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## HHS OCR Offers New Materials for Covered Entities to Promote Compliance with the Affordable Care Act's Nondiscrimination Provisions Now in Effect

### Introduction

Hospitals, health clinics, health insurance issuers, State Medicaid agencies, community health centers, physician practices, home health care agencies and certain other health care and coverage providers are now subject to new specific compliance requirements under the [Final Rule, \*Nondiscrimination in Health Programs and Activities\*](#) (the "Final Rule"), which implements [Section 1557](#) of the Patient Protection and Affordable Care Act ("Section 1557") with respect to federally funded health programs and activities. These requirements include:

- designation of a compliance coordinator,
- adoption of grievance procedures, and
- compliance with information technology accessibility standards.

Additional obligations, including the conspicuous posting of nondiscrimination notices along with taglines for non-English language speakers, and compliance with certain buildings and facilities accessibility standards, will go into effect on a rolling basis over the next eighteen months.

A covered entity that fails to comply with, or acts in violation of, Section 1557 and its implementing regulations may be required to take corrective actions, including payment of compensatory damages.

### Background

Enacted in 2010 as part of The Patient Protection and Affordable Care Act ("ACA"), Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs and activities. Specifically, Section 1557 provides that, with certain exceptions, "an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)." According to HHS, Section 1557 is the first federal civil rights law to broadly prohibit discrimination on the basis of sex in federally funded health programs.

Section 1557 authorizes the Secretary of the U.S. Department of Health and Human Services ("HHS") to promulgate regulations implementing these nondiscrimination requirements. To that end, HHS Office for Civil Rights ("OCR") published a Request for Information on August 1, 2013, to solicit information from the public on issues arising under Section 1557, and then a [proposed rule](#) on September 8, 2015. While the Final Rule adopts the same structure as the proposed rule, OCR made several significant changes, including with respect to the scale of the notice requirements,

the buildings and facilities accessibility standards and the religious exemption allowance, each discussed below. Not discussed below, but equally notable, is OCR's mandate that sex-specific health programs or activities are allowable only where the covered entity can demonstrate that the sex-specific program is substantially related to the achievement of an important health-related or scientific objective.

OCR received nearly 25,000 comments in response to the proposed rule. Although many commentators requested that OCR "categorically declare ... that certain actions are or are not discriminatory," OCR declined, stating that "[t]he determination of whether a certain practice is discriminatory typically requires a nuanced analysis that is fact-dependent." OCR also declined to adopt requests that compliance with language access standards promulgated by CMS or other federal and state agencies be deemed compliance with the Final Rule. OCR did, however, agree to "coordinate as appropriate with other federal agencies to avoid inconsistency and duplication in enforcement efforts" and "give consideration to an entity's compliance with the requirements of other Federal laws where those requirements overlap with Section 1557."

## The Final Rule

OCR published the Final Rule on May 18, 2016. According to OCR's July 19 [email alert](#), the Final Rule aims to strengthen protections for populations that have been most vulnerable to discrimination in the health care context. The Final Rule does this by broadly prohibiting discrimination on the basis of race, color, national origin, age, sex or disability under (i) every health program or activity, any part of which receives federal financial assistance provided or made available by HHS; (ii) every health program or activity administered by HHS (*e.g.*, the Medicare Part D Program); and (iii) every health program or activity administered by a Title I entity (*i.e.*, both federal- and state-facilitated Health Insurance Marketplaces as well as all plans offered by issuers that participate in those Marketplaces). The Final Rule also obligates "covered entities" to ensure their health programs and activities comply with these requirements. Under the Final Rule, "covered entities" are entities that operate or administer any of the above-referenced health programs or activities, including hospitals, health clinics, health insurance issuers, state Medicaid agencies, community health centers, physician practices and home health care agencies. HHS is also a covered entity under the Final Rule.

Importantly, if a covered entity is principally engaged in health services or health coverage, all of the entity's operations are considered part of the health program or activity, and therefore must comply with Section 1557 (*e.g.*, a hospital's medical departments, as well as its cafeteria and gift shop).

