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MEMORANDUM

June 3, 2016

To: Tribal Health Clients

From: Hobbs, Straus, Dean & Walker LLP

Re: ***HHS Issues Final Rule on Nondiscrimination in Health Programs***

Introduction

On May 18, 2016, the Department of Health and Human Services (HHS) published its final rule governing nondiscrimination in health programs and activities. 81 Fed. Reg. 31,376 (May 18, 2016) (attached to this memorandum). We discussed the proposed rule in our memorandum to Tribal Health Clients dated October 21, 2015.

The final rule implements Section 1557 of the Affordable Care Act (ACA),[1] which provides that an individual may not be excluded from participation in, denied the benefits of, or be subjected to discrimination under certain health programs or activities on the grounds prohibited under title VI of the Civil Rights Act of 1964 (race, color, or national origin); title IX of the Education Amendments of 1972 (sex); the Age Discrimination Act of 1975 (age); or Section 504 of the Rehabilitation Act of 1973 (disability). The prohibition on discrimination under Section 1557 applies to "any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under [title I of the ACA]."

Proposed Rule and Tribal Concerns

Under federal law, legislation providing special treatment for Indians is based on a political, rather than racial, classification, and is therefore not considered racial discrimination.[2] Consistent with that understanding of the law and the right of the Indian Health Service (IHS) and tribes to limit health care services to IHS-eligible beneficiaries, the regulations implementing title VI of the Civil Rights Act provide an explicit exemption for Indian health programs at 45 C.F.R. § 80.3(d).[3] Since Section 1557 of the

[1] 42 U.S.C. § 18116.

[2] *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 553 & n.24 (1974).

[3] 45 C.F.R. § 80.3(d) provides:

ACA prohibits race discrimination in health programs by incorporating title VI by reference, the title VI exception for Indian health programs should apply to Section 1557 as well.

In the proposed Section 1557 nondiscrimination regulations, HHS referenced and incorporated the title VI exemption for Indian health programs at Section 80.3(d) in the proposed definition of discrimination. However, other than that single citation to Section 80.3(d), the proposed regulations did not address their application to the IHS or tribes. Moreover, the preamble to the proposed rule listed the IHS as an example of a health program or activity subject to the nondiscrimination requirements by virtue of being a program or activity conducted by HHS, without noting that the IHS may limit its services to its Indian beneficiaries without running afoul of title VI.[4]

Many tribes and tribal organizations were concerned that the proposed regulations did not adequately address or account for the Indian health program exemption from title VI or its legal basis in the political status of tribes and the federal trust relationship. Many of those tribes and tribal organizations submitted comments on the proposed regulations that included, among others, the following suggestions:

- Explicitly state in the regulations and/or preamble, including Section 92.2 (stating general application of the regulations), that the IHS and tribal health programs may restrict services and coverage to Indian beneficiaries and that such classifications are based on a political, rather than racial, distinction under Federal law.
- Describe the title VI exemption in 45 C.F.R. § 80.3(d), rather than simply cite to it, in the regulations.
- Exempt tribes and tribal health programs from Sections 92.207 and 92.208, prohibiting discrimination in providing or administering insurance coverage and employee health benefit programs, and make clear that tribal governments and health programs can limit coverage to their members and communities.
- Expressly permit Purchased/Referred Care programs to limit coverage and be held harmless for discrimination on the basis of disability, age, or sex, in light of the priority of care decisions that must be made as a result of severely limited funding.
- Exclude tribes and tribal health programs from the definitions of "covered entity"

> Indian Health and Cuban Refugee Services. An individual shall not be deemed subjected to discrimination by reason of his exclusion from benefits limited by Federal law to individuals of a particular race, color, or national origin different from his.

[4] 80 Fed. Reg. 54,172, 54,195 (Sept. 8, 2015).

and "health program or activity."

- Exclude assistance to tribes and tribal health programs from the definition of "federal financial assistance."

