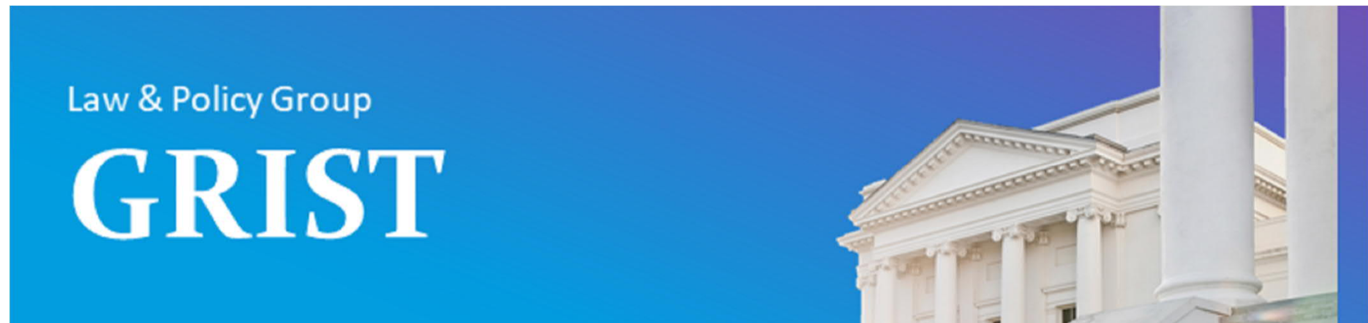
MERCER

welcome to brighter



ACA 1557 nondiscrimination rule revised, but what is effective now?

By Kaye Pestaina and Katharine Marshall
Nov. 5, 2020

In this article

Scope of Section 1557 narrowed | Notice and other administrative requirements removed | Sex discrimination prohibitions substantially revised | Enforcement tools altered | Nationwide injunction halts enforcement of certain provisions | Some LEP standards, most disability protections intact | Employer issues | Related resources | Appendix: Comparing 2016 and 2020 final Section 1557 regulations

Nondiscrimination provisions under Section 1557 of the Affordable Care Act (ACA) continue to garner attention, especially the protections for individuals who are transgender or have limited English proficiency (LEP). A final regulation issued June 19 and effective Aug. 18 significantly changes the 2016 final rule, but certain provisions raise questions in light of the US Supreme Court's June 15 decision in *Bostock v. Clayton Cty., Ga.* (140 S. Ct. 1731). In addition, nationwide injunctions temporarily prevent enforcement of certain parts of the 2020 rule. This GRIST discusses the 2020 regulation and the provisions currently in effect. While the rule doesn't apply to most employer group health plans, the nondiscrimination standards and ongoing litigation will shape employee access to healthcare services covered by employer plans. Plan sponsors also should note the regulation's administrative and notice changes, which could eliminate the need for plan features put in place to comply with the 2016 rule.

Scope of Section 1557 narrows

ACA Section 1557 prohibits discrimination based on race, color, national origin, sex, age and disability in health programs and activities that receive federal funds. The law essentially applies to those health programs and activities the same civil rights protections found in four other laws:

- Title VI of the Civil Rights Act of 1964, which bans discrimination based on race, color and national origin

Copyright 2020 Mercer LLC. All rights reserved.

MARSH & McLENNAN COMPANIES

- Title IX of the 1972 amendments to the same civil rights law, which prohibits sex discrimination in education programs and activities
- The Age Discrimination Act, which bans all forms of age discrimination
- Section 504 of the Rehabilitation Act, which prohibits disability discrimination

Group health plans don't typically receive federal funds directly, so the application of Section 1557 to employer plans had been an open question prior to the 2016 regulation. The 2020 final regulation narrows Section 1557's implications for employer plans, removing several provisions from the 2016 rule. However, employers exempt from Section 1557 remain subject to similar nondiscrimination requirements under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). The Equal Employment Opportunity Commission has issued guidance on how these laws apply employer-sponsored group health plans, including disability-based distinctions in health coverage, contraceptive coverage and retiree health plans (now rescinded).

