Health Care in Motion
Timely, Substantive Updates on Policy Shifts · Actionable Advocacy to Protect Health Care

October 21, 2022

1557 Proposed Rule: A New Life for Non-Discrimination Protections

Late this summer, the Department of Health and Human Services (HHS) released its proposed rule overhauling the Affordable Care Act's (ACA) non-discrimination protections. Section 1557 is the ACA provision applying four pre-existing federal civil rights protections (Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973) to a range of federal health programs and activities, including health insurance. Its implementation, however, has been fraught. The rule – which was first promulgated in 2016 under the Obama Administration and went through a major revision and rollback during the Trump Administration – has been the subject of multiple court challenges. The proposed rule released by the Biden Administration reinstates many of the provisions in the original 2016 rule and expands and revises other protections. Below, we provide a summary of the history of Section 1557 rulemaking and a review of some prominent changes proposed in its current iteration. Based off of HHS' past rulemaking timeline, readers can expect to see the next steps of rulemaking sometime in 2023.

1557: A Dramatic History

The Obama Administration first gave life to section 1557 of the ACA when it released a massive rule implementing the provision in 2016. Legal challenges were mounted almost immediately, aimed squarely at the rule's definition of discrimination "on the basis of sex" and specifically at inclusion of discrimination based on "gender identity" and "termination of pregnancy" in that definition. In 2020, the Trump Administration released a revised rule implementing Section 1557. The 2020 rule limited the scope of the rule's application, removed the definition regarding discrimination based on sex, removed protections against discriminatory plan designs, and gutted language access, notice, and enforcement provisions. Between informal release of the 2020 rule to the public and its formal publication in the Federal Register, the Supreme Court issued its ruling in *Bostock v. Clayton County, Georgia*, finding that discrimination based on sex encompasses sexual orientation and gender identity in the context of employment. Several lawsuits were filed against the Trump Administration for the rollback of protections, including *BAGLY v. HHS* (CHLPI along with others represent the plaintiffs). Courts instituted nationwide preliminary injunctions on some parts of

the 2020 rule, including its repeal of the definition of discrimination on the basis of sex and incorporation of Title IX's religious exemptions.

The Biden Administration has taken a different tack when it comes to discrimination protections. On his first day in office, President Biden issued the Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, which among other things, directed federal agencies to review existing guidance and regulations to ensure that sex-based protections extended to discrimination on the basis of gender identity and sexual orientation. In May 2021, the Office of Civil Rights (OCR) announced that in light of the Court's decision in *Bostock*, OCR would interpret section 1557 to include protections against discrimination based on gender identity and sexual orientation and that the Administration would release a revised 1557 rule that conformed with *Bostock*. (Despite these moves, discriminatory plans were still being sold on HealthCare.gov in 2022.) More than a year later, HHS published its proposed rule in the Federal Register on August 4, 2022.

"On the Basis of Sex"

The 2016 rule included explicit prohibitions on discrimination based on pregnancy and gender identity in its definition of discrimination on the basis of sex. The 2020 1557 rule eliminated the definition section, throwing confusion into what a covered entity's obligations were under Section 1557 and what rights consumers had, particularly when it came to discrimination based on gender identity. Following the Supreme Court's decision in *Bostock* and the Biden Administration's public announcements regarding its application of *Bostock* onto other nondiscrimination protections, advocates expected that the newly proposed 1557 rule would explicitly codify prohibition of discrimination based on gender identity. The proposed rule does this, clarifying that discrimination on the basis of sex includes discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity. The preamble to the rule includes examples of how these protections apply to providers and insurers (specific examples of plan design discrimination based on gender identity are discussed in more detail below).

The proposed rule does not include a separate specific provision related to pregnancy-related conditions; however, HHS asked for comments on whether a provision should be added, particularly in light of the Supreme Court's decision in *Dobbs v. Jackson's Women's Health Organization*. *Advocates, such as the National Women's Law Center*, urged HHS to include a stand-alone provision with language "outlining the full scope of pregnancy or related conditions" and "clarify[ing] that sex discrimination based on pregnancy or related conditions includes, but is not limited to, pregnancy, childbirth, termination of pregnancy, other pregnancy outcomes, miscarriage, miscarriage management, ectopic pregnancy, or recovery from any of these conditions or related conditions, contraception, and fertility treatment."