Final Rule

In the final rule, HHS declined to adopt these tribal suggestions, and made few changes to the proposed rule. In response to the tribal comments, the preamble to the final rule states:

> 45 CFR 80.3(d) is not an exemption from coverage; it provides an exception to application of the prohibitions on race, color, and national origin discrimination when programs are authorized by Federal law to be restricted to a particular race, color, or national origin. The final rule incorporates that exception, and OCR will fully apply it, as well as other exemptions or defenses that may exist under Federal law. OCR intends to address any restrictions on application of the law to tribes in the context of individual complaints.[5]

In Section 92.101, describing prohibited discrimination, the final rule retains the reference to § 80.3(d), as well as other exceptions applicable to title VI, Section 504 of the Rehabilitation Act, and the Age Act, but does not explain that § 80.3(d) permits tribes and the Indian Health Service to limit services to Indian beneficiaries.

Prohibited discrimination is further described under Section 92.101 of the final rule and includes aiding or perpetuating discrimination "by providing significant assistance to any entity or person that discriminates on the basis of race, color, or national origin in providing any aid, benefit, or service to beneficiaries of the covered entity's health program or activity."[6] Generally, the final rule requires covered entities to comply with implementing regulations for each of the nondiscrimination laws referred to in Section 1557 (title VI of the Civil Rights Act; title IX of the Education Amendments of 1972; the Age Discrimination Act of 1975; and Section 504 of the Rehabilitation Act of 1973) in the administration of their health programs. Additionally, Section 92.101 sets out new standards for prohibiting discrimination on the basis of sex.

The final rule requires entities applying for federal financial assistance to submit an assurance that they will comply with Section 1557 and the final rule, and authorizes

[5] 81 Fed. Reg. at 31,381.

[6] The final rule also prohibits discrimination on the basis of association with an individual of a protected class. *See* 42 C.F.R. § 92.209.

the Director of the Office of Civil Rights to require that any covered entity found to have discriminated in violation of Section 1557 or the final rule take remedial action to overcome the effects of that discrimination. 42 C.F.R. §§ 92.5, 92.6. Section 92.7 of the final rule requires each covered entity that employs 15 or more persons to adopt grievance procedures, and to designate at least one employee responsible for coordinating compliance efforts and investigating grievances. In addition, under new Section 92.8, every covered entity must meet certain notice requirements to notify its beneficiaries and the public that the covered entity does not discriminate; that auxiliary aids and services and language assistance services are available and how to obtain them; contact information for the responsible employee and information about how to file a grievance; and how to file a discrimination complaint with the HHS Office of Civil Rights.[7] Enforcement mechanisms available under the nondiscrimination laws cited in Section 1557 and their implementing regulations are available for enforcement under Subpart D of the final rule.

Under the final rule, covered entities must take reasonable steps to provide meaningful access to individuals with limited English proficiency, as outlined in Section 92.201 of the final rule; comply with existing standards for communication with individuals with disabilities (Section 92.202) and accessibility standards for buildings and facilities (Section 92.203); ensure that health programs or activities provided through electronic and information technology are accessible to individuals with disabilities as provided in Section 92.204; make reasonable modifications to policies, practices, or procedures as necessary to avoid discrimination on the basis of disability, as specified in Section 92.205; and provide equal access to health programs or activities without discrimination on the basis of sex and treat individuals consistent with their gender identity, as stated in Section 92.206. In addition, a covered entity may not discriminate in providing or administering health-related insurance or other coverage, as provided in Section 92.207 of the final rule.[8]

The effective date of the final rule is July 18, 2016, except that provisions requiring changes to health insurance or group health plan benefit design will apply starting on the first day of the first plan or policy year beginning on or after January 1, 2017.

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[7] A sample notice prepared by HHS is provided in Appendix A to the final rule.

[8] Under Section 92.208 of the final rule, a covered entity that provides an employee health benefit program is liable for violations of the rule with respect to that employee health benefit plan only when: (a) the covered entity is principally engaged in providing or administering health insurance or other health coverage; (b) the entity receives Federal financial assistance intended primarily to fund the entity's employee health benefit program; or (c) the entity receives federal financial assistance in providing or administering health services or coverage other than an employee health benefit program, but only with respect to employees in that health program or activity.

Conclusion

If you would like any assistance or further information regarding the HHS final rule on nondiscrimination in health programs, please contact Elliott Milhollin at (202) 822-8282 or emilhollin@hobbsstraus.com; Geoff Strommer at (503) 242-1745 or gstrommer@hobbsstraus.com; or Caroline Mayhew at (202) 822-8282 or cmayhew@hobbsstraus.com.