

HHS Releases Discrimination Rule Affecting Transgender Benefits

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The Department of Health and Human Services (HHS) recently released the Final Rule implementing Section 1557 of the Affordable Care Act (ACA), which prohibits certain types of entities from discriminating in health programs on the basis of race, color, national origin, age, disability, or sex (including gender identity-based discrimination). Most affected entities are not likely to have discrimination issues related to most of these categories; however, the new rules include significant requirements related to health coverage for transgender individuals that may force changes to current benefits.

Background

There is no specific requirement under the ACA for medical plans to provide coverage of transgender-related services; however, the Final Rule provides that most exclusions in coverage for health services related to gender transition are discriminatory. Therefore, group health plans subject to the Final Rule, whether directly or indirectly, may be required to include at least some transgender benefit coverage to avoid being considered discriminatory.

The Final Rule generally applies to “covered entities”—health programs and activities that receive federal financial assistance administered by HHS. Covered entities subject to the Final Rule include:

- Health insurance issuers that offer health plans through a public (state or federal) Marketplace;
- Issuers with health plans that participate in Medicare Advantage and Medicaid;
- Group health plans that receive Medicare Part D subsidies; and
- Providers that accept Medicare (except for Part B) and Medicaid.

Importantly, the Final Rule applies to all operations of a covered entity. For example, the rule would apply to all TPA services provided by a health insurance company that is subject to the rule, and to a group health plan offered to the employees of a medical provider subject to the rule.

Impact on Employer-Sponsored Group Health Plans

It’s important for employers to understand exactly how the rule may affect employer-sponsored health plans. Most employer-sponsored group health plans are not directly subject to the Final Rule. However, since most health insurance companies will need to comply, employers purchasing fully-insured plans will end up providing the coverage to employees because insurance companies simply will not sell a plan that does not include these services.

HHS has limited the scope of the Final Rule as it relates to employer-sponsored self-funded plans (as long as the plan is not directly receiving federal financial assistance). However, self-funded plans that utilize a TPA may be affected if the TPA is part of an entity that is subject to the Final Rule. Self-funded employers should communicate with their TPA as soon as possible to determine how the Final rule may affect their particular group health plan.

Summary

Even employers not directly subject to the Final Rule may end up providing expanded coverage for transgender-related medical services. Employers offering fully-insured coverage, and self-funded employers working with a TPA that is affiliated with an insurance company, may not have much choice if the insurance carrier and/or TPA determines it is subject to the new rules. The Final Rule can be found at (<https://www.federalregister.gov/articles/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities>), and the HHS Fact Sheet (<http://www.hhs.gov/civil-rights/for-individuals/section-1557>) provides a summary of the Final Rule along with additional information.

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