

Report on Medicare Compliance Volume 31, Number 27. August 01, 2022 HHS Revises Sec. 1557 Rule; Expands Definition of Sex, Adds 'Notice of Availability'

By Nina Youngstrom

In a proposed rule again revising Sec. 1557 of the Affordable Care Act, the Biden administration would protect gender identity, sexual orientation and pregnancy from sex discrimination and bring back notice and other requirements that were dropped from the Trump administration's version of the rule.^[1] The proposed rule, announced by HHS July 25, is more in keeping with the Obama administration's 2016 vision, with its notice of nondiscrimination and Sec. 1557 compliance officer, but it also introduced a "notice of availability" about language assistance and auxiliary aids. And as the latest incarnation makes clear, nondiscrimination requirements apply to telehealth services.

The ping-ponging of the protections and requirements of Sec. 1557, which prohibits discrimination on the basis of race, color, national origin, sex, age or disability, is unusual, said attorney Abby Bonjean, a former HHS Office for Civil Rights (OCR) investigator. It's been somewhat of a "roller coaster," she noted. "I have watched it from day one being at OCR when 1557 first came out, [and] then we had the Trump administration trying to roll back as many protections as they could." Now the Biden administration is moving to bring them back, said Bonjean, with Polsinelli. For now, though, she reminds hospitals and other covered entities they aren't required to post taglines because the 2020 regulation is still the rule of the land.

HHS also introduced something novel that's consistent with the Biden administration's emphasis on health equity, said Tamra Moore, an attorney with King & Spalding. It would be a violation of 1557 if a covered entity discriminates against individuals "on the basis of race, color, national origin, sex, age, or disability through the use of clinical algorithms in its decision-making," according to the proposed rule. Moore noted that "HHS is requesting comment, and I suspect they want to hear from health systems and hospitals about whether to implement this."

The most high-profile aspect of the Sec. 1557 regulation is the back and forth over the definition of sex discrimination. In interpreting the Affordable Care Act, HHS in the 2016 version defined discrimination "on the basis of sex" to include termination of pregnancy and gender identity, which it described as a person's internal sense of being "male, female, neither, or a combination of male and female." OCR in the 2020 rule, however, eliminated gender identity and termination of pregnancy from that definition. "'Sex' according to its original and ordinary public meaning refers to the biological binary of male and female that human beings share with other mammals," according to the 2020 regulation.

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