



Regulatory Update

This *Compliance Alert* addresses two recent developments that potentially affect the group health plans HPI administers on your behalf:

- A decision by the U.S. Supreme Court on June 15, 2020, addressing three cases related to charges of employment discrimination “on account of sex” under Title VII of the Civil Rights Act of 1964, as amended
- Updated regulations under Section 1557 of the Affordable Care Act issued the by the U.S. Department of Health & Human Services (HHS) on June 19, 2020, that eliminate certain notice requirements previously applicable to certain employers engaged in “health programs or activities” and that received certain “federal financial assistance.”

Supreme Court Employment Discrimination Decision

The U.S. Supreme Court has determined that the Title VII prohibitions against employment discrimination “on account of sex” (i.e., based on gender) also prohibit employment discrimination on the basis of gender identity and sexual orientation.

Background

Title VII prohibits employment discrimination *on account of race, color, religion, sex and national origin*. Since Title VII was first enacted, the parameters of what constitutes employment discrimination, as well as how each of the protected categories is defined, have evolved through court cases and decisions.

In recent years, the issue of whether discrimination *on account of sex includes discrimination on account of gender identity and/or sexual orientation* has been working its way through lower courts. Different courts have come out on opposite sides of the question, and the cases have continued to move forward on appeal. Three cases, *Bostock v. Clayton County, GA*, *Altitude Express v. Zarda*, and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, finally reached the Supreme Court and were decided in June. These cases all involved employees whose previously satisfactory employment was terminated upon the employer learning that the employee was either gay or transgender.

The Court concluded that *discrimination on account of homosexuality or transgender status does constitute employment discrimination on account of sex*. As such, it is prohibited under Title VII. In its decision, the Court reasoned that when accepting certain conduct, such as attraction to women in males, but rejecting identical conduct in females, and then making employment decisions on that basis, an employer is discriminating on account of the sex of the employee.

Potential Impact on Group Health Plans

The facts of the cases decided in June involved termination of employment and not coverage provisions of those employers’ group health plans. But, as noted by the Court in its decision, the Title VII prohibitions of employment discrimination are broad and extend well beyond hiring and firing decisions to include discrimination in compensation, terms, conditions, or other privileges of employment. Thus, a group health plan offered by an employer which covers or denies coverage for certain services on the basis of sex, gender identity or sexual orientation may be open to charges of prohibited discrimination and at risk for litigation. For example, denial of services related to conditions such as pregnancy or ovarian cancer for a transgender male could potentially give rise to litigation under Title VII. In addition, denial of services related to gender dysphoria may also be challenged under these recent decisions.



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Next Steps for Plan Sponsors

Plan sponsors may want to review how services related to or based on sex, gender identity or sexual orientation are covered under their plans, and may want to consult with employment counsel about whether plan designs should be amended in light of the clarified definition of what it may mean to discriminate in the terms of employment *on account of sex*.

Updated Section 1557 Regulations

Effective August 18, 2020, Section 1557 of the Affordable Care Act will no longer require mandated notices of nondiscrimination or the resources those notices offered.

Background

In 2016, HHS issued the first 1557 regulations to enforce prohibitions against discrimination by entities that were engaged in “health programs or activities” and that received certain “federal financial assistance” (such as Medicare and Medicaid payments). Among the requirements imposed on these covered entities were:

- Mandated notices of nondiscrimination with taglines in 15 different languages to be included with “significant communications” related to the group health plan
- The designation of a dedicated Civil Rights Compliance Officer whose name and contact information had to appear in the mandated notice
- The availability of a grievance procedure through HHS to file complaints related specifically to discrimination under 1557, with the appropriate contact information also required in the mandated notice

To help our clients who are Section 1557 covered entities comply with the 2016 rule, HPI has been adding the notice to the following communications related to their Plan(s):

- My Plan web site
- Plan Documents
- SBCs
- SOBs
- Explanations of Benefits (EOBs)
- Welcome Kits
- Appeals letters
- Wellness materials accessed through the wellness portal

Note: These changes affect only plans offered by those clients who identified themselves as “covered entities” for the purposes of this rule and for which HPI has been incorporating the mandated notices into their plan communications.



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While 1557 protections against discrimination generally continue to be in effect, starting August 18, 2020, the nondiscrimination notice, designation of a Civil Rights Compliance Officer (for the purposes of the group health plan), and the special grievance procedure will not be required.

In eliminating the notice, the regulators noted the extremely high production costs and the lack of evidence over the past four years that the notices have had any significant impact. The regulators also reasoned that there was no need for additional grievance procedures because the avenues for addressing complaints of discrimination that existed before the 2016 regulation took effect continue to be available for that purpose.

HPI's Next Steps

HPI will cease including the nondiscrimination notice with all communications issued or effective after August 17, 2020.

In addition, on August 18, 2020, HPI will remove the notices from each existing Plan Document, SBC and SOB, and from all places where these documents have been posted.

If you have questions after you review this Regulatory Update, please contact the HPI Account Service Team.

The information contained in this Alert is based on our current understanding of recent regulatory developments which may affect group benefit plans. It should not be construed as specific legal advice or legal opinion. The contents are for general informational purposes only and are not a substitute for the advice of legal counsel.