# The Future of Healthcare Discrimination Litigation—Section 1557 of the ACA

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It is no secret that the Affordable Care Act (ACA) has changed the future of health care in the United States, but in the midst of the ACA's high-profile litigation on the individual mandate, contraceptive coverage, and tax subsidies, one critically important provision of the ACA has received scant attention. That section, Section 1557 of the ACA, is simply entitled "Nondiscrimination" and provides as follows:

> An individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or section 504 of the Rehabilitation Act of 1973, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.[1]

This section clearly has the potential to impact the entire health care industry significantly.

## Health Care Discrimination Litigation before Section 1557

Before Section 1557, discrimination in federal health programs already was prohibited on the basis of race, color, national origin, age, and disability. However, there were numerous limitations on health care discrimination actions that no longer may apply.

For example, in *Alexander v. Sandoval*, the U.S. Supreme Court ruled that there is no private right of action for disparate "impact" discrimination under Title VI of the Civil Rights Act of 1964. As a result of this ruling, a private individual could bring a claim for intentional discrimination (disparate "treatment") only on the basis of race, color, or national origin. Only the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) could bring a disparate impact claim for discrimination in the provision of health care services.[2]

The Court's decision in *Alexander* made disparate impact litigation in health care discrimination virtually non-existent. OCR is understaffed and overburdened by its responsibilities, including those related to Health Insurance Portability and Accountability Act compliance and enforcement. As a result, facially neutral policies regarding the provision of health care services that have a disproportionate effect on protected minorities largely go unchallenged in today's world.

Further, before Section 1557, the health care entities covered by federal anti-discrimination laws were much more limited. Specifically, for the most part, federal anti-discrimination laws only covered entities receiving "Federal financial assistance." By regulation, physicians accepting Medicare Part B were excluded from coverage. But, as stated above, all of these limitations may have ended as a

1 42 U.S.C. § 18116
2 *See* 532 U.S. 275, 293 (2001).

result of Section 1557.

## The Impending Impact of Section 1557

Academic commentators have been the first to recognize the potential impact of Section 1557. They have recognized, for example, that because it references Title IX, Section 1557 now prohibits discrimination in health care on the basis of sex.[3]

Commentators also have recognized that Section 1557 now applies federal anti-discrimination laws to a wider range of health care actors. By its terms, Section 1557 applies to health care programs that receive federal financial assistance, including "credits, subsidies or contracts of insurance."[4] Thus, now Section 1557 likely covers physicians and providers that accept Medicare Part B, as well as private insurance companies and all entities that receive tax credits and subsidies under the ACA.

Section 1557 also applies to programs administered by an executive agency and to entities established under Title I of the ACA.[5] Therefore, activities under numerous federal programs now are subject to Section 1557's anti-discrimination requirements, including those administered by the National Institutes of Health and the U.S. Food and Drug Administration. Entities established under Title I include the new health insurance exchanges and the new Consumer Operated and Oriented Plans—which now also are covered by Section 1557's requirements.

Most importantly, because it explicitly incorporates anti-discrimination laws that provide for a private right of action for disparate impact claims, Section 1557 may be interpreted as providing the same.[6] As a result, a private plaintiff potentially could bring a disparate impact claim under Section 1557 to challenge facially neutral health care policies that disproportionately affect minorities and other protected classes. This could have a significant impact on the health care industry. Indeed, the racial disparities in health care are undeniable. Disparate impact claims could thus be brought to challenge facially neutral policies ranging from a hospital's decision to relocate, to a hospital's decision to limit its number of Medicaid beds. Indeed, any policy limiting access to Medicaid patients would be subject to challenge. Some argue the ways in which health systems are organized, financed, and deliver their services all disproportionately affect minorities.

