Federal Judge Blocks Transgender Protections

ELEVENTH HOUR RULING IMPACTS HEALTHCARE INDUSTRY ON EVE OF IMPLEMENTATION

Insights
1.03.17

On Saturday, December 31, 2016, a federal judge in Texas entered a nationwide preliminary injunction barring the enforcement of antidiscrimination protections pertaining to transgender and abortion health services and insurance coverage under the Affordable Care Act (ACA). The decision impacts healthcare providers across the country and may require your immediate attention (*Franciscan Alliance, et al. v. Burwell, et al.*).

Background: Legal Context Of Section 1557 Of The ACA
Section 1557 of the ACA prohibits discrimination by a covered entity on the basis of race, color, national origin, sex, age, and disability in certain health programs or activities. Notably, it does not prohibit discrimination by a covered entity against its employees unless certain health programs or activities are involved. On May 18, 2016, the Department of Health and Humans Services (HHS) published a final rule titled "Nondiscrimination in Health Programs and Activities," which sought to clarify and codify the nondiscrimination requirements of Section 1557, particularly with respect to the prohibition of discrimination on the basis of sex.

In implementing Section 1557, the Final Rule prohibits discrimination by any health program or activity receiving federal financial assistance on the grounds prohibited under four federal civil rights laws: (1) Title VI of the Civil Rights Act of 1964, (2) Section 504 of the Rehabilitation Act of 1973, (3) Title IX of the Education Amendments of 1972, and (4) the Age Discrimination Act of 1975. Failure to comply could mean a loss of federal funding, debarment from doing business with the government, and false claims liability.

The Final Rule implementing Section 1557 applies to every health program or activity that receives HHS funding, every health program or activity administered by HHS, such as the Indian Health Service or the Medicare program, and every health program or activity administered by an entity created by Title I of the ACA. Given the broad definition of covered entity, virtually every healthcare provider would be required to comply with the Final Rule.

The Final Rule took partial effect on July 18, 2016; however, for those insurance issuers or group health plans that must alter their plan benefit designs based on the Final Rule, the effective date was scheduled to be the first day of the first plan or policy year on or after January 1, 2017.

States And Religiously-Affiliated Healthcare Providers Challenge The Final Rule

A group of eight states and three private healthcare providers with religious missions sued HHS and HHS Secretary Sylvia Burwell in the U.S. District Court for the Northern District of Texas challenging the Rule's interpretation of discrimination "on the basis of sex" to include "gender identity" and "termination of pregnancy." They reasoned that Section 1557's scope should be limited by Title IX's binary definition of sex (i.e., the immutable, biological differences between males and females as acknowledged before birth), and that the Rule's failure to include Title IX's religious and abortion exemptions rendered the Rule contrary to law.

As a result, they argued that the Rule violated the Administrative Procedures Act (a federal law that allows an individual suffering legal wrong because of agency action to file suit against the government) (APA). The Plaintiffs also claimed that the Rule violated the Religious Freedom Restoration Act (RFRA), reasoning that it would have required them to deliver healthcare in such a way that would violate their religious freedom and thwart their independent medical judgment.

Ultimately, the challengers argued that the Rule's effect would be unconscionable. Either they would be required to perform procedures that constitute an "impermissible material cooperation with evil" or they would be subjected to hefty monetary penalties in the form of civil liability or the loss of billions of dollars in aggregated federal funding.

On October 21, 2016, the group of states and private challengers moved for a preliminary injunction to resolve the matter before the Rule's insurance provision went into effect on January 1, 2017, at which time they contended they would be forced to make significant and expensive changes to their insurance plans. The government opposed the lawsuit, arguing that the Final Rule did not mandate the coverage or performance of any particular procedure, but rather only requires that covered entities provide health services and health insurance in a nondiscriminatory manner.

The Court Blocks Key Part Of Final Rule Implementing Section 1557

Unlike many of us, Judge Reed O'Connor (a 2007 George W. Bush appointee who previously halted the government's efforts to allow transgender people to use the bathroom that corresponds with their gender identity) was busy over the holiday season. On December 31, 2016 – the eve of the insurance provision's effective date – he issued a nationwide injunction blocking the challenged portion of the Final Rule.

