Section 1557 of the ACA – The Impact of the Final Rule on Healthcare Providers

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In earlier articles, I have called Section 1557 "the future of healthcare discrimination litigation"[1] and the "legal side of health equity."[2] HHS/OCR's final rule under Section 1557—which will go into effect on July 18, 2016—confirms these labels.

Under the final rule, and consistent with last year's proposed regulations, a healthcare entity that receives federal financial assistance must take immediate action. If a provider has 15 or more employees, that provider must: 1) designate an employee responsible for coordinating compliance with Section 1557 and the final rule; 2) adopt a grievance procedure to promptly and equitably resolve complaints of discrimination; and 3) comply with extensive notice requirements to patients (in multiple languages).

Complying with Section 1557 and the final rule also means taking reasonable steps to provide meaningful access to patients with limited English proficiency, as well as taking appropriate steps to provide effective communication for patients with disabilities. In addition, because HHS/OCR has interpreted Section 1557's prohibition on sex discrimination in healthcare to include discrimination on the basis of gender identity—healthcare providers should promptly revise all of their nondiscrimination policies and procedures to account for this expansion of protected classes.

Providers also should note that HHS/OCR has expressly stated that it will evaluate complaints of discrimination on the basis of sexual orientation to determine whether such complaints are actionable under Section 1557. Thus, as the law on sexual orientation discrimination develops (under Title VII for example), providers should expect the law under Section 1557 to develop in the same way.

Equally impactful is HHS/OCR's express interpretation of Section 1557 as providing for a private cause of action for a disparate impact claim of discrimination in healthcare. Under such an interpretation, any private plaintiff (*e.g.,* a single patient, a class of patients, or a civil rights group employing an impact litigation strategy) may challenge a facially neutral policy or practice that disproportionately impacts any protected class under Section 1557. This interpretation—if upheld by the courts—would usher in a new era of healthcare discrimination litigation, since under prior Supreme Court precedent the availability of such a cause of action was severely curtailed. HHS/OCR has also made clear that it interprets Section 1557 as providing for compensatory damages to plaintiffs—another interpretation that will surely lead to an increase in litigation.

This final rule will also undoubtedly lead to more religious liberty litigation under the federal Religious Freedom Restoration Act. In particular, HHS/OCR decided against providing for any religious exemptions to its final rule—so religious healthcare providers (whether they be Catholic hospitals or private physicians) must lay claim to RFRA's protections should they wish to conscientiously object to complying with Section 1557 or the final rule. For its part, HHS recognized that RFRA and other statutory protections will likely limit the application of Section 1557 and the final rule in some contexts.

1 http://bit.ly/1WeKZpm
2 http://bit.ly/1rhKzFi

And although Section 1557 applies to some 900,000 private physicians that accept Medicaid or meaningful use payments, HHS/OCR chose to adhere to the longstanding interpretation that the acceptance of Medicare Part B payments alone does not bring a physician within the purview of Section 1557. It is fair to expect that this heavily criticized policy may be challenged as being expressly contrary to the statutory text of Section 1557.

In all, providers are under no small burden when it comes to complying with Section 1557. In addition to the concrete steps required under the rule, providers should evaluate any policies or procedures that may be subject to a disparate impact challenge. And because HHS/OCR has expressly declined to adopt a ban on the arbitration of claims under Section 1557, providers should also update their arbitration clauses accordingly.

Fortunately, HHS/OCR has provided sample notices that providers may use to comply with the final rule—as well as a sample grievance procedure. In addition, HHS/OCR will prepare a training module that providers may use to help ensure institutional compliance with Section 1557. Nevertheless, this final rule makes clear that the impact of Section 1557 will be significant and long-lasting.

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