exemptions

The 2024 regulations provide that covered entities may rely on applicable federal religious freedom and conscience laws to dispute the application of Section 1557. An administrative process for obtaining a written assurance of exemption is provided under the rule.

Effective Dates

The final rule is effective 60 days after publication in the Federal Register, which is July 5, 2024. However, different provisions of the rule have longer timeframes, including the requirement for carriers and TPAs to make benefit design changes to ensure nondiscrimination in health insurance coverage by the first day of the first plan year beginning on or after January 1, 2025. Covered entities must initially distribute the notice of nondiscrimination by November 2, 2024, and the notice of availability by July 5, 2026. Thereafter, Section 1557 covered entities should plan to include the nondiscrimination notice in open enrollment materials (and enrollment materials for new hires and special enrollees). These notices should also be included with enrollment materials provided to new hires and special enrollees.

Conclusion

Section 1557 covered entities should review their approach to compliance with section 1557 given its history of almost constant change. Again, a holistic and multi-disciplinary approach is required. With respect to group health plans sponsored by section 1557 covered entities, plan sponsors should review their health plan's design for discriminatory practices. Group health plans sponsored by section 1557 covered entities will need to distribute the notice of nondiscrimination by November 2, 2024, and include the notice of nondiscrimination with open enrollment materials thereafter (and enrollment materials for new hires and special enrollees). Plan sponsors should then also distribute the notice of language assistance by July 5, 2026, and provide it in enrollment materials for subsequent plan years. Again, the notice of language assistance must also be added to a host of other materials ranging from EOBs to complaint forms. Lastly, self-funded employer plan sponsors that are not directly covered by section 1557 but that maintain plans with the exclusions mentioned here should discuss the implications of the final rule with their TPA(s) and legal counsel. Alliant will continue to monitor this topic.