Section 1557's application to employer plans under 2016 rule

The 2016 regulation confirmed Section 1557's limited application to most group health plans but noted at least two scenarios in which the nondiscrimination standards would directly apply:

- ***Group health plans of health entities that receive federal funds.*** Under the 2016 regulation, any entity that receives funds from the US Department of Health and Human Services (HHS) and is principally engaged in providing or administering health services or health insurance is subject to Section 1557. Even if only a part of the entity received HHS funds, all of the entity's operations, including its group health plans, had to comply with Section 1557. For example, hospitals, health systems, health insurers and nursing homes typically receive HHS funds through Medicare and Medicaid reimbursements or other federal programs. For these employers, the 2016 regulation applied to all of their group health plans (whether insured or self-insured) in addition to the health services that covered healthcare providers give to their patients.
- ***Group health plans or employers directly receiving federal funds.*** The 2016 final rule defined an "employee health benefit program" to include health or long-term care coverage for employees, whether provided or administered by an employer, a third-party administrator (TPA) or another entity; an employer-sponsored wellness program; and an employer-provided health clinic. If an employer or a group health plan received HHS funds, the employer or plan would be subject to Section 1557. This implicated, for example, group health plans that received the Medicare Part D retiree drug subsidy (RDS), as well as some plan sponsors with employer group waiver plans (EGWPs) — employer group health plan arrangements that provide certain Medicare Part C and D benefits to eligible individuals.

Indirect Section 1557 impact on employer plans through TPAs/PBMs. Even if an employer did not fit into either of the scenarios above, its group health plan could experience indirect effects from the 2016

Copyright 2020 Mercer LLC. All rights reserved.

regulation if Section 1557 applied to the plan's insurance provider, TPA or pharmacy benefit manager (PBM). For example, health insurers offering public exchange plans receive federal financial assistance (in the form of exchange subsidies), while some PBMs receive HHS funds through the Medicare Part D program. Under the 2016 rule, these insurers and PBMs primarily offer or administer health coverage and therefore must comply with Section 1557 in all of their services, not just those related to exchange plans or Medicare Part D.

As a result, insurers subject to Section 1557 had to follow the 2016 rule when providing insured coverage to an employer plan or administrative services to a self-insured employer plan (with some exceptions). This caused many insurers to apply all of the Section 1557 requirements — including nondiscrimination notices, language-assistance taglines and transgender plan design changes — when delivering services to insured and self-insured employer plans.

2020 rule reduces Section 1557's impact on employer plans, insurers

The 2020 regulation significantly narrows the application of Section 1557 to employers and insurers. Stating that the 2016 rule improperly extended Section 1557 to programs and entities not covered by the law, HHS removed various definitions, including the provision on employee health benefit programs.

Covered programs and activities. The 2020 rule applies only to the following programs and activities:

- Any part of a health program or activity receiving federal financial assistance (including credits, subsidies or contracts of insurance) from HHS
- Any program or activity administered by HHS under Title I of the ACA
- Any program or activity administered by any entity established under Title I of the ACA

No indirect application to employer plans. The 2020 rule doesn't require insurers operating a program or activity subject to Section 1557 to apply its requirements to insured or self-insured employer health coverage.

Health insurance is not healthcare. Under the 2020 rule, Section 1557 applies to all of an entity's operations only if it is "principally engaged" in the business of providing healthcare. HHS regulators now say that health insurance is different from healthcare, so insurers are not principally engaged in providing healthcare if most of their activity involves administering or insuring benefits. As a result, Section 1557 no longer applies to all of an insurer's operations whenever any part of its business is subject to the regulation. Instead, the 2020 rule applies only to an insurer's programs and activities that receive federal funding or are created by ACA Title I. For most insurers, such programs and activities would include qualified health plans on public exchanges, Medicare Advantage plans, Medicaid managed care plans or certain EGWPs, but usually not employer-sponsored coverage.

Copyright 2020 Mercer LLC. All rights reserved.

Notice and other administrative requirements removed

The 2020 regulation eliminates a number of specific administrative provisions in the 2016 rule that required covered entities to:

- Designate at least one employee to coordinate Section 1557 compliance efforts
- Adopt a grievance procedure to resolve individual complaints
- Provide and post a nondiscrimination notice and statement — including information on how to obtain language and communications assistance and where to file a complaint with the HHS Office of Civil Rights — in “significant” publications and communications
- Post and include in significant communications taglines in at least 15 languages stating how to obtain language assistance

HHS now says that the nondiscrimination notices, responsible employees and grievance procedures required by the four civil rights statutes underlying Section 1557 are sufficient to enforce its requirements. Regulators also decided that the notice and tagline provisions were “imprecise and overly burdensome,” imposing an unjustified financial burden on covered entities. Although the preamble to the revised 2020 rule says that taglines are still required when needed to ensure access for individuals with LEP, how this would be enforced is unclear since the 2020 regulation no longer has any references to taglines.

Notice and taglines now optional. Effective Aug. 18, covered entities, including hospitals and health systems, can choose — but are not required — to eliminate the Section 1557 nondiscrimination notice and taglines. For instance, covered entities like insurers that had included these items in explanations of benefits (EOBs), summaries of benefits and coverage (SBCs), and other communications for individuals in employer-sponsored plans can now take out this information. Even if the 2020 rule had retained these requirements, the narrower scope of insurers’ operations subject to Section 1557 would allow elimination of the notice and taglines from communications for insured or self-insured employer-sponsored coverage.

