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Blog Post

On the Basis of Sex…Discrimination in Group Health Plans and What Employers Should Know

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In just a few days' time, recently promulgated federal final rules addressing sex-based nondiscrimination in the administration of health care benefits have created a flurry of healthcare industry activity. The angst arises from providers, payers, and certain health plans alike. While the spotlight shines brightest on healthcare providers and health insurers, the focus of this post is on employer group health plans and the evolving definition of sex discrimination.

On May 6, 2024, two federal agencies — namely the U.S. Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS) — jointly released a final rule implementing the nondiscrimination requirements in Section 1557 of the Affordable Care Act (ACA) (the Final Rule). The original intention of Section 1557 of the ACA was to prevent discrimination in certain health programs or activities on the basis of race, color, national origin, sex, age, and disability. The evolution of Section 1557 has — in the eyes of some — expanded beyond the more traditional notions of sex discrimination under Title IX, i.e., that "sex" refers to the biological distinctions between male and female.

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This perceived expansion started with the original Section 1557 Final Rule in 2016 that defined sex discrimination to include discrimination based on gender identity, sexual orientation, and termination of pregnancy and prohibited health plans from imposing categorical exclusions for health services related to gender transition. In 2020, a new Section 1557 Final Rule was issued, reverting to the more limited definition of sex discrimination under Title IX and rescinding many of the protections in the 2016 Rule, including those related to sexual orientation and gender identity. Days after the 2020 Rule was published, in *Bostock v. Clayton County* the U.S. Supreme Court held that discrimination based on sex under Title VII of the Civil Rights Act includes discrimination based on sexual orientation and gender identity. Following the *Bostock* decision, the new Final Rule swings the pendulum back to the 2016 Rule and beyond, saying that sex discrimination includes, but is not limited to, discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits), pregnancy or related conditions, and sex stereotypes. A health plan engages in prohibited sex discrimination if it imposes a categorical coverage exclusion or limitation for health services related to gender transition or gender-affirming care or if it denies or limits coverage for specific health services related to gender-affirming care (including gender transition) if the denial or limitation results in discrimination on the basis of sex. For example, a health plan may place restrictions on coverage for gender-affirming surgeries only if those restrictions are no more stringent than restrictions the plan places on other types of surgical care.

The Attorney General of Florida and the Catholic Medical Association, an association of Catholic healthcare providers, immediately filed suit challenging the Final Rule's requirements related to coverage of gender dysphoria care. The Attorney General argues that the Final Rule will force the state to violate its own law prohibiting hormone treatment and gender-transition surgery

for Florida children. The state says that the Final Rule creates issues not only for providers who refuse to provide gender transition interventions, but also for health insurers and group health plans (including Florida's plan for state employees), as HHS "threatens the loss of federal funds for States and insurance issuers that refuse to cover these interventions." The State is asking the court to "vacate the [Final Rule], issue preliminary injunctive relief enjoining enforcement, issue permanent injunctive relief, enjoining enforcement, declare that the 2024 rules are contrary to law and arbitrary and capricious, and more."

The Final Rule clarifies that Section 1557 applies to group health plans that receive federal financial assistance, including Medicare Part C and Part D payments. For traditional group health plans in the private sector — i.e., those that do not receive federal funding — the Final Rule excepts employers or other sponsors of a group health plan from its nondiscrimination scope, and that exception specifically includes the provision of employee health benefits. So, at first blush, many employer plan sponsors may be inclined to ignore all news about Section 1557, the Final Rule, and coverage of the Florida case and other rapidly developing litigation trends.

That said, we advise employers to generally keep a finger on the pulse of Section 1557 developments. Certainly any companies offering retiree health plans may be caught under the Final Rule since they "receive federal financial assistance" via Medicare Advantage. And there could even be downstream impacts on active group health plans that employers should watch for. For example, third party administrators of self-funded plans may themselves be subject to Section 1557 and the Final Rule because of the administrative services they are providing. Also, the Final Rule applies to insurers for the insurance they provide to their fully insured group health plans. As a result, sponsors of self-funded

plans could indirectly experience the impact of the Final Rule.

Group health plans — including those sponsored by employers — should watch this Florida lawsuit and other similar litigation related to Section 1557 and the Final Rule. Akerman's Employee Benefits and Healthcare attorneys will be tracking developments.