Covered Entities

The strength of nondiscrimination protections rely not just on the breadth of what discrimination is prohibited, but on *who* must comply with them. The statutory language of Section 1557 states that individuals shall not be discriminated against by "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 2016 rule had interpreted this to include "the provision or administration of health-related services, health-related insurance coverage, or other health-related coverage, and the provision of assistance to individuals" in obtaining those services. The Obama Administration not only considered Section 1557 protections to apply to health insurance, they also interpreted the rule such that when an entity accepted federal financial assistance in one of its programs, the nondiscrimination protections would apply to the entity's *entire* operations. For example, if a health insurance company accepted Advanced Premium Tax Credits from members in one of its plans, the company would not be permitted to discriminate in *any* of its other offerings. The 2020 rule walked back these understandings. The Trump Administration determined that selling health insurance was *not* considered a health program/activity and thus could not, on that factor alone, subject an entity to comply with Section 1557. Furthermore, the Trump Administration promulgated a narrow understanding of Section 1557 compliance, such that if an entity is not principally engaged in providing health care and they accept federal financial assistance that would subject them to Section 1557, only the part of the entity accepting the federal financial assistance would need to comply, not the entire operation.

In the current proposed rule, the Biden Administration has returned to the 2016 rule's understanding of a covered entity (health insurers are considered health programs and activities). The proposed rule also reinstates the understanding that that the entirety of covered entity must comply with these nondiscrimination protections – not just the part accepting federal financial assistance.

Discriminatory Plan Design and Practices

The proposed rule also reinstates prohibitions on discriminatory plan designs that were in the 2016 rule, but eliminated in 2020, and adds new provisions to protect consumers in light of changing technology and health care delivery innovation.

- *Discriminatory plan design*

  The 2020 rule had eliminated sections prohibiting benefit designs and marketing practices that discriminate on the basis of race, color, national origin, sex, age, or disability. The proposed rule reinstates this protection, and specifically prohibits covered entities from "denying, cancelling, limiting, or refusing to issue or renew health insurance coverage or other health-related coverage, or denying or limiting coverage of a claim, or imposing additional cost sharing or other limitations or restrictions on coverage, on the basis of race, color, national origin, sex, age, or disability."

  In recognition of the need to strengthen protections against discrimination based on gender identity, the proposed rule adds new provisions that explicitly address benefit designs that impermissibly limit coverage based on a person's sex at birth, gender identity, or gender otherwise recorded, including, for example, imposing cost sharing or additional limitations/restrictions on services based on gender identity and categorically excluding gender affirming care. The proposed rule deviates slightly from the 2016 rule and prohibits a covered entity from applying any policy or practice of treating

individuals differently or separating them on the basis of sex "in a manner that subjects any individual to more than de minimis harm." This standard recognizes that there may be some legitimate bases for different treatment based on sex, but centers the inquiry on whether the practice harms an individual based on sex. Finally, the proposed rule makes it clear that Section 1557 does not require insurers to cover a particular service related to gender transition or gender affirming care if it is not otherwise covered. However, plans must ensure non-discriminatory administration of benefits.

With the exception of the specifics on discrimination based on gender identity, the rule does not explicitly define what constitutes a discriminatory benefit design or marketing practice, but provides some broad examples in the preamble and cross-references the examples of discriminatory benefit designs that were included in the Notice of Benefit and Payment Parameters for 2023 following advocacy from many in the HIV community. Additional examples of discriminatory benefit design or marketing practice can be found in the comments submitted on behalf of the Federal AIDS Policy Partnership's HIV Health Care Access Working Group.