Judge O'Connor sided with the plaintiffs, finding that HHS acted outside its authority and that Congress did not intend the nondiscrimination provisions on the basis of sex to include protections for gender identity or abortion history. If Congress had intended to include a more expansive definition of sex in the ACA, he reasoned, then Congress would not have incorporated Title IX (and its binary definition of sex) into Section 1557. Judge O'Connor also held the Final Rule's failure to incorporate Title IX's religious exemptions rendered the Final Rule arbitrary, capricious, and contrary to the law under the APA.

Judge O'Connor also addressed plaintiffs' arguments that the Final Rule violated the RFRA. Judge O'Conner agreed that the Final Rule placed substantial pressure on plaintiffs to abstain from a sincere religious exercise (i.e., the refusal to perform, refer for or cover gender transition procedures or abortions). He similarly found that the law operated to make the practice of religious beliefs more expensive, which he said also imposed an undue burden.

Although the government may burden one's religious exercise under certain circumstances, to do so it must show that the burden is the least restrictive means in advancing a compelling interest – an interest the government would be willing to pursue itself. Judge O'Connor found that the government was not so inclined because the government's own health insurance programs (i.e., Medicare and Medicaid) do not mandate coverage for transition surgeries and TRICARE, the military's insurance program, specifically excludes such coverage.

If the government wished to expand access to transition and abortion procedures, Judge O'Connor advised the most straightforward way to achieve this would be for the government to assume the cost or providing them. By requiring the plaintiffs to do so in its place, the judge decided that the Rule likely violated the RFRA.

Inevitability? The Impact of the Trump Administration

Although Judge O'Connor's opinion is a dramatic last-minute development, the outcome may have been inevitable. President-elect Trump has frequently communicated his commitment to repeal and replace the ACA. To further this goal, he has chosen Rep. Tom Price (R-GA) – an outspoken opponent to the ACA – to head HHS in his administration. Price is also opposed to abortion and has characterized the Obama Administration's efforts to expand transgender rights as federal overreach.

Therefore, while Judge O'Connor's opinion may be news today – and it is certainly important given the January 1 effective date – covered entities may have nevertheless found themselves in this position down the line.

Where Do Covered Entities Go From Here?

Healthcare providers may find themselves scratching their heads at this point. With so much speculation about the impact of a Trump Administration, a possible congressional dismantling of the ACA, and now this development, it may be difficult to pinpoint your obligations under Section 1557. Fortunately, Judge O'Connor was clear that only the portion of the Final Rule that interprets discrimination on the basis of "gender identity" and "termination of pregnancy" is blocked.

The remainder of the Rule implementing Section 1557, which prohibits discrimination in the provision of health services and health insurance coverage on the basis of disability, race, color, age, national origin, or sex (other than gender identity and termination of pregnancy), is now in effect (as of July 18, 2016 or January 1, 2017, depending on the provision). The same is true for the portions of the Final Rule that require or enhance language assistance for people with limited English proficiency, and require covered entities to provide notice of compliance with Section 1557.

proficiency, and require covered entities to provide notice of compliance with Section 1557.

If you were prepared to fully comply with the January 1 deadline, you have the option to table at least some of those plans until this issue is resolved. However, you should be aware that individuals may also attempt to use other civil rights statutes, such as Title VII, in order to redress alleged grievances related to a healthcare organization's treatment of transgender individuals. In other words, avoiding liability under the ACA might not necessarily be the end of the story when it comes to legal obligations.

Determining the best option for your organization depends on a variety of factors. If you do decide to make any changes or delay implementation, you may need to communicate that decision to your workforce, patients, and insureds, and you should consult with legal counsel before taking any such actions.

If you have any questions about these suggestions, please contact the authors at AGreenbaum@fisherphillips.com, JWrigley@fisherphillips.com, TGeorge@fisherphillips.com, your Fisher Phillips attorney, or any member of our Healthcare Practice Group.

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