

HEALTH CARE REFORM: NONDISCRIMINATION IN HEALTH PROGRAMS AND ACTIVITIES

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs or activities that receive federal financial assistance from **any** federal agency. The Office of Civil Rights (OCR) in the Department of Health and Human Services (HHS) has been enforcing Section 1557 since the ACA was signed into law in 2010. On May 13, 2016, OCR released final regulations detailing how HHS applies the standards of Section 1557 to health programs and activities funded or administered by HHS.

COVERED ENTITIES

The regulations apply only to Covered Entities, which include:

1. Entities operating a health program or activity that receives federal financial assistance from HHS. Examples include but **are not limited to:** (a) hospitals and physician practices receiving Medicare (excluding Part B) or Medicaid payments; (b) health-related schools or educational organizations receiving grant awards to support health professional training programs, such as physician assistant programs; (c) state Medicaid and public health agencies; and (d) issuers offering coverage through the Health Insurance Marketplaces (i.e., the Exchanges).
2. Health Insurance Marketplaces.
3. Health programs and activities administered by HHS.

Schools, community colleges and other public agencies should consult with their legal counsel to determine whether or not they are Covered Entities. For example, community colleges offering health care training programs should evaluate their funding sources to determine if they are subject to these regulations. Federal financial assistance from HHS may be available through several agencies, such as the Health Resources and Services Administration, the Centers for Disease Control and Prevention and the Centers for Medicare and Medicaid Services.

EMPLOYERS WHO ARE NOT COVERED ENTITIES

The final regulations do not apply **directly** to employers unless they are Covered Entities. However, if OCR lacks jurisdiction over an employer because it is not a Covered Entity, it will refer matters to other federal agencies that may have jurisdiction over discrimination claims, such as the Equal Employment Opportunity Commission.

NONDISCRIMINATION IN HEALTH PROGRAMS AND ACTIVITIES

The regulations prohibit discrimination in health programs and activities on the basis of race, color, national origin, age, sex or disability. Protections include:

- Individuals cannot be denied health care or health coverage based on their sex, including their gender identity and sex stereotyping;
- Categorical coverage exclusions or limitation for all health care services related to gender transition are discriminatory;
- Individuals must be treated consistent with their gender identity, including access to facilities;
- Providers may not deny or limit treatment for any health services that are ordinarily or exclusively available to individuals of one gender based on the fact that a person seeking such services identifies as belonging to another gender;
- Covered Entities must take reasonable steps to provide meaningful access to each individual with limited English proficiency likely to be served or encountered in its health programs and activities. Reasonable steps include providing language assistance services, such written or oral translation; and
- Covered Entities must take appropriate steps to ensure communications with individuals with disabilities are as effective as communications with others in its health programs and activities. Appropriate steps include providing auxiliary aids and services, such as sign language interpreters.

The regulations do not resolve whether discrimination on the basis of sexual orientation is a prohibited form of sex discrimination under Section 1557. OCR will evaluate complaints alleging sex discrimination related to an individual's sexual orientation on a case-by-case basis to determine if they can be addressed under Section 1557.

DOES THIS GUIDANCE IMPACT EMPLOYER BENEFIT PLANS?

A Covered Entity providing an employee health benefit program will be liable for violations with regards to its employee health benefit program only if:

1. It is principally engaged in providing or administering health services, health insurance coverage or other health coverage.
2. It receives federal financial assistance from HHS that is primarily intended to fund the Covered Entity's employee benefits program. For example, if an employer receives grant money specifically designated to support its employee wellness program, then the final rule will apply to the administration of that wellness program.
3. It is not principally engaged in providing or administering health services or coverage but operates a health program or activity that is not an employee health benefit program and receives federal financial assistance from HHS. The Covered Entity will be liable with regard to its employee health benefit program only for employees working in the health program or activity receiving financial assistance. For example, a State receiving federal funds for its Medicaid program will be liable with regard to the

benefits provided to its Medicaid employees but not employees in its transportation department (unless it also operates a health program or activity).

EFFECTIVE DATE AND NEXT STEPS

The regulations are effective July 18, 2016 except for provisions affecting group health plan benefit design, which will not take effect until the first day of the first plan year beginning on or after January 1, 2017. Covered Entities need to take the following steps now:

- **Designating a responsible employee and adopting grievance procedures.** Covered Entities with 15 or more employees must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Section 1557, including the investigation of any grievances. Entities must also adopt procedures for addressing grievances that provide for prompt and fair resolution of the grievance.
- **Posting notices and taglines.** Within 90 days of the effective date of the regulations, each Covered Entity must post a notice that it does not discriminate on the basis of race, color, national origin, sex, age or disability in its health programs or activities. The notice must also alert individuals with disabilities or limited English proficiency of the availability of communication assistance services. Covered Entities must also post taglines in the top 15 languages spoken by individuals with limited English proficiency in the states in which the Covered Entity operates that advises them of the availability of free language assistance services. OCR has provided a sample notice and taglines (<http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html>).
- **Determine if your employee benefit plan is impacted.** As discussed above, a Covered Entity's employee benefit plan may be subject to these regulations if it received money from HHS to fund any part of its benefit plan or if it received money from HHS to fund a health program or activity. If the regulations apply to your plan, then you should review the plan for any categorical exclusions or limitations related to gender transition. These provisions are facially discriminatory and must be replaced by coverage that is not discriminatory. Not all services related to gender transition need be covered, however, so it is best to immediately start planning for the types of coverage to make available. If changes are required, then they must be made by the first day of the plan year starting on or after January 1, 2017.

RESOURCES

Additional information on Section 1557, including Factsheets on Key Provisions and Frequently Asked Questions on the Final Rule can be found on the HHS website at:

<http://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>.

Please contact your Keenan Account Manager for questions regarding changes to your benefit plans or if you require any additional information regarding the Affordable Care Act.

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