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Compliance Announcements

U.S. District Court Injunction on ACA Section 1557

A U.S. District Court on Dec. 31, 2016 issued a preliminary injunction that have the effect of staying parts of a federal rule that would extend antidiscrimination protections for transgender individuals and pregnancy terminations under ACA Section 1557. The case, *Franciscan Alliance et al v. Burwell,* was brought by five states and three religiously-affiliated health care providers who argue that the rule could force them to provide services, such as gender reassignment procedures, that conflict with their personal beliefs.

It is important to keep into perspective the reach of the injunction, what it covers and what it does not. The court decision, while broadly written basically says that the U.S. Department of Health and Human Services ("HHS") exceeded its authority regarding its regulations prohibiting sex discrimination and abortion services. This decision is of main interest to church plan clients interested in compliance with ACA Section 1557. The case is complex, and by all means does not mean that all clients should put Section 1557 on the back burner. First, remember that it is a preliminary injunction. There is still an opportunity for HHS to appeal the decision to the Fifth Circuit or re-write the regulations. We will have to wait until later in January to find out whether the Trump administration will move to file an appeal or not. Keep in mind that this opinion is not necessarily the last word. There is a case before the U.S. Supreme Court that will decide the definition of sex for purposes of Title IX. Until then, caution is the best course to take.

Scope of the Injunction
What we do know at this point is the most impact of this injunction will be felt by church plans. However, the scope of the injunction is fairly broad and does not appear to be limited to religious or health care organizations. Its "nationwide" language may mean that it applies to all types of plans and employers. The decision says that HHS overstepped by issuing regulations regarding prohibition on sex discrimination.

Provisions That May Still Be Applicable
Employer plans may still have to comply with the disability, language assistance and notice requirements. It's important to recognize that this injunction does nothing to limit other aspects of Section 1557, such as the Limited English Proficiency rules, which are a much bigger compliance challenge for some covered employers and health plans than the rules on gender identity and abortion. Figuring out how to incorporate all those taglines into every significant plan communication can be burdensome and they were not part of the decision.

Also, remember that the EEOC still has its position under Title VII that specifically refers to a risk in treating gender identity differently in a health and welfare benefit plan.

What Should Employers Do?

- Wait to see what HHS and the Trump Administration do.

- Have welfare benefit plans been modified to eliminate categorical exclusions related to gender transition or gender identity? If so, it is not a problem to leave those modified plan designs in place for now. Nothing about the injunction makes it "illegal" to extend nondiscriminatory benefits based on gender identity.

- What if a covered plan or employer objects to providing transgender benefits? This injunction may give them a little more leeway to stall on making that change. Until the case is settled or we hear from the U.S. Supreme Court, it will be harder for HHS or a private citizen to argue that a categorical exclusion for sex changes or other gender transition benefits is clearly discriminatory under Section 1557 without a valid regulation to point to.

- Nevertheless, until the regulation is changed or pulled, we must recognize that Section 1557 is still on the books. There is room to interpret the prohibition against discrimination on the basis of sex as prohibiting discrimination with respect to gender identity and gender transition.

- For church plans intending to rely on the Religious Freedom Restoration Act (RFRA) as exempting them from provisions they deem to be the objectionable aspects of Section 1557, this decision will give them greater comfort because the injunction leaves the regulation in limbo. More importantly, the court's analysis regarding an outcome under a RFRA analysis clearly favors their position.

Take Aways

This case and its impact on employer plans is complex. Many employers complied in good faith with the regulation and pulled exclusions out of their welfare benefit plans and now have to determine whether (and what) to put back in. Those that did nothing have to decide whether to comply only with the non-sex provisions.

First and foremost, we strongly recommend that any employers thinking of changing their plan language in lieu of this case should first consult an ERISA attorney.

For the immediate future, it would be a wise decision to act with caution and perhaps even to wait until we hear more from HHS or get cues from the Trump administration on what they plan to do regarding this case and a potential appeal of the case.

(This information is no way intended to be legal advice. Please seek an ERISA attorney for legal advice on your self-funded program.)

(Source: SPBA)