Monthly Health Care Reform Update

SECTION 1557 OF THE ACA MAY REQUIRE GROUP HEALTH PLANS TO PROVIDE COVERAGE FOR CERTAIN TRANSGENDER RELATED HEALTH SERVICES

This update is part of a Brown & Brown series summarizing new guidance issued in connection with the Patient Protection and Affordable Care Act (also known as Health Care Reform). We are joining forces with our business partner, the law firm of Miller Johnson, to provide these updates to you. For this edition, we are focusing on the final regulations issued under Section 1557 of the ACA by the Office of Civil Rights ("OCR") within the Department of Health and Human Services. Generally, Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age or disability.

Who is Subject to Section 1557?

Only "covered entities" are subject to Section 1557. A "covered entity" is a:

- "Health program or activity;"
- That receives "federal financial assistance."

The terms "health program or activity" and "federal financial assistance" are both broadly defined under the final regulations. Generally, a health program or activity includes entities that provide health care services (e.g., hospitals, nursing homes, physicians and dentists), or health insurance issuers. Additionally, most health care providers receive federal financial assistance because they accept payments from Medicare or Medicaid. Most health insurance issuers receive federal financial assistance because they receive Medicare payments, or premium tax credits in connection with health plans issued through federal or state health insurance marketplaces.

Although Section 1557's primary purpose is not directed at employer group health plans, as explained below, it is possible that an employer's group health plan is subject to Section 1557.

Fully Insured Group Health Plans

With respect to employer group health plans, Section 1557 will apply to fully insured group health plans because—as explained above—most health insurance issuers are subject to Section 1557. This means that most fully insured group health plans must comply with the substantive requirements of Section 1557 (which are explained below), but the health insurance issuer, not the employer, must comply with the administrative requirements of Section 1557 (which are also explained below).

Self-Funded Group Health Plans

It is less likely that a self-funded group health plan will be subject to Section 1557. In fact, only self-funded employer group health plans maintained by the following types of entities are subject to Section 1557:

- An entity that is, itself, a health program or activity (e.g., health care providers, insurers, or third-party administrators).

- Any entity that receives federal financial assistance *of which the primary objective is to fund the group health plan* (e.g., a group health plan sponsored by an entity that receives a retiree drug subsidy).

- Any entity that is not, itself, a health program or activity but *operates* a health program or activity that receives federal financial assistance (e.g., a retailer that operates a pharmacy that accepts payments from Medicare Part D, or a university that operates a hospital that accepts Medicare or Medicaid payments). However, self-funded employer group health plans covered in this situation are *only covered by Section 1557 with respect to employees of the health program or activity*.

OCR acknowledged that it doesn't have jurisdiction over self-funded group health plans that fall outside of the three situations explained above. However, if OCR becomes aware of a self-funded group health plan over which it doesn't have jurisdiction but violates Section 1557, it will refer the matter to the Equal Employment Opportunity Commission ("EEOC"). It appears that the EEOC takes the position that a group health plan that violates Section 1557 also violates other nondiscrimination laws over which the EEOC has jurisdiction. In this case, the EEOC may institute an employment discrimination charge against the employer.

So, even if an employer's self-funded group health plan is not directly subject to Section 1557, the employer-sponsor should consider voluntarily complying with the substantive requirements to avoid a charge by the EEOC. (In this situation, it **doesn't** appear that the employer will need to comply with the **administrative** requirements under Section 1557.)

Substantive Requirements Under Section 1557

The primary purpose of Section 1557 is to prohibit discrimination. This may seem trivial because other laws already prohibit discrimination based on these classifications. But, Section 1557 is unique in that it clearly states that *discrimination based on sex includes discrimination based on gender identity and sex stereotyping*. As a result, Section 1557 expressly prohibits the following:

- Denying or limiting coverage (or imposing additional cost sharing or other limitations or restrictions on coverage), for any health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual because the individual's sex assigned at birth is different from the one to which such health services are ordinarily or exclusively available.

- Maintaining or implementing a categorical exclusion or limitation for all health services related to gender transition (i.e., a blanket exclusion for transgender health services).

The final regulations clarify that in determining if a particular denial or limitation is discriminatory under Section 1557, OCR will first inquire as to whether and to what extent coverage is available when the same service is not related to gender transition. For example, if a group health plan denies a claim for coverage for a hysterectomy that a patient's provider says is medically necessary to treat gender dysphoria, OCR will evaluate the extent to which the group health plan covers hysterectomies in other circumstances. Having said that, however, Section 1557 does not restrict a group health plan from denying claims that are not "medically necessary." As a result, it would appear that provisions such as precertification requirements may be permissible.

Administrative Requirements Under Section 1557

- **Notice Requirements:** Beginning on October 17, 2016, covered entities must include in significant publications and communications (including electronic communications), the following:

  - A nondiscrimination statement.
  - A short statement written in the top 15 non-English languages spoken by individuals with limited English proficiency in the state ("taglines").

  For significant publications and communications that are small-sized (e.g., postcards and tri-fold brochures), the regulations permit a shorter nondiscrimination statement and only require taglines in the top 2 non-English languages.

- **Compliance Officer and Grievance Procedures:** Covered entities with 15 or more employees must:

  - Designate an employee to coordinate compliance efforts with and carry out responsibilities under Section 1557.
  - Adopt grievance procedures that provide for the prompt and equitable resolution to grievances that allege violations of Section 1557.

Next Steps

Sponsors of self-funded group health plans should determine whether their group health plan is subject to Section 1557 and, if so:

- By the first plan year beginning on or after January 1, 2017:

  - Ensure that the third-party administrator of the self-funded group health plan updates it computer systems to accommodate non-binary gender billing codes (e.g. "male" or "female"). This is because requiring transgender enrollees to repeatedly go through the internal appeals process to obtain coverage for certain services would subject these enrollees to a burdensome process, which is likely discriminatory in violation of Section 1557.

    - Remove categorical exclusions of gender transition-related services. While utilization of gender transition-related services is likely to be low, a self-funded group health plan that must provide coverage for just one participant's gender transition is likely to incur a significant expense.

- For plans subject to the administrative requirements under Section 1557, review group health plan disclosures, including electronic enrollment and employee intranet sites as well as written materials, to determine which constitute significant publications and communications and must be updated to include the nondiscrimination statement and taglines.