The 2020 regulation’s elimination of the notice and taglines, as well as the narrowed scope of covered entities, faces court challenges. The litigation is ongoing.

Sex discrimination prohibitions substantially revised

While Section 1557 bars discrimination based on race, color, national origin, age and disability, its sex discrimination provisions have drawn the most attention. Since Section 1557 incorporates the prohibitions under Title IX of the 1972 amendments to the Civil Rights Act, the ACA provision prohibits discrimination “on the basis of sex,” the language used in Title IX. The 2016 final 1557 regulation defined

Copyright 2020 Mercer LLC. All rights reserved.

"on the basis of sex" to include gender identity and became the basis for specific healthcare protections for transgender individuals. The 2020 final regulation eliminates the definition of "on the basis of sex," as well as specific provisions addressing transgender discrimination. The sex discrimination provisions of both the 2016 and the 2020 regulations continue to face substantial litigation.

2016 regulation expanded protections

The 2016 regulation banned not just discrimination in treatment based on differences between a woman and a man, but also defined sex discrimination as follows:

> Includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.

The regulation also defined several terms used in its definition of discrimination "on the basis of sex":

- ***Gender identity.*** Gender identity is "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth." A "transgender individual" is someone whose gender identity is different from the one assigned at birth.
- ***Sex stereotypes.*** This type of sex discrimination is based on stereotypical notions of appropriate behavior, appearance, characteristics or other traits for each gender. Impermissible stereotyping includes the expectation that individuals will consistently identify with only one gender and will conform to stereotypical gender-related expressions, including expectations about the appropriate roles of a certain sex.

Rationale for including gender identity and sex stereotypes. The preamble to the 2016 rule noted that federal courts and agencies have interpreted sex discrimination to include bias based on gender identity and sex stereotypes. Regulators noted that a 1989 US Supreme Court case, *Price Waterhouse v. Hopkins* (490 U.S. 228), concluded that sex stereotyping can constitute sex discrimination. The case involved a female employee who alleged that she had been denied partnership because she did not fit the firm's idea of what a woman should look or act like. Regulators also pointed out that HHS, other federal agencies and courts have concluded that sex discrimination includes discrimination on the basis of gender identity. Citing both *Price Waterhouse* and a 2015 Equal Employment Opportunity Commission decision finding Title VII's ban on sex discrimination could include sexual orientation discrimination *(Baldwin v. Dep't of Transp.*), regulators said that Section 1557 could prohibit sexual orientation discrimination as a type of gender stereotyping.

Equal access for transgender individuals. The 2016 rule required providing equal access to health services without discrimination on the basis of sex and treating individuals consistent with their gender identity. This might prohibit, for example, covered entities from denying a transgender female medically

Copyright 2020 Mercer LLC. All rights reserved.

necessary hormone therapy. When treating individuals consistent with their gender identify, covered entities could not deny or limit health services ordinarily available to individuals of one sex, such as ovarian cancer treatment, to a transgender individual whose sex assigned at birth, gender identity or recorded gender is different from that of individuals who ordinarily receive those health services.

Specific provisions related to transgender coverage. Besides the broad definition of sex discrimination, other provisions in the 2016 regulation specifically addressed transgender protections from discrimination in health insurance. The preamble stated that Section 1557 doesn't require coverage of any particular procedure or treatment for gender transition, and the regulation itself permits a covered entity to use medical-necessity criteria in coverage decisions. However, the 2016 rule prohibited covered entities from having coverage that operates in a discriminatory manner, such as coverage that:

- Denies, limits coverage of, or imposes additional cost sharing or other restrictions on health services usually available to individuals of one sex, such as a hysterectomy, to a transgender individual simply because that person's gender or sex assigned at birth differs from that of individuals who usually receive those health services
- Has or implements a categorical coverage exclusion for gender-transition services, which regulators said are not limited to surgical treatment, but could include psychotherapy, hormone therapy or other services that become standard medical care in the future
- Denies, limits coverage of, or imposes additional cost sharing or other restrictions on specific health services related to gender transition if such denial or restriction results in discrimination against a transgender individual

In issuing the 2016 rule, regulators noted certain gender-transition services are recognized as medically necessary to treat gender dysphoria. Referencing standards issued by the World Professional Association for Transgender Health (WPATH) and other health authorities, regulators stated that characterizing all transition-related treatment as cosmetic or experimental is "outdated and not based on current standards of care." Regulators stressed that covered entities must use a nondiscriminatory process to determine whether a particular health service is medically necessary or otherwise meets applicable coverage requirements.

