



Alerts

Groundbreaking Healthcare Nondiscrimination Rule Issued by HHS: What It Means for Covered Entities

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Health Law Alert

HHS late last week issued a Final Rule prohibiting discrimination in healthcare on the basis of race, color, national origin, sex, age or disability. The Rule also broadens protection for individuals with limited English proficiency and individuals with disabilities.

Why is the Rule Significant?

The Rule implements Section 1557 of the Affordable Care Act (ACA), which has been compared to the Civil Rights Act as the most important piece of legislation of our era. The significance of the rule includes the following:

- It implements anti-discrimination provisions of the ACA, the first statute to include a broad prohibition against discrimination based on sex in federally-funded health programs.
- It prohibits exclusion or denial of care or coverage based on the race, color, national origin, sex, age or disability of an individual or entity, or an individual with whom the individual or entity is known or believed to have a relationship or association.
- It prohibits discrimination based on a patient's gender identity and requires treatment of individuals consistent with their gender identity.
- It requires that all women must be treated equally with men in the health care they receive.
- It includes protections for individuals with disabilities and enhances language assistance for people with limited English proficiency.

Who Does the Rule Affect?

The Rule affects all health programs and activities which receive Federal funds through HHS, all health programs and activities administered by insurers of ACA health plans, and all health programs and activities administered by HHS. The Rule does not apply to physicians who participate only in Part B, but it does cover all physicians who receive Medicaid or meaningful use information technology funding.

When Does the Rule Become Effective?

July 18, 2016, except for provisions which require changes to health insurance or group health plan design. Those provisions become effective on the first day

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of the first plan year beginning on or after January 1, 2017.

Are Religious Sponsored Providers Exempt from the Rule?

No. The Rule does not exempt providers who may object based on religious beliefs to providing services to transgender individuals or other requirements of the Rule. However, if application of the Rule would violate applicable Federal statutes protecting religious freedom and conscience, that application would not be required. These statutes include the Religious Freedom Restoration Act and the provisions of the ACA regarding abortion services.

Does the Rule Require Coverage of Gender Transition Services?

No. Insurers are not required to provide gender transition services under the Rule, but coverage is required for medically necessary services related to gender transition services.

Does the Rule Prohibit Discrimination on the Basis of Sexual Orientation?

While the Rule does not resolve this question, HHS cautioned that OCR will evaluate complaints that allege sex discrimination related to sexual orientation to see if they involve stereotyping prohibited under the ACA.

May a Covered Entity Operate a Sex-Specific Health Program or Activity?

Yes, but only if the covered entity can demonstrate a justification that the sex-specific health program or activity is substantially related to the achievement of an important health related or scientific objective.

Will This Rule be Challenged?

Most likely. While it hasn't been challenged yet, we anticipate challenges relating to the extension of protection to transgender individuals, failure to exempt religious sponsored providers from coverage under the Rule and conflicts with state laws, such as the Mississippi law granting physicians the right to refuse to provide treatment that violates their religious beliefs.

What Do You Need to Do to Comply with the Rule?

As a covered entity:

- You must comply with all provisions of the Rule on and after July 18, 2016, except for those provisions of the Rule which relate to notice requirements, and those which relate to health insurance and group health plans which have a delayed effective date.
- If you employ 15 or more persons you must designate an employee responsible for compliance with the Rule, and you must adopt grievance procedures that incorporate appropriate due process standards
- You must notify beneficiaries, enrollees, applicants, and the public of a number of specific items of information including your anti-discrimination policy, availability of translation services, availability of a grievance procedure and how to file a grievance
- Within 90 days of July 18, 2016, you must post notices and taglines conveying notice of such information in various languages, locations and publications as specified in the Rule

For further information or assistance in compliance with the requirements of the Rule, you may contact [Stephen T. Moore](#) or your regular [Hinshaw attorney](#).

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