Section 1557 of the ACA: The Legal Side of Health Equity

Andrew C. Stevens

This week marks the end of National Minority Health Month and its 2016 theme of "Accelerating Health Equity for the Nation."[1] This month, the Health and Human Services (HHS) Office of Minority Health's goal was to "raise awareness of the health disparities that continue to affect racial and ethnic minorities," and to highlight "how we are working together to accelerate health equity."

To support this goal, Congress will host a forum this Friday entitled "Achieving Health Equity: The Path Forward."[2] At this forum, experts and members of Congress will discuss the ways in which health equity can be advanced through expanded access to insurance, culturally competent and linguistically appropriate care, and improved data collection. In addition, the Congressional Tri-Caucus—comprised of the Congressional Asian Pacific American Caucus (CAPAC), the Congressional Black Caucus (CBC), and the Congressional Hispanic Caucus (CHC)—will likely soon reintroduce the Health Equity and Accountability Act,[3] a bill that seeks to comprehensively address—and eliminate—health disparities in the U.S.

An existing provision—Section 1557[4] of the ACA—will have a significant impact on the healthcare industry. In short, Section 1557 prohibits discrimination in the provision of healthcare on the basis of several protected classes, including for the first time ever on the basis of "sex." Together with its proposed regulatory overlay,[5] Section 1557 is the legal side of health equity.

For example, under Section 1557, a healthcare provider may not deny care to a patient on the basis of a patient's race, sex, age, disability, or national origin. Significantly, courts and HHS are interpreting "sex" to include gender identity. But Section 1557 also prohibits *unintentional* discrimination. Thus, any facially neutral healthcare policy that disproportionately affects a protected class may be challenged as unlawful.[6] Many civil rights commentators view litigation of this kind (called *disparate impact* litigation) as a necessary condition to achieving health equity.

The proposed regulatory overlay of Section 1557 (to be finalized in the coming months) further codifies the legal side of health equity. Under the proposed regulations, healthcare providers with 15 or more employees must designate an employee for coordinating compliance with Section 1557 and its regulations. Healthcare providers must also adopt a formal grievance procedure that promptly and equitably resolves allegations of discrimination. These providers must comply with extensive notice requirements, informing individuals that: 1) the provider does not discriminate; 2) there are grievance procedures available; and 3) they may file a complaint with HHS on the basis of any discrimination. And finally, healthcare providers must ensure meaningful access for individuals

1 http://minorityhealth.hhs.gov/nmhm16/, last accessed May 10, 2016.
2 https://democrats-energycommerce.house.gov/committee-activity/hearings/democratic-forum-on-achieving-health-equity-the-path-forward-april-29, last accessed May 10, 2016.
3 https://www.congress.gov/bill/113th-congress/house-bill/5294, last accessed May 10, 2016.
4 http://www.agg.com/The-Future-of-Healthcare-Discrimination-LitigationSection-1557-of-the-ACA-08-17-2015/, last accessed May 10, 2016.
5 http://www.agg.com/files/Publication/a438b231-db42-4c70-9fc0-ccf0400d7d82/Presentation/PublicationAttachment/747bb4ab-9c45-48d2-a0f6-d0e0528d0c85/Stevens-Update-HHS-Proposed-Regulations-on-Section-1557.pdf, last accessed May 10, 2016.
6 The question of *who* may challenge such a policy under Section 1557 is an interesting one yet to be addressed. Before Section 1557, only the HHS Office for Civil Rights could challenge these policies under Title VI of the Civil Rights Act. Courts will soon have to answer the question of whether private plaintiffs may now challenge such policies themselves under Section 1557.

with limited English proficiency or disabilities. If a provider is found to have committed a violation of Section 1557, that provider must also take remedial action to overcome the effects of any discrimination.

Section 1557 and its regulations are, therefore, the legal side of health equity. These regulations require healthcare providers to take action or risk legal consequences. They provide remedies for aggrieved patients and allow for state and Federal enforcement of nondiscrimination law. And while the health equity movement has largely been collaborative—consider the hundreds of providers that have taken the #123forEquity Pledge[7]—those relationships can sometimes turn adversarial.

To that end, healthcare providers should ensure compliance with the final regulations under Section 1557 (once they are released) and take steps to ensure that no patients feel as though they have been discriminated against. Litigation under Section 1557 and its regulations is inevitable (and in fact ongoing), but healthcare providers can minimize their risk and continue to accelerate health equity.

For more information on Section 1557—and to stay up to date on future developments—follow me on Twitter at @DrewStevensEsq and #Section1557.

7 http://www.equityofcare.org/pledge/index.shtml.

Authors and Contributors

Andrew C. Stevens
Associate, Atlanta Office
404.873.8734
andrew.stevens@agg.com
Twitter: @DrewStevensEsq

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Atlanta Office
171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office
1775 Pennsylvania Avenue, NW
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Washington, DC 20006

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