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Administration Takes New Approach to Non-Discrimination Laws That Could Weaken Protections

As the Trump Administration makes massive changes to the federal government, it is also quietly laying the groundwork to narrow the protections offered by federal non-discrimination laws, including laws meant to protect people from discrimination in health care. On April 23, the Administration released an Executive Order announcing its intention to "eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." Disparate impact is a theory of discrimination that grounds liability in disproportional harm to a protected class arising from a defendant's policy or practice, even if there is an absence of discriminatory intent. Stated plainly – if a company or government maintains a policy that yields discriminatory outcomes, it can be found liable of discrimination without needing to show that there is smoking gun of purposeful bias. For example, if a city police department insists on only hiring or promoting its officers using a multiple-choice exam when there are equally valid methods of determining competency for the job, the city can be found liable for discrimination if the exam yields racially disparate outcomes. These claims have been the cornerstone of civil rights litigation aimed at eliminating more insidious forms of discrimination. The Executive Order comes on the heels of other Administration actions signaling that health care non-discrimination enforcement will not be a priority.

Disparate Impact: What Is It and Why Is it Important to Civil Rights Law Enforcement?

Disparate impact has been a recognized form of discrimination under federal civils rights laws for decades. Whether disparate impact liability is

Disparate Impact in Action: CVS Pharmacy, Inc. vs. Doe

In *CVS v. Doe*, plaintiffs argued that an insurance plan's requirement that beneficiaries use mail order pharmacies instead of brick-and-mortar pharmacies had a disparate discriminatory impact on people with HIV in violation of Section 504 of the Rehabilitation Act and Section 1557 of the ACA, the federal civil rights law that prohibit discrimination based on disability. Plaintiffs argued the policy, while not intentionally discriminatory based on disability, had a disproportionate impact on people with HIV because:

- It took away their ability to interact with the pharmacist and
- created potential privacy concerns

The case was ultimately dismissed by the U.S. Supreme Court, meaning that the question of whether Sections 504 and 1557 allow disparate impact claims remains

available depends on the language of the statute prohibiting a particular type of discrimination, and how that language has been interpreted by courts. In 1971, SCOTUS explicitly recognized disparate impact claims under Title VII of the Civil Rights Act in its decision in Griggs v. Duke Power Co. Congress later codified disparate impact as an impermissible form of discrimination in the Civil Rights Act of 1991.

For a more thorough rundown of section 1557's legislative and regulatory history, see previous Health Care in Motion newsletters here and here.

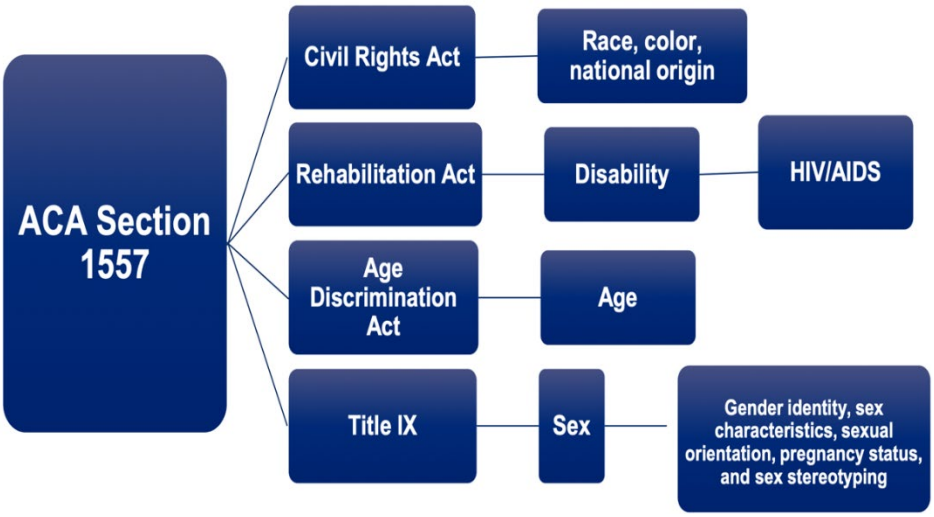
In health care, disparate impact claims have primarily been brought under the Americans with Disabilities Act (ADA) and its precursor Section 504 of the Rehabilitation Act, both of which prohibit discrimination based on disability. More recently, plaintiffs have brought health care-related disparate impact claims under Section 1557 of the Affordable Care Act (ACA), the non-discrimination provision that applies existing federal civil rights protections to health insurance and other health programs and activities.