Court vacates two sex discrimination provisions of the 2016 rule

A group of states and religious healthcare providers immediately challenged the 2016 regulation in court. In December 2016, a federal district court in Texas issued a nationwide temporary restraining order preventing HHS from enforcing the rule's definition of sex discrimination to include discrimination based on gender identity or termination of pregnancy (*Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016)). In October 2019, the same court vacated those two provisions (*Franciscan Alliance v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019)). The court's order is currently in effect pending an appeal before the 5th Circuit (*Franciscan Alliance, Inc. v. Azar,* Docket No. 20-10093 (5th Cir. Jan. 24, 2020)).

Copyright 2020 Mercer LLC. All rights reserved.

Changes in 2020 regulation reflect different legal and policy views

Against this backdrop, the 2020 Section 1557 regulation repeals and replaces much of the sex discrimination language in the 2016 regulation. However, litigation challenging the 2020 rule has temporarily halted the changes to certain sex discrimination provisions.

Removal of definition of discrimination on the basis of sex. The 2020 rule takes out the 2016 regulation's definition of discrimination on the basis of sex. Regulators stated that they will rely on the "plain meaning" of sex, which they view as the biological binary categories of male and female. The preamble of the 2020 regulation concludes that Section 1557 and Title IX do not include gender identity or sexual orientation discrimination as forms of sex discrimination.

Elimination of transgender coverage and access to care protections. The 2020 rule also removes specific protections for health insurance coverage and nondiscriminatory access to care for transgender individuals and the ban on categorical exclusion of gender-transition services. In the preamble, HHS said the 2016 regulation was "erroneous" in stating that categorical coverage exclusions of gender-transition services were "outdated and not based on current standards of care." Instead, regulators now say that no scientific and medical consensus supports the medical necessity of gender-transition services, and the 2016 rule did not provide sufficient evidence to justify the prohibition on categorical exclusions. In addition, the preamble to the 2020 rule clarifies that sex can be taken into account in the provision of healthcare as well as insurance coverage.

Title IX abortion-neutrality provision and religious exemption incorporated. The removal of the definition of discrimination on the basis of sex also eliminates the "termination of pregnancy" part of the definition. The 2020 regulation also strengthens religious and conscience exemptions:

- ***Abortion neutrality.*** In the 2020 regulation, HHS expressed its desire to interpret sex discrimination consistent with statutory text of Title IX, including the abortion-neutrality provision. That provision specifies that the ban on sex discrimination doesn't require or prohibit providing abortion-related benefits or services. The 2020 rule incorporates this abortion-neutrality provision into the 1557 regulation and amends the Title IX regulation to include similar language. Regulators say that this amendment does not change existing Title IX protections against pregnancy discrimination or other federal rules on abortion.

- ***Religious exemption.*** Unlike the 2016 regulation, the final 2020 rule specifically incorporates Title IX's exemption of religious entities from Section 1557's sex discrimination prohibitions. HHS maintains that under the Civil Rights Restoration Act of 1987, this exemption is not limited to educational institutions controlled by religious entities but can also apply to religiously affiliated hospitals and health systems.

- ***Religious and conscience provisions added.*** Separate from Title IX's religious exemption, several other federal laws provide conscience and religious freedom protections. All have unique provisions

Copyright 2020 Mercer LLC. All rights reserved.

but could exempt healthcare providers or hospitals otherwise covered by Section 1557 from performing certain medical procedures that raise religious or moral objections. The reach of these laws and their impact on the requirement to provide equal access to healthcare services will continue to generate debate and litigation. The 2020 regulation replaces the 2016 rule's provision for nonenforcement of any requirement that violates federal protections for religious freedom and conscience with a similar provision that specifically refers to the following laws :

- The Religious Freedom Restoration Act (42 USC § 2000bb)
- The Coats-Snowe Amendment (42 USC § 238n)
- The Church Amendments (42 USC § 300a-7)
- Section 1303 and 1553 of the Affordable Care Act (42 USC §§ 18023 and 18113)
- The Weldon Amendment

Gender identity and sexual orientation protections removed from 10 separate regulations. The 2020 regulation also amends 10 different HHS regulations, some dating back to 2006, to remove gender identity and sexual orientation discrimination protections. These changes affect Medicaid managed care, Medicare's Program for All-Inclusive Care for the Elderly (PACE), public exchange and private insurance plans, including the marketing and sales activities of agents and brokers of exchange plans.

Enforcement tools altered

Revised enforcement provisions in the 2020 regulation could alter the remedies available to address Section 1557 violations.