### *Requirements*

#### Compliance Coordinator and Grievance Procedures

Under the Final Rule, as of July 18, 2016, any covered entity with fifteen or more employees that receives federal financial assistance must designate at least one employee to coordinate the entity's compliance with Section 1557, and must implement grievance procedures to address complaints of discrimination. The Final Rule requires that such grievance procedures incorporate due process standards and provide for the "prompt and equitable resolution of grievances" alleging discrimination. On its website, OCR offers a [model grievance procedure](#), which proposes timelines and procedures for filing, investigating, hearing and appealing a Section 1557 grievance. OCR also makes available on its website [training materials](#), which OCR strongly encourages covered entities to use to train their employees on Section 1557 compliance.

#### Notice of Nondiscrimination and Taglines

Under the Final Rule, covered entities must take appropriate initial and continuing steps to notify beneficiaries, enrollees, applicants and the public generally that the covered entity does not discriminate on the basis of race, color, national origin, sex, age or disability in its health programs and activities, and, further, that the covered entity

provides appropriate aids and services to ensure that individuals with disabilities have an equal opportunity to participate (e.g., large-print materials, text telephones, captioning, video remote interpreting services as appropriate). The notice must also provide information about how to access such services, whom within the entity to contact for more information, and how to file a grievance with the entity and report discrimination to OCR.

To that end, the Final Rule requires that, not later than October 17, 2016, each covered entity must post on its website, in its “significant publications and communications,” and in conspicuous physical locations where the entity interacts with the public, a notice of nondiscrimination conveying this information, along with the required “taglines.” A “tagline” is a short statement written in a non-English language that indicates the availability of language assistance services free of charge. With an entity’s notice of nondiscrimination, the entity must include a tagline in at least each of the top 15 languages spoken by individuals of the relevant state(s) with limited English proficiency (“LEP”).

For significant publications and communications that are *small-sized* (e.g., postcards and tri-fold brochures), the Final Rule requires covered entities to post a nondiscrimination statement along with taglines in at least the top two non-English languages spoken by LEP individuals in the state(s). [OCR has prepared](#) a model notice of nondiscrimination and a model nondiscrimination statement as well as taglines in 64 different languages.

#### Access to Information Technology, Buildings and Facilities

In addition to promoting meaningful access to effective communication, the Final Rule requires covered entities to take steps to provide individuals with disabilities equal access to information technology, unless the steps would result in an undue financial burden or fundamentally alter the program. Under the Final Rule, covered entities must make all electronically provided health programs and activities accessible to individuals with disabilities.

Furthermore, consistent with existing directives implementing the requirements under the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act of 1973, the Final Rule requires that any facility or part of a facility in which health programs or activities are conducted that is constructed or altered by or on behalf of, or for the use of, a recipient of federal financial assistance or state-based Marketplace<sup>SM</sup> shall comply with the [2010 ADA Standards for Accessible Design](#) (“2010 Standards”), as defined in the [ADA Title II regulations](#).

Although covered entities must comply with the information technology accessibility requirements as of July 18, 2016, the time frame within which a covered entity must comply with the buildings and facilities accessibility requirements depends on the nature of the construction (existing versus new) as well as applicability of the 2010 Standards. Buildings and facilities not covered by the 2010 Standards have been granted an eighteen-month grace period (until January 18, 2018) to comply with the 2010 Standards.

#### *Exceptions*

Some issues are not covered by Section 1557. Employment discrimination is not covered under Section 1557 except in certain circumstances and for certain employers related to discrimination in employee health benefit *programs*. In addition, if the application of the Section 1557 requirement would violate applicable federal laws protecting religious freedom and conscience, application is not required. This is a substantial modification to the proposed rule, which sought comment on whether the rule should include its own exemption for religious organizations in circumstances in which nondiscrimination obligations conflict with religious beliefs.

#### **Conclusion**

The Final Rule imposes new compliance obligations on covered entities that may be substantial. For example, covered entities must update their policies and procedures to include grievance procedures; designate a compliance coordinator; and prepare, publish and distribute notices and statements of nondiscrimination. Covered entities must

also implement policies and practices to ensure compliance with information technology and buildings and facilities accessibility standards. Covered entities are also encouraged to train their employees on Section 1557 compliance. According to OCR, the Final Rule accords with and does not broadly expand existing civil rights requirements and standards applicable to covered entities. In addition, OCR anticipates that implementation of the Final Rule will yield reductions in health disparities and increased access to health care, which, in turn, will contribute to an increase in health care coverage and an associated decrease in payments by the federal government for uncompensated care.