Insights

New Additions to Federal Anti-Discrimination Rules Giving Healthcare Providers Regulatory Déjà Vu

May 20, 2024

By: Brandon W. Shirley

On May 6, 2024, the Department of Health and Human Services (HHS) adopted a final rule that extends existing anti-discrimination rules for healthcare providers participating in federal healthcare programs. The new rule specifically adds protections for LGBTQI+ individuals, including those based on sex characteristics such as pregnancy or related conditions, intersex traits, sexual orientation, gender identity, and sex stereotypes. The rule will take effect on July 5, 2024, although legal challenges have already been filed in federal court seeking injunctive relief.

This final rule may seem familiar to affected providers, as HHS previously attempted to define "sex" to include these protections in 2016. However, federal courts blocked those parts of the rule from taking effect, and HHS eventually rescinded the rules. HHS has since made attempts to revive these protections in 2020 and 2022, but they were also blocked by federal courts. The final rule reinstates these protections and, unless barred by federal courts again, will take effect on July 5, 2024. Healthcare providers who do not comply with the new rule may face penalties such as termination of Medicaid provider agreements, exclusion, suspension, or other sanctions.

The final rule raises several compliance challenges and questions for healthcare providers. Most notably, the rule could be interpreted to require healthcare entities and practitioners to provide health care services that are prohibited under state law, such as puberty blockers or gender-affirming care to minors, or abortion-related care. While the law allows providers to make case-by-case determinations on providing such care, they are prohibited from adopting categorical policies to deny such care in advance. Healthcare entities and providers will need to understand how to implement and comply with the final rule in states where such practices are prohibited. The Supreme Court is expected to provide some clarity on such questions in its upcoming decision on whether the federal government can require providers to offer emergency abortion care under EMTALA in states that outlaw such procedures.

If you have questions about your compliance with the final rule, please contact Brandon W. Shirley or another member of the Krieg DeVault Health Care Practice.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.