Single standard vs. four different standards. The 2016 regulation stated that the enforcement mechanisms under the four underlying civil rights laws applied to Section 1557 claims. Some interpreted this language as making all of the remedies under all four civil rights statutes available for any 1557 claim. This is significant since some of those civil rights laws have broader remedies than others, according to court rulings. For instance, the ability to claim race, color or national origin discrimination based on disparate impact is available under Title VI but not for sex discrimination claims under Title IX. The 2020 regulation clarifies the enforcement language, which regulators say in the preamble limits Section 1557 remedies for a particular type of discrimination to enforcement mechanisms of the parallel underlying law. For example, remedies for any sex discrimination claims under Section 1557 are limited to the remedies available under Title IX, so individuals could not claim sex discrimination based on disparate impact.

Compensatory damages. The 2020 rule repeals an earlier provision that made compensatory damages available for Section 1557 violations. In the preamble, regulators say that compensatory damages for a

Copyright 2020 Mercer LLC. All rights reserved.

particular type of prohibited discrimination under Section 1557 are available only if allowed under the underlying civil rights statute. Regulators say this change conforms to the Department of Justice's Title VI Manual, which says compensatory damages are generally not available for disparate impact claims under Title VI.

Private right of action. The 2020 rule also removes the 2016 regulation's provision granting an individual or entity the right to bring a civil action for Section 1557 violations. In the preamble to the 2020 rule, HHS declines to take a position on whether Section 1557's statutory language creates a private right of action. This leaves the issue up to the courts to decide. Without a private right to sue, only agencies can take enforcement action to remedy a Section 1557 violation.

Nationwide injunction halts enforcement of certain provisions

Just four days before HHS published the 2020 final Section 1557 regulation in the *Federal Register*, the US Supreme Court issued its opinion in *Bostock*, which involved three claims of sex discrimination in employment under Title VII of the 1964 Civil Rights Act. In *Bostock*, the majority held that "homosexuality and transgender status are inextricably bound up with sex … because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex." According to the court, Title VII's sex discrimination prohibition is broad and bars an employer from firing an employee simply because the individual is homosexual or transgender.

Although Section 1557 incorporates the sex discrimination prohibition of Title IX, not Title VII, case law under Title VII often shapes interpretations of Title IX. So even though *Bostock* didn't involve a Section 1557 claim, the ruling has implications for understanding Section 1557's sex discrimination ban. Several lawsuits are challenging the 2020 Section 1557 regulation, including the changes to sex discrimination prohibition. These actions have claimed, in part, that *Bostock*'s conclusion that the federal civil rights law protects transgender and homosexual individuals from sex discrimination requires HHS to restore these protections in the Section 1557 regulation.

Cases are also challenging other parts of the 2020 regulation, including the narrower scope of Section 1557's application and elimination of the notice and tagline requirements.

Injunction puts sex-stereotyping claims back in play

Two federal district courts have issued nationwide preliminary injunctions prohibiting HHS from implementing the regulation's revised definition of sex discrimination that eliminates sex stereotyping as a type of bias.(*Whitman-Walker Clinic v. HHS*, No. 20-1630 (D.D.C. Sept. 2, 2020) and *Walker v. Azar*, No. 20-2834 (E.D.N.Y. Aug. 17, 2020)). Both decisions say the *Bostock* ruling raises an issue as to whether the same reasoning should apply to sex discrimination under Title IX and Section 1557 (which incorporates that statute). HHS's failure to consider *Bostock* in the 2020 final regulation resulted in a

Copyright 2020 Mercer LLC. All rights reserved.

policy change lacking the reasonable analysis required under the Administrative Procedure Act, according to the district courts.

The effect of these injunctions is to restore the 2016 regulation's definition of discrimination "on the basis of sex" — or at least the portion of that definition that prohibits discrimination based on sex stereotypes. Meanwhile, the 2016 regulation's inclusion of gender identity in the definition of sex discrimination remains vacated by the *Franciscan Alliance* decision. However, the court in *Whitman-Walker Clinic* noted that "[d]iscrimination based on transgender status — i.e., gender identity — often cannot be meaningfully separated from discrimination based on sex stereotyping because the belief that an individual should identify with only their birth-assigned sex is such a sex-based stereotype."

A more recent preliminary injunction order from the court in the *Walker v. Azar* case has the effect of restoring the 2016 regulation's equal access provision. That provision requires covered entities to "treat individuals consistent with their gender identity," and prohibits denying or limiting "health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available."

Religious exemption also enjoined

The court in the *Whitman-Walker Clinic* case also issued a nationwide preliminary injunction to stop HHS from implementing the 2020 rule's adoption of Title IX's religious exemption. The court stated that HHS failed to consider the consequences that this addition would have on access to care.

