

Is Our Self-Insured Health Plan Subject to the Section 1557 Nondiscrimination Rules?

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QUESTION: The claims administrator for our company's self-insured health plan is also an insurer that sells policies through the Exchanges. Does this make our company or our group health plan subject to the Section 1557 rules on nondiscrimination in programs and activities?

ANSWER: Most likely, neither your company nor your self-insured health plan is currently subject to the Section 1557 nondiscrimination rules simply because the plan's third-party administrator (TPA) also sells policies through the Exchanges—but the law in this area continues to evolve. As background, Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age, or disability by any "health program or activity" receiving federal financial assistance.

The term "health program or activity" includes not only programs administered by HHS but also all operations of entities "principally engaged in the business of providing healthcare." According to HHS, health insurers are not principally engaged in the business of providing health care (rather, they are in the business of providing coverage for health care). An entity not principally engaged in providing health care is subject to Section 1557 only to the extent the operation receives federal financial assistance from HHS.

Thus, while Exchange coverage offered by the insurer would be subject to Section 1557, coverage that does not directly receive federal financial assistance would not be. In addition, HHS has specified that Section 1557 does not apply to self-insured group health plans so long as (or to the extent) they do not receive funding from HHS and the entities operating them are not principally engaged in the business of providing health care. This is the case for ERISA plans, non-ERISA plans (such as governmental or church plans), and excepted benefits.

So long as your self-insured group health plan does not receive federal financial assistance (and your company is not principally engaged in providing health care), it will not be subject to Section 1557 simply because the TPA that administers it also offers Exchange coverage. Note, however, that proposed regulations would make Section 1557 applicable to insurers for the insurance they provide to insured group health plans and for TPA activities they provide to self-insured health plans. And a court has held, in a class action lawsuit, that the activities of an insurer, acting as a TPA for self-insured health plans, constitute the operation of a health program or activity under the plain language of Section 1557.

Keep in mind that Section 1557 is not the only nondiscrimination provision to consider. The employer may be subject to underlying laws broadly prohibiting discrimination on the basis of race, sex, or other specified characteristics. And your self-insured health plan may also be subject to the more familiar nondiscrimination requirements under Code § 105(h), which prohibits discrimination in favor of highly compensated individuals.

For more information, see EBIA's Self-Insured Health Plans manual at Section XIII.D ("Benefits Must Not Be Discriminatory"). See also EBIA's Health Care Reform manual at Section XXXIV.A ("Section 1557

Nondiscrimination: Grounds Prohibited Under Federal Laws”) and EBIA’s Group Health Plan Mandates manual at Section XXI.A (“What Is Title VII, as Amended by the PDA, and Who Must Comply?”).

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