



The Clock Is Ticking – ACA Nondiscrimination Rules Will Take Effect January 1

Insights

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Earlier this year, the Department of Health and Human Services (HHS) and the Office of Civil Rights (OCR) published a final rule to implement Section 1557 of the Affordable Care Act (ACA). Most prominently, this rule prohibits discrimination in health coverage on the basis of race, sex, color, national origin, age, or disability. You have until the first day of your plan year beginning on or after January 1, 2017 to make any necessary changes to your health plan benefit design, so the time to understand your obligations is now.

Which Employers Are Covered By Section 1557?

Section 1557 only applies to employers who:

- are principally engaged in providing or administering health services or health coverage;
- receive “federal financial assistance” with the primary objective to fund an employee health benefit program; or
- are not principally engaged in providing or administering health services or health coverage, but operate an employee health program that receives federal financial assistance.

You are still subject to Section 1557 even if you are unaware that you are receiving federal financial assistance. This could include grants, loans, government contracts, and other similar types of assistance. The HHS defines this category broadly, having previously indicated that recipients of Children’s Health Insurance Program (CHIP) premiums, Medicaid, and Medicare Parts A, C, and D, including retiree drug subsidies, qualify as receiving federal financial assistance.

Furthermore, if Section 1557 applies to an employer, it also applies to all employer-sponsored employee health benefit programs, which include health coverage, wellness programs, health clinics, and long-term care coverage or insurance.

Nondiscrimination Provisions

As noted above, Section 1557 prohibits discrimination in health coverage on the basis of race, sex, color, national origin, age, or disability. Discrimination includes denying or limiting health coverage, denying a claim, employing discriminatory marketing or benefit design, and imposing additional cost sharing, among other things.

Much of the focus of Section 1557 has been on sex discrimination, which includes pregnancy, gender identity, and sex stereotyping. Under the rule, individuals must be treated consistently with their gender identity. For example, individuals must have access to health facilities consistent with their gender identity (like room assignments).

Further, sex-specific health care cannot be denied or limited if the individual seeking care identifies with another gender. For example, prostate exams would not have to be offered to a transgender male, but treatment for ovarian cancer should be provided. Finally, an explicit exclusion for any health-related service associated with gender transition will be considered facially discriminatory.

Language Assistance

Sometimes overlooked is the separate requirement under Section 1557 that all covered entities must provide nondiscrimination and accessibility notifications and taglines. If you have not altered your practices to conform to this rule, you must act quickly – the deadline for providing these notifications and taglines was October 16, 2016.

These statements must inform participants that language assistance, along with auxiliary aids and services, can be provided, free of charge if necessary. The statements must also provide a summary of how to obtain these services. Additionally, covered entities with 15 or more employees are required to adopt grievance procedures and designate an employee to coordinate any grievances. The HHS has posted [sample notifications](#) and [grievance procedures](#) on its website.

This information must be displayed prominently on all significant communications, enrollment materials, at covered entities' physical locations, and on their websites. The HHS provided some relief by permitting covered entities to exhaust any existing supply of current publications before complying with this portion of Section 1557, relieving any obligation to complete a special printing of new Summary Plan Descriptions.

Finally, taglines must be written in at least the top 15 most spoken languages by limited English proficient populations statewide. Samples of the tagline translated into 64 languages are also [available online](#), and the HHS provides a [state-by-state list](#) of the top 15 most spoken languages.

Consequences Of Section 1557 Violations

Individuals who believe they are victims of discrimination have the right to bring private actions against employers covered by Section 1557. Employers who are found not to be in compliance can also be required to submit compliance reports and may no longer be eligible for federal financial assistance. The matter may also be referred to the Department of Justice. Moreover, even if the employer is not covered by Section 1557, the rules state that HHS can refer or transfer the matter to the Equal Employment Opportunity Commission (EEOC).

In tandem with this rule, [the EEOC released similar rules](#) earlier this year amending Executive Order 11246. They require certain government contractors to ensure that their fringe benefits, such as health coverage, do not discriminate on the basis of sex. Employers that violate this Executive

Order can be liable for make whole and injunctive relief, and can have their contracts terminated and face debarment proceedings. You may read more about this rule [here](#).

Because it is not always obvious whether these rules apply to your business, you should retain assistance from experienced benefits counsel to evaluate applicability.

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