Litigation continues

These preliminary injunctions are temporary until each district court makes a definitive ruling on the challenges to the sex discrimination and other parts of the 2020 final 1557 regulation. In the meantime, the rest of the final rule took effect on Aug. 18, including the narrower scope of covered entities and the elimination of notice and tagline requirements. However, several other cases are pending; the Kaiser Family Foundation has tracked developments in these cases through Sept. 14, 2020.

Some LEP standards, most disability protections intact

The 2020 final rule retains select parts of the 2016 accessibility standards for people with LEP or disabilities, but makes some changes to the content. Group health plan sponsors and other entities that remain covered by Section 1557 currently must comply with these standards, which are not subject to a temporary injunction.

Copyright 2020 Mercer LLC. All rights reserved.

Meaningful access for individuals with LEP

Section 1557 requires covered entities to comply with Title VI of the Civil Rights Act. Among other things, Title VI prohibits discrimination based on national origin, including discrimination against individuals with LEP — people whose primary language is not English and have limited ability to read, speak, write or understand English. Despite removal of the notice and tagline requirements, the 2020 regulation keeps some of the 2016 rule's meaningful access provisions for people with LEP and incorporates 2003 Title VI guidance giving covered entities more discretion to determine when and how to provide language assistance.

Population vs. individualized assessment. Concerned that the 2016 rule could be interpreted to require providing language assistance to each person with LEP, HHS revised the 2020 rule to require that entities provide meaningful access to individuals with LEP in general. The rule moves away from an individualized case-by-case evaluation of how and when to provide language services to adopt a community or population-based focus. When assessing a covered entity's compliance with LEP accessibility standards, HHS has discretion to weigh a broader set of factors, including how many individuals with LEP are in the service population, how often they have contact with the covered entity, and what language resources are available at what cost to the entity.

Other provisions. The 2020 rule eliminates standards for providing language interpretation services via remote video rather than in person. Instead, the 2020 rule includes audio-only rather than video interpretation services. In the 2020 preamble, HHS cites the higher cost of video as one reason for the change but notes that entities can still provide video services if needed to provide meaningful access. Other LEP accessibility provisions from the 2016 regulation remain intact, such as the requirement that all translation and interpreting services provided must be accurate, free of charge and given in a timely manner.

Protections for individuals with disabilities

The final 2020 regulation has almost the same communication and accessibility standards for individuals with disabilities as the 2016 final rule. While the 2020 rule no longer has a separate definition section, many definitions related to disability protections have moved to the disability sections of the regulation.

Effective communications. Under ADA regulations, covered entities must ensure effective communication with individuals with disabilities. Section 504 of the Rehabilitation Act — specifically referenced in Section 1557 — predates the ADA but includes similar protections, and agencies often coordinate guidance under the two laws. Both the 2016 and 2020 Section 1557 regulations require recipients of federal funds and state exchanges to provide auxiliary aids, such as interpreters on site or by video, when needed to ensure persons with disabilities have equal access to services.

Copyright 2020 Mercer LLC. All rights reserved.

Accessible buildings and facilities. The final 2020 Section 1557 regulation retains the 2016 rule's standards for certain facilities in which health programs or activities take place. These standards adopt the ADA regulations' building and facility accessibility requirements for construction or alternations done after specific dates.

Accessible information and communication technology. The 2020 final rule leaves intact the 2016 standards for accessible information and communication technologies. Covered entities must ensure the information and communication technologies used to provide health programs and activities are accessible to people with disabilities. A limited exception applies if providing accessibility would impose an undue financial or administrative burden on the entity or require changes that would fundamentally alter the program. Federal fund recipients and public exchanges must ensure that the websites for their health programs meet ADA Title II requirements.

Reasonable modifications to policies and procedures. The final 2020 regulation keeps the 2016 requirement for covered entities to make reasonable modifications to policies, practices and procedures when needed to avoid disability discrimination, unless the change would fundamentally alter the nature of the program.

Employer issues

Section 1557 of the ACA continues to be a complicated and evolving area of the law. Further changes are likely, with a major ACA case before the Supreme Court, ongoing Section 1557 litigation and a possible change in administration. Below are key takeaways for employer-sponsored group health plans.

Most of 2020 rule is effective now

Nationwide injunctions temporarily preserve the 2016 rule's sex-stereotyping ban and equal access requirement and block the 2020 rule's adoption of Title IX's religious exemption. However, the rest of the 2020 regulation took effect Aug. 18, including the reduced application of Section 1557 requirements to group health plans and health insurers, as well as the elimination of notice and tagline requirements. As a result, many plan sponsors have no Section 1557 compliance obligations. However, the 2020 rule does apply to employers principally engaged in providing medical care that receive federal assistance, such as health systems, as well as employers or plans that receive direct funds from HHS, such as through the Medicare Part D retiree drug subsidy.