While it is not possible to wipe out federal law or decades of legal precedent with only an Executive Order signature, the new Executive Order could pave the way for an erosion of disparate impact litigation, nonetheless. The Executive Order directs:

- Federal agencies tasked with enforcing anti-discrimination laws to eliminate disparate impact liability "in all contexts to maximum degree possible and use their discretion to deprioritize enforcement of civils rights laws based on disparate impact claims.
- The Attorney General to review all regulations, guidance, or orders related to civils rights laws and amend or repeal them consistent with the Executive Order.
- The Attorney General and the Chair of the Equal Employment Opportunity Commission to assess pending investigations and lawsuits under federal civil rights laws that rely on a theory of disparate-impact liability and take actions consistent with the Executive Order.

The Future of Section 1557 and Disability Protections in Health Care

Section 1557 is one of the most politicized provisions of the ACA, with a long track record of dueling implementing regulations that vary significantly depending on what party has control of the executive branch. As discussed above, Section 1557 applies existing civil rights laws to prohibit discrimination based on race, color, national origin, sex, age, or disability in certain health care programs and



Source: Consumer Representatives to the NAIC, What the New Section 1557 Rule Means for Health Insurance Non-Discrimination Protections and Considerations for Regulators (Spring National Meeting 2024)

activities. Based on the recent regulations issued by the Biden Administration, Section 1557 also applies to health insurance.

Recent moves by the Trump Administration indicate that Section 1557 may be reshaped once again. At the very start of the second Trump Administration, the Office of Civil Rights (OCR) within the Department of Health and Human Services (HHS) quietly removed information about Section 1557 from its website. In his first days in office, President Trump moved to quickly rescind Biden era orders and guidance on sexual orientation and gender identity discrimination, paving the way for yet another re-write of Section 1557. HHS is likely to release a new regulation at some point, reverting to an interpretation embraced by the first Trump Administration that explicitly excluded discrimination based on gender identity and sexual orientation from Section 1557's prohibition on sex discrimination. There is active litigation on this very question, and if the Trump Administration issues any rules with a more limited interpretation of sex discrimination, these changes are sure to be aggressively disputed in court.

Though most legal experts agree that the framework of Section 1557 allows for a private right of action (allowing plaintiffs who have been discriminated against to sue entities directly rather than rely on government agencies to enforce Section 1557), this mechanism for enforcement is complicated. Plaintiffs must bring suits under one of the four civil rights statutes referenced in Section 1557, and the standard of review for a discrimination claim that intersects multiple civil rights laws is still ambiguous. Whether private plaintiffs are permitted to bring a disparate impact claim varies under the constituent statutes of Section 1557.

What's Next?

Health care discrimination protections will likely continue to be under threat in an Administration that has embraced a deregulatory approach to health care and insurance and a much smaller role for federal monitoring and enforcement. It will be challenging to enforce the anti-discrimination protections offered by Section 1557 when disparate impact will not be allowed. This is because it can be difficult to demonstrate evidence of discriminatory intent, but potentially easier to demonstrate disparate impact on different patients. The Trump Administration has signaled little appetite so far for enforcing Section 1557, so that may fall on private plaintiffs to carry that baton, but their ability to do so may depend on which underly constitutional statute they are relying on.

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