

Final Rule on Health Plan Nondiscrimination

Labor & Employment Law Update

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Although bathroom use seems to be at the forefront with the media in regards to transgender issues; there are several other issues to consider, and the final rule on health plan nondiscrimination is no exception. Transgender related health services tend to deal with gender dysphoria, a medical condition where an individual's gender identity is different from the sex assigned to that individual at birth.

The final regulations implementing Affordable Care Act (ACA) Section 1557 is applicable to plan years beginning on or after January 1, 2017. Within the final rule, the following prohibitions apply to covered entities, such as insurance companies and insurance marketplaces:

- A plan may not impose additional cost sharing on the basis of race, color, national origin, sex, age or disability. Such discrimination is also prohibited if based on the fact that an 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;
- A plan may not have or implement a categorical coverage exclusion or limitation for all health services related to gender transition; or
- Otherwise deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage for specific health services related to gender transition if such denial, limitation or restriction results in discrimination against a transgender individual.

In short, transgender related health services would need to be on par with other covered services to avoid claims of discrimination.

While employers are generally not "covered entities" and are not directly mandated to comply with the final regulations, the regulation affects insurance companies that market and sell health plans to employers. Some states, such as Illinois, have already incorporated requirements in their Insurance Code mandating coverage of transgender related services.

In any case, whether offering an insured plan or a self-insured plan, employers should give consideration to providing some level of additional transgender related benefit coverage to avoid potential claims of discrimination from

participants or investigations from the EEOC. The Office of Civil Rights (OCR) has indicated that complaints of discrimination, such as plan design based discrimination, against non-covered entities (such as employers) will be referred to the EEOC as they will be outside the scope of the final regulation.

For most employers, the employee population will provide a very low instance of those seeking to utilize coverage for transgender related services. With this in mind, the potential plan cost may be equivalent or less than the cost of defending a claim of discrimination, making it economical to incorporate such coverage in a plan. It remains to be seen whether employers will be able to avoid compliance on the basis of moral or religious reasons and whether any changes will be made by the newly elected administration.

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