Insurer/TPA 1557 obligations don't necessarily apply to their client group health plans

Employers may see changes in benefit communications from insurers and TPAs to eliminate the Section 1557 notice and taglines previously included in open enrollment materials, EOBs and SBCs. However, insurers and TPAs are free to maintain these items in benefit communications. Employers should check with their insurers and TPAs to find out what, if anything, will change in 2021 materials.

Copyright 2020 Mercer LLC. All rights reserved.

Some insurers have noted their opposition to the 2020 rule's elimination of specific protections for transgender individuals, including the ban on categorical exclusion of gender-transition services. Those insurers may decide to keep benefit design changes made to comply with the 2016 regulation or a similar state law. Employers should work with their carriers or TPAs to reach agreement on any plan design changes for 2021.

Section 1557 rule could impact healthcare access

Some healthcare providers have used and will continue to use the religious freedom and conscience laws referenced in the final 2020 rule as grounds for not offering certain services, such as abortions or gender-transition surgery. Employers that cover these procedures should be aware of any in-network providers with these restrictions and inform employees about alternative providers.

Religiously affiliated employers covered by Section 1557 should discuss any religious exemptions or related conscience laws with counsel. Interpretations of these laws can be complex, differ by jurisdiction and change with litigation. For example, a 2019 regulation would have withheld federal funds from healthcare institutions that fail to respect the rights of healthcare workers who decline for religious or moral reasons to provide or refer patients for certain types of care. A New York federal district court vacated that rule (*New York v. HHS*, 414 F. Supp. 3d 475 (2019)), but litigation over the conscience regulation continues.

Title VII employment nondiscrimination protections continue to apply

The Supreme Court's *Bostock* decision confirms that Title VII of the Civil Rights Act of 1964 protects employees from discrimination because of gender identity or sexual orientation. How the law applies to group health coverage is an open question to address through future cases, rulemaking or best practices. For instance, which gender-transition services are deemed medically necessary will depend on medical standards of care and clinical guidelines that may differ by insurer. Plan sponsors should make sure they clearly communicate to employees what is and is not covered and meet ERISA claims regulations that require an explanation of the clinical rationale for medical-necessity decisions.

In the *Bostock* decision, the justices acknowledged the ruling would have implications beyond the facts in the case, including workplace issues like dress codes and same-sex restrooms. These issues are left to resolve on a case-by-case basis. Employers should stay informed on developments in this area and update policies as appropriate. Unlike many benefit requirements under ERISA and tax rules, nondiscrimination standards often evolve through fact-specific case law. Courts have found Section 1557 violations based on the statute's language that run counter to the 2020 Section 1557 regulation. For example, here are some cases involving transgender coverage and Section 1557: *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (2018); *Boyden v. Conlin*, 341 F.Supp.3d 979 (2018); *Prescott v. Rady Children's Hosp. — San Diego*, 265 F. Supp. 3d 1090 (2017).

Copyright 2020 Mercer LLC. All rights reserved.

Review other nondiscrimination standards

The Section 1557 rule extends beyond the sex discrimination protections that have generated litigation.to address disability rights, language assistance, and nondiscrimination based on age, race and national origin. As cases develop under Section 1557, courts might look to apply parallel interpretations to the nondiscrimination provisions of Title VII, the ADA and the Age Discrimination in Employment Act.

Employers may want to consider reviewing existing requirements and best practices governing access for individuals with LEP or disabilities, including reasonable accommodations or modifications to provide new benefit-related digital tools and websites for individuals with certain disabilities. In addition, the COVID-19 pandemic has highlighted longstanding racial disparities in healthcare access that might be the focus of future litigation. This may be a good time to examine more inclusive benefit plan offerings.

Related resources

Non-Mercer resources

- *Walker v. Azar*, No. 20-2834 (E.D.N.Y. Oct. 29, 2020 and Aug. 17, 2020)
- Press release on final 2020 ACA Section 1557 rule and litigation (HHS, Sept. 15, 2020)
- *Whitman-Walker Clinic v. HHS*, No. 20-1630 (D.D.C. Sept. 2, 2020)
- Final 2020 ACA Section 1557 regulation (Federal Register, June 19, 2020)
- *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (U.S. June 15, 2020)
- *Franciscan Alliance v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. Oct. 15, 2019)
- Section 1557 FAQs (HHS, May 18, 2017)
- Final 2016 Section 1557 regulation (Federal Register, May 18, 2016)
- ACA Section 1557 (42 USC § 18116)

Mercer Law & Policy resources

- Top 10 compliance issues for health and leave benefits in 2021 (July 20, 2020)
- Justices' Title VII ruling on LQBTQ bias has health benefit imp acts (June 15, 2020)
- Healthcare law and policy outlook for 2020 (Feb. 18, 2020)

Copyright 2020 Mercer LLC. All rights reserved.

