

## Publications

### Deja Vu: HHS's Notice of Proposed Rulemaking under ACA Section 1557

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Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age, or disability by health programs and activities funded or administered by the U.S. Department of Health and Human Services (HHS). Section 1557 itself has remained unchanged since it was enacted in 2010.

On July 25, 2022, the HHS Office of Civil Rights issued the 2022 Notice of Proposed Rulemaking ([2022 Proposed Rule](#)) reinterpreting the meaning of Section 1557. The 2022 Proposed Rule was published in the Federal Register on August 4, 2022.

If finalized, this will be the third set of regulations interpreting Section 1557.

#### Prior Rules

In 2016, the Obama Administration's HHS finalized regulations interpreting Section 1557 (2016 Rule) to prohibit discrimination based on gender identity, gender expression, and transgender status. The 2016 Rule provided, among other things, that sex discrimination includes discrimination on the basis of gender identity and termination of pregnancy. The 2016 Rule also required covered entities to send nondiscrimination notices and "tagline" translation notices in at least 15 languages with all "significant communications."

In *New York v. Azar*, a US District Court set aside the 2016 rule because it was arbitrary, capricious, an abuse of discretion, and not in accordance with law.

Then in 2020, the Trump Administration's HHS adopted a revised rule (2020 Rule). For a discussion of 2020 Rule review this [Vorys Client Alert](#). The 2020 Rule repealed portions of the 2016 Rule that defined discrimination "on the basis of sex" to include discrimination based on gender identity, gender expression, or termination of pregnancy and to also limit the entities subject to Section 1557. Therefore, the 2020 Rule did not apply the protections of Section 1557 to LGBTQ people and women who have had abortions. The 2020 Rule also eliminated the

nondiscrimination and “tagline” translation notice requirements.

## 2022 Proposed Rule

The 2022 Proposed Rule re-expands the interpretation of “on the basis of sex” to prohibit discrimination on the basis of sexual orientation and gender identity. The 2022 Proposed Rule additionally expands the interpretation to prohibit discrimination against someone for seeking reproductive care and discrimination on the basis of pregnancy or related conditions, including “pregnancy termination.”

The 2022 Proposed Rule acknowledges that a plan may have a “legitimate, nondiscriminatory reason for denying or limiting a service, including where the covered entity typically declines to provide the health service to any individual or where the covered entity reasonably determines that such health service is not clinically appropriate for a particular individual. However, a provider’s belief that gender transition or other gender-affirming care can never be beneficial for such individuals (or its compliance with a state or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate.” This sets up a situation where a plan could be forced to choose between violating state law or violating this interpretation of Section 1557.

The 2022 Proposed Rule re-adds a requirement that covered entities provide language assistance services for individuals with limited English proficiency (LEP) and effective communication and reasonable modifications to policies and procedures for people with disabilities. This is effectively an expansion of the 2016 Rule’s notice requirements. In addition, health programs and activities, specifically including services offered via telehealth, also must be accessible to LEP individuals and individuals with disabilities.

There may be an indirect application of the 2022 Proposed Rule to self-insured plans that don’t otherwise receive federal financial assistance. The 2022 Proposed Rule applies if HHS finds that a third party administrator who is subject to the limitations for its insured business is responsible for a potential discriminatory design of a self-insured plan. Because many self-insured plans defer to their TPA for the plan design, we believe that many self-insured plans will be swept up in this interpretation.

The 2022 Proposed Rule also prohibits the use of certain clinical algorithms in health care decision-making. This will eliminate an important cost containment measure for many plans.

The 2022 Proposed Rule does contain a process for an employer to claim an exemption from certain parts of this guidance under federal conscience or religious freedom laws.

Public comments on the 2022 Rule are due on October 3, 2022, 60 days after publication in the Federal Register.

Contact your Vorys lawyer if you have questions about the 2022 Proposed Rule and its potential impact on your business.