

CLIENT ALERTS

ACA Non-Discrimination Protections – Health Care Providers: Immediate Action Required by July 18

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IMPACT:

Health Care Providers, Insurers, TPAs

Section 1557 of the Affordable Care Act (ACA) and related regulations prohibit discrimination on the basis of race, color, national origin, sex, age, or disability, by any health program or activity that receives federal funding or assistance from the federal Department of Health and Human Services (HHS) or that is administered by an executive agency.

If you are a health care provider, odds are 9,999/10,000 that ACA's non-discrimination provisions and related regulations apply to you, as a service provider and as a sponsor or administrator of health care plans for your employees. And quick action is required: the May 2016 Final Regulation and its operations and compliance requirements discussed below go into effect on July 18, 2016. Its posted notice requirements go into effect 90 days later on October 17, 2016.

What entities are affected? What conduct is covered? What immediate actions are required?

Entities affected:

Health Care Providers as Service Providers:

ACA Section 1557 requirements and regulations affect all health care providers receiving payments from Medicare Part A, C, D, Medicaid and other federal Department of Health and Human Services (HHS) dollars, including:

- 6,174 hospitals

Related People

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- 900,000 physicians
- 16,032 skilled nursing physicians
- 9,407 home health agencies
- 3,346 hospices
- 210,989 independent and clinical labs
- Outpatient PT and speech pathology
- 5,317 ESRD facilities
- 3,757 rural health clinics
- 5,174 ASCs
- 3,907 FQHCs

Health Care Providers' Employee Group Health Care Plans, Insurers and TPAs:

Group health plans sponsored by health care providers and the insurers of such plans are also subject to Section 1557 non-discrimination requirements. Large health care practices and hospitals with self-insured plans may also contract with third-party administrators (TPAs) affiliated with insurers to administer their plans. Section 1557's non-discrimination requirements also apply to such TPAs and to health care insurers that offer Health Marketplace/Exchange plans.

Conduct Prohibited:

Discrimination by such group health plans and insurers and TPAs can take the form of discriminatory benefit design, coverage carve-outs, limits on health coverage, benefit claim denial, denial or refusal to issue or to renew a health insurance plan or coverage, discriminatory marketing, or the imposition of additional cost sharing. All of these discriminatory plan designs and/or practices must be eliminated by plan amendments.

While health care providers and their insurers and TPAs may understand most of the protected statuses that fall within Section 1557, they may not fully expect that Section 1557's prohibition against "sex discrimination" **includes gender identity discrimination**. Lesbian, gay, bi-sexual and transgender (LGBT) individuals cannot be discriminated against in receiving health care services or employee benefits or health insurance based on their sex, including their gender identity or nonconformity with sex stereotypes. Transgender people must be treated consistent with their gender identity.

For health care providers, discrimination against LGBT people or against any other protected persons under Section 1557 can take the form of refusal of treatment, harassment, delivery of different care or denial of access to facilities.

Immediate Actions Needed:

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The Final Regulation goes into effect on **July 18, 2016**, including its compliance and operations requirements, as described below:

Immediate Attention to Open Enrollment Materials:

For group health plans offered by health care providers and their insurers, Section 1557 will take effect the first day of the first plan year beginning on or after January 1, 2017. **As a practical matter, however, open enrollment materials in the upcoming fall enrollment periods should reflect the plan changes that go into effect in the next plan year.**

We recommend plan design review by plan benefits counsel and preparation of notice communications (a letter or other documents) describing anticipated changes to comply with Section 1557, for use during the open enrollment period. We also recommend plan review by benefits counsel for compliance through plan amendments effective for the first plan year on or after January 1, 2017.

Immediate Language Assistance Measures:

Section 1557 also enhances language assistance for people with limited English proficiency and seeks to improve effective communication for individuals with disabilities.

Immediate Grievance Procedure and Compliance Coordinator:

Covered entities **with 15 or more employees** must institute a grievance procedure for resolution of Section 1557 complaints and must designate a compliance coordinator.

Immediate Record-Keeping for Compliance Reports and Reviews:

The existing enforcement mechanisms under four long-standing federal civil rights acts apply to redress Section 1557 violations. These mechanisms require covered entities to keep records and to submit compliance reports to the OCR, to conduct compliance reviews and complaint investigations, and to provide technical assistance and guidance.

Posted Notices In Place No Later Than October 17, 2016:

Posted notices must be in place no later than October 17, 2016, 90 days after the Final Regulation becomes effective on July 18, 2016.

Posted notices must inform beneficiaries, enrollees, applicants, and members of the public of:

- (1) The entity's nondiscrimination policy;
- (2) The availability of auxiliary aids and services where necessary, at no cost;
- (3) Translation and language assistance services;
- (4) How to receive these supplemental services;
- (5) The name and contact information of the compliance person (for larger entities only);

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- (6) Complaint and grievance procedures; and
- (7) How to file a discrimination complaint with OCR.

Notices must generally contain taglines in at least the top 15 non-English languages spoken in the state in which the entity is located or does business, or for smaller communities, in at least the top two non-English languages spoken.

FOR ACTION STEP CHECKLISTS AND ADDITIONAL INFORMATION, PLEASE CLICK [HERE](#).

If you have any questions regarding the issues raised in this Alert, please contact the authors of this alert, or a member of Butzel Long's Health Care Law or Employee Benefits practices teams.

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