

August 4, 2022

BIDEN ADMINISTRATION PROPOSES NEW REGULATION TO STRENGTHEN HEALTH INSURANCE COVERAGE NONDISCRIMINATION PROTECTIONS

The Biden Administration recently issued a [proposed rule](#) to prohibit discrimination based on race, color, national origin, sex, age, and disability in most federal health programs, health insurance coverage, and other health-related coverage options. The regulation is a revision and expansion of existing federal nondiscrimination requirements and gets its authority from Section 1557 of the Affordable Care Act (ACA).

If finalized, the rule will apply to all federal health programs administered by the Department of Health and Human Services (HHS), such as Medicare, Medicaid, CHIP, the health insurance marketplaces, and other “health programs or activities” that receive any federal funds that flow directly or indirectly through HHS. Examples of these programs according to HHS are state or local health agencies, hospitals, health clinics, health insurers, physician’s practices, pharmacies, community-based health care providers, nursing facilities, and residential or community-based treatment facilities. Also affected are every program or activity administered by entities established under Title I of the ACA.

Interestingly, the regulation does not necessarily apply to employee benefit plans, but it can apply if the group plan benefits from any type of HHS-based federal funding or subsidy dollars. However, since most health insurance carriers, and many third-party claims administrators (TPAs) and pharmacy benefit managers (PBMs), will be subject to this regulation, even if a group plan is not directly affected by the rule, its vendors will likely be subject to its requirements.

Some notable provisions of the new rule include:

- It defines sex discrimination to include sexual orientation, gender identity, and pregnancy-related conditions, and makes it illegal to deny or limit health services based on an individual’s sex assigned at birth, gender identity, or recorded gender;

- It also prohibits affected health programs from preventing or limiting healthcare providers from treating patients or providing services due to the patient's sex assigned at birth, gender identity, or recorded gender;
- It bans discrimination based on marital, family, or parental status;
- It ensures that people have nondiscriminatory access to telehealth services;
- Health programs must examine and eliminate computer algorithms that may lead to discriminatory practices;
- Health programs may not treat individuals differently or separate them on the basis of sex if such separation or differentiation causes people any more than *de minimis* harm; and,
- It prohibits denying or limiting access to gender transition care or limited access to other care if such a treatment would have been otherwise provided to someone else based on the patient's sex assigned at birth, gender identity, or gender otherwise recorded.

Covered entities subject to the rule (such as health insurance carriers, TPAs, and PBMs that benefit from any funding that directly or indirectly flows through HHS) will need to:

- Train staff on the implementation of the rule and appoint a Section 1557 "coordinator" to oversee their compliance;
- Institute written civil rights and grievance procedures to address any potential discrimination complaints;
- Provide individuals with language assistance/translation services;
- Distribute a notice annually about their nondiscrimination procedures and the availability of language assistance services. This notice must go to health program and activity participants, beneficiaries, enrollees, and applicants; and,
- Post information about the Section 1557 nondiscrimination requirements at physical locations and online.

It is important to note that the proposed rule is not yet final federal policy, so no health plan changes are required at this time. The federal Department of Health and Human Services is accepting public comments on the measure for the next 60 days. After that comment period closes, the Biden Administration may choose to finalize the measure as is, make revisions, or postpone finalization. If the regulation is finalized, either as is or with revisions, then affected health insurance issuers will need to make sure that their plan provisions and practices are consistent with the terms of the expanded rule. Until then, the current Section 1557 regulation remains in place. We will continue to monitor the status of this proposal and will keep you informed of any final policy changes that could necessitate health coverage changes.

Kelly Benefits is not a law firm and cannot dispense legal advice. Anything contained in this communication is not and should not be construed as legal advice. If you need legal advice, please contact your legal counsel.