An investigation by OCR exemplifies the impact of a disparate impact claim. In 2009, the University of Pittsburgh Medical Center (UPMC) sought to close one of its hospitals—which would have had a disparate impact on the poorer African American neighborhood in which it was located. OCR, pursuant to its obligation to enforce Title VI, ultimately reached an agreement with the health system whereby UPMC agreed to: (1) subsidize expanded hours and services at a federally qualified health center; (2) provide door-to-door transportation for residents to three outpatient facilities in a neighboring community; (3) provide door-to-door service to another UPMC-affiliated hospital; (4) conduct six health-screening programs throughout the year as well as a diabetes-screening program twice a year; (5) designate an ombudsperson to help individuals navigate the UPMC health care system; and (6) provide outreach to faith-based health ministries in the community.

Despite its potential, claims under Section 1557 have only just begun to reach the courts. The courts that have addressed Section 1557, however, have consistently held that Section 1557 creates a private right of action for plaintiffs.[7] Yet the *Gilead and Rumble* courts disagreed as to the appropriate standards to be applied to claims under Section 1557. On the one hand, the *Gilead* court held that Congress must have intended to "import the various different standards and burdens of proof into a Section 1557 claim, depending upon the protected class at issue."[8] On the other hand, the *Rumble* court held that Congress intended to "create a new, health-specific, anti-discrimination cause of action that is subject to a singular standard, regardless of a plaintiff's protected class status."[9]

3 *See, e.g.*, Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity*, 55 HOW. L.J. 855 (2012).
4 42 U.S.C. § 18116
5 Id.
6 *See, e.g.*, Sarah G. Steege, *Finding a Cure in the Courts: a Private Right of Action for Disparate Impact in Health Care*, 16 MICH. J. RACE & L. 439 (2011).
7 *Southeastern Pennsylvania Transportation Authority v. Gilead Sciences, Inc.* 2015 WL 1963588 (E.D. Penn. May 4, 2015); *Rumble v. Fairview Health Services*, 2015 WL 1197415 (D. Minn. March 16, 2015).
8 2015 WL 1963588 at *6.
9 2015 WL 1197415 at *12.

Section 1557 also could be the basis for health care discrimination class actions. In one recent case, a putative class action alleging intentional and disparate impact disability discrimination was brought under Section 1557 against a health insurer.[10] In that case, the plaintiff was able to successfully obtain a temporary restraining order preventing the insurer from changing its policies which would adversely affect patients with HIV.

From these three cases, it is clear that Section 1557 potentially is a powerful tool in the hands of a private plaintiff. This is especially true if the *Rumble* court's holding ultimately prevails. It also seems certain that Section 1557 will be the subject of more litigation as the meaning of Section 1557—and the standards to be applied under it—are litigated in the future. It is possible that the scope and meaning of Section 1557 will be in front of the U.S. Supreme Court within the next five years.

## Future Guidance and Regulations from HHS

By its terms, Section 1557 allows for HHS to issue regulations implementing the section's nondiscrimination provisions. These regulations have not been released, but are due out in the near future.[11] In fact, the regulations were expected in the Spring of 2015. These regulations could provide crucial guidance to health care providers attempting to navigate the new world of Section 1557.

A letter written by the then OCR Director, however, already has provided some guidance, and further expanded the scope of Section 1557. Specifically, this letter made clear that Section 1557's prohibition on discrimination on the basis of sex extends to "discrimination based on gender identity or failure to confirm to stereotypical notions of masculinity or femininity."[12] In *Rumble*, the court directly referenced this letter in approving the plaintiff's discrimination claim under Section 1557, alleging he had been discriminated against in his care for being transgendered.

## Conclusion

Section 1557 has the potential to significantly impact health care discrimination litigation in the United States—and as a result, the health care industry itself. As Section 1557 becomes more widely known, and more widely litigated, health care providers likely will see a snowball effect with regard to Section 1557. Soon, Section 1557 could be a garden-variety claim for plaintiffs, brought with increasing regularity. Health care providers should therefore start preparing now by consulting with counsel on any policies that may impact protected classes.

10 *East v. Blue Cross and Blue Shield of Louisiana*, 2014 WL 8332136 (M.D. La. Feb. 24, 2014).
11 *See* Department of Health and Human Services Unified Agenda RIN: 0945-AA02.
12 Leon Rodriguez, OCR Transaction Number: 12-000800, July 12, 2012.

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