

CROWLEY | FLECK PLLP ATTORNEYS



Injunction Blocks ACA Nondiscrimination Rule

January 3, 2017

By Adrienne Maxwell and Kristy Buckley

Federal District Court Judge Delays Implementation of Affordable Care Act Nondiscrimination Rule

On the last day of 2016, Judge Reed O'Connor, United States District Court for the Northern District of Texas, issued a nationwide injunction temporarily preventing the implementation of specific challenged provisions in the Affordable Care Act's Nondiscrimination Rule. The enjoined provisions were to take effect January 1, 2017, and would have prevented discrimination on the basis of "gender identity" and "termination of pregnancy." In issuing the injunction, Judge O'Connor found that federal rulemakers exceeded their authority by defining discrimination on the basis of sex under Title IX of the Education Amendments of 1972 to include discrimination on the basis of "gender identity" and "termination of pregnancy," and by failing to incorporate a religious exemption into the rule's mandate. The injunction was granted at the request of plaintiffs, which included several states and several religiously affiliated nonprofit medical groups, including the Franciscan Alliance, Inc.

The injunction delays, among other things, the nondiscrimination requirements regarding (1) coverage of sex-specific necessary medical procedures regardless of an individual's sex at birth, and (2) blanket prohibitions on covering gender transition services. The injunction also delays the nondiscrimination requirements preventing discrimination based on the "termination of pregnancy," which the plaintiffs argued may have required coverage for abortion services. The provisions of the nondiscrimination rule that relate to accessibility to health care and communications are not affected by this injunction.

Commentary on the Injunction

- General Comments: While the grounds for the injunction focused on the failure to

include a religious exemption, the injunction applies nationwide to all entities covered by the rule. As a result, insurers and other covered entities have the opportunity to decide whether to delay their own compliance with the nondiscrimination rule, or whether to move forward with implementing the rule's mandate. The injunction was issued on December 31, 2016 and effectively blocks the nondiscrimination rule compliance date of January 1, 2017 until further guidance is issued.

- Comments for Employers with Fully-Insured Group Health Plans: The decision regarding whether to delay implementation of coverage consistent with the nondiscrimination rule will typically be through your insurance issuer. If you are curious about your issuer's treatment, we recommend that you contact your issuer directly.
- Comments for Employes with Self-Funded Group Health Plans: Entities with self-funded plans have two options: (1) decide to continue with any planned implementation of any changes to bring their self-funded plans into compliance with the nondiscrimination rule; or (2) delay coverage, pending further guidance from the courts regarding the implementation of the rule's mandates. Employers that have no clear religious affiliations should be prepared for compliance with the nondiscrimination rule once the injunction is lifted.

Background:

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination based on race, color, national origin, sex, age, or disability in health activities and programs that receive federal assistance or funding. On May 18, 2016, the Department of Health and Human Services promulgated a final rule implementing the ACA nondiscrimination provision (the "Final Rule", 81 Fed. Reg. 31376). The Final Rule clarified which entities are subject to the ACA nondiscrimination provision, and what those "covered entities" may or may not do. The Final Rule was particularly notable for the protections it provided for transgender individuals, including prohibiting discrimination on the basis of sex stereotyping and gender identity and prohibiting categorical denials of health services related to gender transition and related services. The Final Rule did not require coverage for all health services related to gender transition. However, health plans were required to provide a neutral, nondiscriminatory reason for denying particular services, to ensure that the denial or limitation is not a pretext for discrimination. The entities covered by the final rule included all employers or insurers that operate a health program or activity, any part of which receives Federal financial assistance (additionally includes health plans offered on the exchange and certain self-funded health plans offered by federally funded health care service employers). The Federal funding component includes credits, subsidies, or insurance contracts. The list of covered entities included most health insurance issuers, hospitals, health clinics, physician's practices, community health centers, nursing facilities, residential or community-based treatment facilities, or other similar entities.

For More Information

Contact Kristy Buckley at 406-522-4522 or kbuckley@crowleyfleck.com if you would like more information.

If you require assistance with a particular employee benefit matter, or have questions or comments regarding this newsletter, please contact one of the attorneys listed below.

Employee Benefit Attorneys:

Kristy Buckley
406-522-4522
kbuckley@crowleyfleck.com

Joel Kaleva
406-523-3600
jkaleva@crowleyfleck.com

Sarah Loble
406-457-2033
sloble@crowleyfleck.com

Adrienne Maxwell
406-523-3631
amaxwell@crowleyfleck.com



Transwestern Plaza II
490 N. 31st Street Suite 500
Billings, MT 59101-2529

P: (406) 252-3441 F: (406) 256-8526

To be added to our mailing list, please email Tiffani Swenson
tswenson@crowleyfleck.com

www.crowleyfleck.com | [Forward to a Friend](#) | [Web Version](#) | [Unsubscribe](#)

DISCLAIMER – Crowley Fleck prepared these materials for the reader's information, but these materials are not legal advice. We do not intend these materials to create, nor does the reader's receipt of them constitute, an attorney-client relationship. Online readers should not act upon this information without first obtaining direct professional counsel. Specifically, please do not send us any confidential information without first speaking with one of our attorneys and obtaining permission to send us information. Thank you.