- *Clinical Algorithms*

  The proposed rule adds a new section addressing growing concern about the use of algorithms in clinical decision making. The proposed rule states that a covered entity must not discriminate against any individual on the basis of race, color, national origin, sex, age, or disability through the use of clinical algorithms in its decision-making. The preamble to the rule cites several recent examples of clinical algorithms used to justify clinical decisions that harm Black enrollees and people living with disabilities, including over the course of the COVID-19 pandemic when jurisdictions operated under crisis standards of care. Studies have shown that these algorithms are sometimes based on incomplete data and that without a more nuanced individualized assessment, can lead to clinical decisions that systematically harm patients based on race and ethnicity. The preamble also notes that it is not the intention of HHS to prohibit use of algorithms. Rather, HHS notes that algorithms are not a substitute for clinical decision making and encourages providers to interrogate the underlying data assumptions used in clinical decision making algorithms and whether they are based on faulty, inaccurate, or harmful assumptions about race/ethnicity and other traits.

  CHLPI, the Disability Law Center, Disability Policy Consortium, the Center for Public Representation, and the RDMH Dialysis Patient Support Group submitted comments to HHS about the proposed rule's clinical algorithm provision. While supportive of the prohibition of discriminating through the use of clinical algorithms, we highlighted the need for clear and robust legal standards, along with dedicated financial and staff resources, so this provision can adequately and timely address discrimination in health care decision-making.

- *Telehealth*

  In recognition of the growing use of telehealth, particularly as a result of the COVID-19 pandemic, the proposed rule adds new provisions addressing telehealth and prohibiting discriminatory plan designs and practices specific to telehealth. The proposed rule imposes an affirmative duty on covered entities to not discriminate in their delivery of services through telehealth. The rule also requires telehealth to be accessible to individuals with disabilities and provide meaningful program access to limited English proficient (LEP) individuals.

Enforcement: Private Right of Action, Uniform Enforcement, and Disparate Impact

Since the original Section 1557 rule was finalized in 2016, a legal disagreement has unfolded regarding enforcement against covered entities found to be engaged in discrimination. Who is permitted to hold such bad actors to account? Can they be sued by the victims of discrimination in court (known as a "private right of action")? If so, what standards apply in these cases, especially given that Section 1557 references four separate civil rights statutes, each with its own body of court decisions? What rules should courts apply to determine liability, to discern causation for harm, or to determine what a plaintiff's burden of proof is?

In 2015, a federal court considered a case brought by Jakob Rumble, a transgender man from Minnesota who experienced sex discrimination at the hands of hospital staff. Writing before the Obama Administration had released the first final rule interpreting Section 1557, the judge concluded that by enacting Section 1557, Congress had created a new, uniform right to be free from discrimination in health care. She ruled that private litigants – such as Mr. Rumble – were permitted a private right of action to sue under the new law, and could claim any and all of the protections included in the referenced underlying civil rights laws. How else could a court decide cases of intersectional discrimination where the claimant experienced discrimination related to more than one protected status? The court concluded 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."

In the years since, this position has been questioned by other federal courts and dismissed by the Trump Administration. With regard to the question of whether a victim may bring a lawsuit in federal court to enforce Section 1557, the Trump Administration took no position. On the question of what rules to apply, the preamble to the 2020 final rule explicitly rejected the *Rumble* approach. It interpreted Section 1557 claims to be limited to the specific rules for whichever of the four individual civil rights statute related to the protected status claimed. Claims of sex discrimination, for example, would be subject to the rules for Title IX claims. Where intersectional claims are brought, the Trump Administration's rule concluded that "the Department analyzes the elements of each claim according to the statute applicable to that ground." As with much of the Trump Administration's rulemaking, this interpretation limited the protection afforded to victims of discrimination.

In the current proposed rule, the Biden Administration included a proposed section entitled "Enforcement Mechanisms." The preamble to the proposed rule cites a recent Supreme Court case to recognize that Section 1557 does indeed provide a "private cause of action" for victims of discrimination to seek enforcement in court. In *Cummings v. Premier Rehab Keller*, the Supreme Court ruled that a patient may sue in federal court for disability discrimination under the Rehabilitation Act and Section 1557. It was a Pyrrhic victory, however, as the Supreme Court passed this conclusion on its way to ruling that the same victim was not permitted to seek emotional distress damages for the injury she suffered as a result of the discrimination. Section 1557 – as interpreted by the Supreme Court – might represent the old legal maxim that a right without a remedy is no right at all.

