Update: HHS Proposed Regulations on Section 1557 of the ACA

Andrew C. Stevens

On September 8, 2015, HHS published its proposed regulations implementing Section 1557 of the Affordable Care Act. In a previous article on Section 1557, entitled "The Future of Healthcare Discrimination Litigation," we discussed the ways in which this "Nondiscrimination" provision will impact the healthcare industry.

In short, federal nondiscrimination laws now apply to a larger range of healthcare actors—and may even provide for a private right of action for a "disparate impact" claim. In other words, Section 1557 may allow a private plaintiff to challenge facially neutral healthcare policies that disproportionately affect protected minority classes.

The Proposed Regulations

Now, with HHS's proposed regulatory overlay, Section 1557's impact is a little clearer. So far, most of the news surrounding the proposed regulations has focused on the fact the regulations make clear that Section 1557 protects transgendered individuals from healthcare discrimination.[1] This is undoubtedly significant, but healthcare providers would also need to take several immediate actions under the proposed Section 1557 regulations. For example, healthcare providers that receive federal assistance (including physicians who receive meaningful use payments) would need to, among other things:

- Designate an employee responsible for coordinating compliance under Section 1557 and its regulations (if the provider has 15 or more employees);
- Adopt a grievance procedure that incorporates due process standards and provides prompt and equitable resolution of allegations of discrimination;
- Comply with exhaustive notice requirements (in multiple languages, potentially), informing individuals that: 1) the provider does not discriminate; 2) there are grievance procedures available; 3) they may file a complaint with the OCR or HHS on the basis of any discrimination; and
- Ensure meaningful access for individuals with limited English proficiency and effective communication for individuals with disabilities.

Under the proposed regulations, a healthcare provider that is found to have committed discrimination in violation of Section 1557 or its regulations must also take remedial action to overcome the effects of its discrimination. Significantly, the proposed regulations prohibit discrimination on the basis of association, meaning that a covered entity may not discriminate against an individual because that individual has a relationship or association with a member of a protected class.

1 As noted in our first article, however, this has been the Office of Civil Rights' position since 2012. In fact, one federal court has already expressly endorsed this position. *See Rumble v. Fairview Health Services*, 2015 WL 1197415 at *10 (D. Minn. March 16, 2015).

Section 1557 Enforcement Mechanisms

A healthcare provider's exposure under Section 1557 is similar to that under other healthcare laws. For example, where compliance with Section 1557 and its regulations cannot be ensured by informal means, the proposed regulations authorize suspension and termination from federal programs as well as enforcement proceedings brought by the Department of Justice. To ensure compliance, a covered entity must also keep records and submit compliance reports to OCR. Importantly, the proposed regulations also make clear that individuals may bring a private civil suit to challenge violations of Section 1557 or its regulations.

The proposed regulations do not explicitly address a private right of action for a "disparate impact" claim, although the regulations arguably support the existence of such an action. For example, the proposed regulations state that:

> [A] private right of action and damages for violations of Section 1557 are available to the same extent that such enforcement mechanisms are provided for and available under Title VI, Title IX, Section 504, or the Age Act with respect to recipients of Federal financial assistance.

Therefore, because a private right of action for a disparate impact claim is available under the regulations implemented under these nondiscrimination statutes (and Section 504 itself), the proposed regulations appear to endorse a private right of action for a disparate impact claim under Section 1557.

The Impact of the Regulations

Unfortunately, these proposed regulations do little to clarify the legal standards that will apply under Section 1557. These standards will therefore ultimately be worked out by the federal courts. Nevertheless, the regulations force covered healthcare providers to comply with Section 1557's nondiscrimination provisions in two ways.

First and most basically, covered healthcare providers must take several actions to ensure compliance with Section 1557. As stated above, covered entities must designate an employee responsible for coordinating compliance and create internal grievance procedures to resolve discrimination allegations.

Second, the proposed regulations all but ensure more Section 1557 complaints, lawsuits, and enforcement actions through the required notice provisions. The regulations require Section 1557 nondiscrimination notices to be placed in conspicuous locations, including the home page of the covered entity's website. As awareness of Section 1557's requirements grow, healthcare providers should expect to see an increase in complaints, both internally and externally.

Finally, to the extent that the proposed regulations appear to support a private right of action for a "disparate impact" claim of discrimination, this is also significant. Should such a claim be allowed under Section 1557, private plaintiffs may be able to singlehandedly force healthcare providers to alter their policies and procedures.

HHS will accept comments on these proposed regulations until November 9, 2015.

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