Other Mercer resources

- Let's get real about inclusive benefits (Oct. 1, 2020)
- Employers protest ACA anti-bias rule (July 25, 2017)

Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.

Copyright 2020 Mercer LLC. All rights reserved.

Appendix: Comparing 2016 and 2020 final Section 1557 regulations

The chart below compares key requirements of the 2016 and 2020 final Section 1557 regulations (45 CFR Part 92) for covered entities.

Topic	2016 final 1557 regulation	2020 final 1557 regulation
Employee compliance coordinator	Covered entity (CE) must designate at least one employee to coordinate 1557 compliance efforts. (§ 92.7(a))	Provision eliminated.
Grievance procedure	CE must adopt grievance procedures that include due process standards for prompt resolution of grievances. (§ 92.7(b) and Appendix C, sample procedure)	Provision eliminated.
Nondiscrimination notice	CE must post and provide in significant communications a notice meeting specific content requirements. (§§ 92.8(b)(1), 92.8(f)(1)(i) and Appendix A, sample notice)	Provision eliminated.
Nondiscrimination statement	CE must post and include in significant communications a statement that the CE does not discriminate on the basis of race, color, national origin, sex, age or disability. (§§ 92.8(b)(2), 92.8(f)(1)(i) and Appendix A, sample statement)	Provision eliminated.
Taglines	CE must post and include in significant communications a tagline in at least 15 languages, stating that language assistance is available and where to get information. (§ 92.8(d) and Appendix B, sample tagline)	Provision eliminated.

Copyright 2020 Mercer LLC. All rights reserved.

Topic	2016 final 1557 regulation	2020 final 1557 regulation
Meaningful language access for individuals with LEP	CE must take reasonable steps to ensure each individual with LEP has meaningful access to the program or service. Rule includes standards for remote interpreting services via video. (§ 92.201)	Revises language to require meaningful access for LEP individuals in general. Replaces standards for remote video interpreting services with standards for remote audio services. (§ 92.101)
Effective communication for individuals with disabilities	CE must ensure effective communication for individuals with disabilities through auxiliary aids, such as onsite or remote video interpreting. (§ 92.202)	Maintains similar provisions. (§ 92.102)
Accessibility standards for buildings for individuals with disabilities	CE must meet certain accessibility standards for buildings and facilities. (§ 92.203)	Maintains substantially similar provisions. (§ 92.103)
Accessibility of electronic information technology for individuals with disabilities	CE must meet certain standards for technology, unless doing so would create undue burden or fundamentally alter the program. (§ 92.204)	Maintains substantially similar provisions. (§ 92.104)
Reasonable modification of policies and procedures for individuals with disabilities	CE must make reasonable modifications to policies and procedures to avoid disability discrimination, unless the changes would fundamentally alter the program. (§ 92.205)	Maintains the same provision. (§ 92.105)
Definition of sex discrimination; equal access on the basis of sex	Defines sex discrimination to include discrimination based on gender identity, sex stereotyping and termination of pregnancy. Requires equal access on the basis of sex, including gender identity. (§§ 92.4 and 92.206)	Definition and equal access provisions eliminated, but nationwide temporary injunctions preserve sex stereotyping as type of sex discrimination and the equal access provision.

Copyright 2020 Mercer LLC. All rights reserved.

Topic	2016 final 1557 regulation	2020 final 1557 regulation
Nondiscrimination in health-related insurance	Prohibits categorical exclusions of gender-transition services. Provides other protections for transgender individuals. (§ 92.207)	Provision eliminated.
Employer liability for discrimination in employee health benefit programs	Applies Section 1557 protections to certain employer health benefit programs providing health or long-term care coverage. (§ 92.208)	Provision eliminated.
Religious freedom protections	Includes general statement about religious freedom and conscience statutes, but does not adopt Title IX's abortion-neutrality provision or religious exemption. (§ 92.2(b)(2))	Incorporates Title IX's abortion-neutrality provision and religious exemption. Adds specific reference to laws with religious or conscience protections, including the Religious Freedom Restoration Act. (§ 92.6(b)) Nationwide injunction temporarily blocks the 2020 rule's adoption of Title IX's religious exemption.
Enforcement	Potentially allows any of the enforcement mechanisms in any of the four civil rights laws underlying Section 1557. Compensatory damages are available, along with a private right of action. (§§ 92.301 and 92.302(d))	Limits enforcement to only the mechanisms available to remedy the particular type of discrimination under the relevant civil rights law. Removes provisions allowing compensatory damages and a private right of action. (§ 92.5)

Copyright 2020 Mercer LLC. All rights reserved.