

## ACA Section 1557 What is it all about?

A client recently asked us if a plan sponsor could limit or exclude benefits related to gender transition and our answer – it can be complicated and may be unsettled; check with counsel before making any decisions.

### BACKGROUND

[Section 1557](#) of the Affordable Care Act prohibits discrimination in certain “health programs and activities” on the basis of race, color, national origin, sex, age, or disability. It applies broadly to a variety of federally assisted entities, although the regulations apply only to health programs and activities funded or administered by HHS. Section 1557 has been in effect since ACA enactment in 2010. [Final regulations](#) implementing Section 1557 became effective July 18, 2016. Provisions to the rule requiring changes to health insurance or group health plan benefit design have an applicability date of the first day of the first plan year on or after January 1, 2017.

### *How does it impact Employer Sponsored Health Plans?*

Section 1557 has limited applicability to employer-sponsored health benefit programs. Section 1557 applies to every health program or activity, any part of which receives Federal financial assistance provided or made available by the Department; every health program or activity administered by the Department; and every health program or activity administered by a Title I entity.

Title I entity means any entity established under Title I of the ACA, including State-based Marketplaces and Federally-facilitated Marketplaces.

Health program or activity means 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 health-related services or health-related insurance coverage. For an entity principally engaged in providing or administering health services or health insurance coverage or other health coverage, all of its operations are considered part of the health program or activity, except as specifically set forth otherwise in this part.

Covered entities include hospitals, health clinics, physicians' practices, community health centers, nursing homes, rehabilitation centers, health insurance issuers, and State Medicaid agencies.

Federal financial assistance includes grants, property, Medicaid, Medicare Parts A, C and D payments, and tax credits and cost-sharing subsidies under Title I of the ACA. (Medicare Part B is not included.)

### *What does this mean for employers that offer an insured plan?*

Employers (not a covered entity) that offer an insured plan will most likely be required to offer transgender services because the insurance company (covered entity) will be required to cover transgender services.

### *What does this mean for employers that offer self-insured health benefits?*

If the Third-Party Administrator that administers an employer's health plan is part of an organization that is considered a covered entity, then the employer will most likely be required to offer transgender services. Should the employer choose not to cover transgender services, the possibility exists that the employer's group health benefit

program may be found to be in non-compliance with applicable law. Consequently, the employer may be subject to any fines, penalties or legal action caused by the exclusion.

If the Third-Party Administrator that administers an employer's health plan is not part of an organization that is considered a covered entity, then the employer may choose to exclude or limit transgender services. But if the Office of Civil Rights of the Health and Human Services Department gets a complaint that the Third-Party Administrator is administering the plan in a discriminatory manner, HHS may refer the matter to the Equal Employment Opportunity Commission.

### ***A recent development***

As posted on the [HHS website](#), on December 31, 2016, the U.S. Court for the Northern District of Texas issued an opinion in Franciscan Alliance, Inc. et al v. Burwell enjoining the Section 1557 regulations that prohibit discrimination on the basis of gender identity and termination of pregnancy. The nationwide injunction provides a reprieve for employers that do not want to offer transgender services.

Whether or not these controversial parts of section 1557 become enforceable depends on the new Administration's goal to repeal of ACA. In the interim, the order prevented some regulations from taking effect as scheduled on January 1, 2017. It isn't certain yet whether HHS will appeal the injunction order.

### ***Bottom Line***

A discrimination suit has the potential to end up in the papers and on the news, something most employers want to avoid. Providing transgender services ensures compliance with applicable law.

Consult with counsel as you make decisions regarding transgender benefits, especially if you are self-insured.

Disclaimer: This material is for the sole purpose of providing general information and does not under any circumstances constitute legal advice and should not be used as a substitute for legal advice. You should seek the advice of counsel when applying the requirements to your plan. For more information on this ErisaALERT contact us by phone at 610-524-5351 and ask for Mary Andersen at ERISAdiagnostics, Inc. or 720-639-5499 and ask for Leanne Fosbre or 215-508-5629 and ask for Theresa Borzelli at SG&C