The 2022 proposed rule does not mention the issue of *which* rules should apply in lawsuits arising from intersectional discrimination or any other actions. The effect of this silence is to leave in place the status

quo in which the *Rumble* court's view of a uniform enforcement standard is a minority position, unlikely to be implemented in the future. The only difference in the 2022 proposed rule is that the enforcement mechanism regulation itself uses an "and" in listing the underlying civil rights statues; the statute itself, as well as both the 2016 and 2020 regulations, use "or" in that same spot. Whether that change is intentional or an oversight remains to be seen.

A parallel legal disagreement exists in the context of "disparate impact" liability under Section 1557. "Disparate impact" describes a method of proving that a policy is discriminatory without having to show intent. For example, where a government agency relies for its hiring and promotion on non-job related standardized testing methods that have been discredited as producing racially disproportionate results, disparate impact can be used to prove discrimination without a need to show specific intent by the testing authorities. In a 1985 Medicaid case, the Supreme Court assumed without deciding that disparate impact liability was possible for disability discrimination claims under the Rehabilitation Act, crafting a standard that inquires whether disabled individuals are denied "meaningful access" to benefits to which they are otherwise entitled. In 2021, the Supreme Court agreed to hear an HIV discrimination case that revisited this same question in the context of a Section 1557 disability discrimination claim. The parties agreed to withdraw the case from the Supreme Court shortly before it was argued, so the legal question of whether and how Section 1557 permits disparate impact liability remains unresolved.

HHS has offered its interpretation on this question before. The 2016 rule included a statement in its preamble that "OCR interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation." Unsurprisingly, the Trump Administration changed course, withdrawing the disparate impact interpretation in favor of regulatory silence. "[T]o the extent any of the underlying statutes authorize disparate impact claims, this final rule will recognize such claims by virtue of its reliance on the governing statutes, regulations, guidance and case law applicable to such claims, without needing to delineate the availability or lack of availability of all possible claims in this final rule." Consistent with its other reversals of course, the Trump Administration undermined any freestanding effect that Section 1557 might have relative to prior civil rights laws. The outer limit of those preexisting laws defined the boundary of Section 1557's reach.

Noting that the Trump Administration removed examples of sex discrimination in the nature of disparate impact, the Biden Administration proposes to leave this omission in place. "The Department has determined not to include [the 2016] provision here as the Department believes it is important to preserve—and not expand—the longstanding treatment of disparate impact in the referenced statutes' implementing regulations." While this preserves the ability of federal agencies to seek disparate impact liability in some circumstances, private litigants will find no support in this interpretation. Optimists will view this proposal as the Biden Administration choosing to keep its powder dry for regulatory interpretations that do not stretch the language of Section 1557 in a way that many courts have condemned. Critics will characterize this omission as a missed opportunity to promote systemic reform efforts through the courts.

--

The 2022 proposed rule has been a long time coming and breathes new life back into an ACA provision that has held much promise, but also attracted much controversy. The comment period for the proposed rule ended in early October, and now HHS is tasked with considering thousands of comments in the finalization of the new rule. Previous rulemaking suggests that we may not expect to see a new final rule until late summer 2023, and that a new final rule – like its predecessors in 2016 and 2020 – will be subject to litigation quickly. Until then, however, we operate under the 2020 rule (with some parts enjoined) and rely on the Biden Administration for robust enforcement of the law.

Subscribe to all Health Care in Motion Updates

Health Care in Motion is written by Robert Greenwald, Faculty Director; Kevin Costello, Litigation Director and Associate Director; Elizabeth Kaplan, Director of Health Care Access; Maryanne Tomazic, Clinical Instructor; Rachel Landauer, Clinical Instructor; and Suzanne Davies, Clinical Fellow. This issue was written with the assistance of Amy Killelea of Killelea Consulting.

*For further questions or inquiries please contact us at **chlpi@law.harvard.edu**.*