



June 28, 2016

ACA Non-Discrimination Protections - Immediate Action Required by July 18

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.

Since ACA became effective in 2010, the Office of Civil Rights (OCR) of HHS has enforced Section 1557. Recently, federal courts have held that this section of ACA allows individuals to sue health care providers if the individuals experience discrimination based on their protected status.

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.

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
- 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.

The OCR has indicated that it will review on a case-by-case basis whether a complained of discriminatory action results from discriminatory plan design for which a health care provider (as employer) or its group health plan may be responsible, or whether the action results from plan administration for which a TPA is responsible.

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.

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.**

The Final Regulation implementing Section 1557 specifically reinforces that 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, nonconformity with sex stereotypes or gender transition. Transgender people must be treated consistent with their gender identity and cannot be denied care provided to anybody else, including during transition-related care.

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. By way of example:

In March 2016, a federal judge refused to dismiss a lawsuit by a transgender man who alleged that he was mistreated at a hospital emergency department. The judge ruled that he had alleged a "plausible" claim that an

emergency room doctor had mistreated him and discriminated against him on the basis of gender identity. *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 (SRN/FLN), 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015).

The plaintiff presented to the hospital emergency department with inflamed female reproductive organs and a temperature of over 100. A doctor later said he could have died without treatment.

Even though he had indicated to the hospital intake clerk that he was male, he was given an “F” wristband which labeled him as female because his driver’s license identified him as such and he was listed as female in the hospital computers. He alleged an abusive and hostile oral and painful physical examination with an apparent intent by the emergency physician to disparage and humiliate him rather than treat him.

Weeks after his treatment and discharge, he received notice that no insurance payments were made on his behalf and that he owed the full amount of his care on the basis that “THE DIAGNOSIS IS INCONSISTENT WITH THE PATIENT’S GENDER.”

The plaintiff brought the lawsuit seeking a permanent injunction requiring the hospital and physician group to adopt practices conforming to ACA Section 1557. The lawsuit also sought compensatory damages for physical and emotional pain, and punitive damages.

In March, the court found that his alleged treatment by the hospital and emergency physician could constitute “unprofessional behavior” and that a fact-finder could infer discriminatory intent. The court further stated that the doctor’s “comments and hostile questioning about plaintiff’s sexual activities,” “coupled with his disregard for repeated requests by the plaintiff for the doctor to stop the painful physical examination, demonstrate evidence of mistreatment due to his gender identity.”

A complaint is also pending with the Office of Civil Rights at the Department of Health & Human Service, where an investigation is still ongoing.

Immediate Actions Needed:

The Final Regulation becomes effective 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 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.

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.

Although Section 1557 does not contain any blanket religious exemption, it does provide that the non-discrimination rules

will be not required to apply if doing so would violate applicable federal statutory protections for religious freedom and conscience. Pending cases in the federal courts will provide further guidance in this area.

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.

Required Notices Posted No Later Than October 17, 2016:

Health care providers subject to Section 1557 must posted required notices **no later than October 17, 2016**, i.e. 90 days after the July 18, 2016 effective date of the Final Regulation.

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);
- (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.

Action Steps

Action Steps for Health Care Providers as Service Providers, Health Care Insurers, and TPAs:

- Prepare and disseminate "notice" communications including nondiscrimination obligations
- Create notices and required taglines in the appropriate non-English languages and identify the 15 (or 2) languages that must be used in the relevant location
- Create policies, procedures and designs to implement non-discrimination (including gender identity and gender transition) in health services, auxiliary aid, and language access requirements, including American Sign Language signers and non-English speaking translators
- Educate employees and agents through appropriate workplace education and training
- Draft and implement a grievance procedure and appoint a compliance coordinator if the covered entity has 15 or

more employees

Action Steps for Health Care Providers as Plan Sponsors or Administrators:

- Review health and welfare plan documents for discriminatory provisions and revise as necessary
- Include letters or other notifications of compliance in open enrollment materials for plan years beginning on or after January 1, 2017
- Review health and welfare plan documents to insure compliance with gender identity and gender transition requirements
- Prepare and disseminate “notice” communications including nondiscrimination obligations
- Create notices and required taglines in the appropriate non-English languages and identify the 15 (or 2) languages that must be used
- Create policies, procedures and designs to implement non-discrimination, auxiliary aid, and language access requirements, including American Sign Language signers and non-English speaking translators
- Draft and implement a grievance procedure and appoint a compliance coordinator if the plan sponsor has 15 or more employees
- Follow the record-keeping and compliance reporting procedures established for compliance with Title VI of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973
- Monitor the group health plan’s covered service providers for compliance with Section 1557

Penalties and Legal Exposure:

Failure to act quickly can expose health care providers and their plans, insurers, and TPAs to considerable penalties or legal sanctions. With respect to enforcement, complaints to OCR can result in reviews and investigations by HHS and by the Department of Justice. Section 1557 also provides a private right of action for aggrieved individuals (including class actions), along with the potential for compensatory damages resulting from discrimination by covered entities. There is no requirement of the exhaustion of administrative remedies.

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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