HHS hears opposition to weakening ACA’s anti-discrimination rule

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The Department of Health and Human Services (HHS) is being urged to seek stakeholder input and formal public comment before making any changes to existing regulations pertaining to prohibitions against sex-related discrimination in health care programs.

Federal prohibitions against discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs and activities are included in Section 1557 of the Affordable Care Act (ACA), but a judge has blocked enforcement of some of the section’s implementing regulations pending the outcome of a lawsuit filed during the Barack Obama administration. HHS has since indicated that the section’s rules are being rewritten.

The AMA’s long-standing policies opposing “any discrimination based on an individual’s sex, sexual orientation, gender identity, race, religion, disability, ethnic origin, national origin or age” are cited in a letter AMA CEO and Executive Vice President James Madara, MD, sent to HHS Office of Civil Rights (OCR) Director Roger Severino.

Enforcement of ACA rule blocked

The HHS issued its final rule on the implementation of Section 1557 on May 18, 2016, and it took effect in July of that year. Enforcement of the rule’s prohibitions against discrimination on the basis of gender identity or termination of pregnancy were blocked Dec. 31, 2016, by U.S. District Judge Reed O’Connor.
O’Connor granted the motion for a preliminary injunction against the prohibitions that was requested in
a lawsuit filed by eight states, the Christian Medical & Dental Associations, the 14-hospital Franciscan
Alliance health system based in Mishawaka, Indiana, and Specialty Physicians of Illinois, a medical
group owned by Franciscan and based in the Chicago suburb of Olympia Fields, Illinois.

The case is on hold as HHS reconsiders the rule implemented under the Obama administration.
O’Connor, a judge for the Northern District of Texas in Fort Worth, has required the Trump
administration to issue periodic progress reports on any and all “rulemaking proceedings initiated with
respect to the challenged rule.”

The administration told O’Connor on Aug. 4 that “a draft of a proposed rule is going through the
clearance process within the executive branch.” The next status report is due Oct. 16.

“The AMA stands behind Section 1557’s gender-identity protections and opposes any modifications to
the rule that would jeopardize the health and well-being of vulnerable populations,” Dr. Madara wrote
in the letter. He urged HHS “to seek input from stakeholders about whether informal guidance may
help to clarify misunderstandings of the existing rule. If HHS determines that rule changes are
necessary, it should undertake the same process used previously to develop the rule, including a
formal Request for Information and public-comment period.”

Also cited in the letter are AMA policies supporting public and private health insurance coverage for
treatment of gender dysphoria as recommended by a patient’s physician.

Physicians’ medical judgment respected

“Section 1557’s protections assist some of the populations that have been most vulnerable to
discrimination, such as lesbian, gay, bisexual and transgender individuals and those suffering from
mental illness, including substance-use disorders, and help provide those populations equal access to
health care and health coverage,” Dr. Madara added. “We also note that Section 1557 does not force
physicians to violate their medical judgment.”

Arizona, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Texas and Wisconsin are the states
participating in the lawsuit.

Section 1557 covers any health program or activity that receives federal financial assistance from the
HHS, including physicians any health program administered by HHS, and health insurance “issuers”
who participate in health insurance marketplaces, according to a summary of the rule on the HHS
website. The rule does not apply to physicians who participate only in Medicare Part B.
“The rule makes clear that OCR will evaluate complaints that allege sex discrimination related to an individual’s sexual orientation to determine if they involve the sorts of stereotyping that can be addressed under Section 1557,” the summary states. “HHS supports prohibiting sexual orientation discrimination as a matter of policy and will continue to monitor legal developments on this issue.”

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