# ACA COMPLIANCE BULLETIN

## HIGHLIGHTS

- A federal court has blocked enforcement of certain provisions of the final rule on Section 1557.
- Section 1557 applies to all health programs and activities (including Exchanges) that are administered or funded by HHS.
- Section 1557 has been in effect and enforced by HHS since the ACA's enactment in 2010.

## EFFECTIVE DATES

**December 31, 2016**
The preliminary injunction was issued blocking certain parts of the final rule.

**January 1, 2017**
Other provisions of the final rule will still take effect on the first day of the first plan year beginning on or after Jan. 1, 2017.

Provided By:
Sullivan Benefits

# FEDERAL COURT BLOCKS ACA SECTION 1557 NON-DISCRIMINATION RULES

## OVERVIEW

On Dec. 31, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide preliminary injunction temporarily blocking enforcement of the Section 1557 nondiscrimination rules under the Affordable Care Act (ACA).

The court's injunction specifically bans the Department of Health and Human Services (HHS) from enforcing the Section 1557 provisions prohibiting discrimination based on **gender identity** or **termination of pregnancy**.

The remaining Section 1557 provisions are not affected by the injunction, and will continue to be enforced by HHS' Office for Civil Rights (OCR). These provisions, which will take effect as scheduled (mostly on Jan. 1, 2017):

- ✓ Prohibit discrimination on the basis of disability, race, color, age, national origin or sex (other than gender identity); and
- ✓ Enhance language assistance for people with limited English proficiency.

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## Overview of the Section 1557 Final Rule

On May 13, 2016, HHS issued a final rule implementing ACA Section 1557 regarding nondiscrimination in federally funded health programs. The final rule:

- ✓ Prohibits discrimination in health care on the basis of race, color, national origin, age, disability and sex (including discrimination based on pregnancy, gender identity and sex stereotyping);
- ✓ Enhances language assistance for people with limited English proficiency; and
- ✓ Helps to ensure effective communication for individuals with disabilities.

***The final rule prohibits discrimination in the provision of health insurance by health insurers that participate in the Exchanges or otherwise receive federal funding from HHS.***

These nondiscrimination protections apply to all health programs and activities that receive federal funding from HHS or that are administered by HHS, including both federally facilitated and state-based Exchanges.

## Background

ACA Section 1557 is the first federal civil rights law to broadly prohibit discrimination on the basis of sex in federally-funded health programs. Previously, civil rights laws enforced by OCR broadly barred discrimination based only on race, color, national origin, disability or age.

In August 2016, five states and three Christian-affiliated health care groups filed a lawsuit challenging the Section 1557 final rule, arguing that the rule:

- ✓ Forces them to perform and provide insurance coverage for gender transition services and abortions against their religious beliefs and medical judgment; and
- ✓ Violates the federal Administrative Procedures Act (APA), the Religious Freedom Restoration Act (RFRA) and certain protections in the U.S. Constitution.

According to the plaintiffs, they would face enforcement actions under the Section 1557 final rule that would cause them irreparable injury if the rule was implemented. As a result, they argued that an injunction was necessary to prevent HHS from enforcing the rule.

## The Court's Injunction

Ultimately, the District Court sided with the plaintiffs, issuing a **nationwide injunction prohibiting HHS from enforcing the Section 1557 nondiscrimination provisions related to gender identity or abortion**. The Court ruled that, without an injunction, the Section 1557 final rule would likely cause substantial harm for the plaintiffs, including the risk of federal funding withdrawal and civil liability. In contrast, the Court determined that HHS would suffer no harm in delaying implementation of the rule if it is ultimately upheld.

The Court's injunction does not affect the Section 1557 provisions related to:

- ✓ Nondiscrimination on the basis of disability, race, color, age, national origin or sex (other than gender identity); and
- ✓ Enhanced language assistance for people with limited English proficiency.

These provisions, which will take effect as scheduled (mostly on Jan. 1, 2017), will continue to be enforced by OCR.

## Application to Employers

The Section 1557 final rule applies to:

- ✓ Any health program or activity that receives funding from HHS (such as hospitals that accept Medicare or doctors who receive Medicaid payments);
- ✓ State based and federally facilitated Exchanges and issuers that participate in those Exchanges; and
- ✓ Any health program that HHS itself administers.

Questions have arisen as to how the Section 1557 nondiscrimination rules apply to employers that offer health benefits to their employees. According to the preamble to the final rule, an employer that receives federal funding and provides an employee health benefit program to its employees will be liable for discrimination in that employee health benefit program only in three defined circumstances:

1. If **the employer is principally engaged in providing or administering health services or health coverage** and receives federal funding, the employer would be subject to Section 1557 in its provision or administration of employee health benefit programs to its employees. (For example, if a hospital provides health benefits to its employees, it will be covered by Section 1557 not only for the services it offers to its patients or other beneficiaries, but also for the health benefits it provides to employees.)
2. If an entity **receives federal funding, the primary objective of which is to fund an employee health benefit program**, that entity's provision or administration of the health benefit program will be covered by Section 1557, regardless of the business in which the entity is engaged.
3. If an employer is not principally engaged in providing or administering health services or health insurance coverage, but **operates a health program or activity (that is not an employee health benefit program) that receives federal funding**, the employer will be covered for its provision/administration of an employee health benefit program, but only with regard to employees in the health program or activity. (For example, when a state receives federal funding for its Medicaid program, the state will be governed by Section 1557 in the provision of employee health benefits for its Medicaid employees, but not for its transportation department employees, assuming no part of the state transportation department operates a health program or activity.)

In summary, **unless the primary purpose of the federal funding is to fund employee health benefits, Section 1557 would not apply to an employer's provision of employee health benefits, if the provision of those benefits is the only health program or activity operated by the employer**. This is the case regardless of whether the employee health benefit program is self-insured or fully-insured by the employer.

The final rule also addresses situations involving employers that do not directly receive federal funding for employee health benefits, such as employers sponsoring self-insured plans that are administered by health insurance issuers offering coverage through an Exchange. The final rule **does not exclude third-party administrators (TPAs) providing administrative services to self-insured plans**. However, it does adopt specific procedures to govern the processing of complains in these cases.

The final rule recognizes that TPAs are generally not responsible for the benefit design of the self-insured plans they administer, and that ERISA (and likely the contracts into which TPAs enter with the plan sponsors) requires plans to be administered consistent with their terms. As a result, OCR will determine whether responsibility for the decision or other action alleged to be discriminatory rests with the employer or the TPA.

**TPA Liability**

**Where the alleged discrimination is related to the plan administration by a TPA that is a covered entity, OCR will process the complaint against the TPA liability because the TPA is responsible for the decision or other action being challenged in the complaint.** For example, OCR will proceed against the TPA in cases where a TPA:

- Denies a claim because the individual's last name suggests that he or she is of a certain national origin; or
- Threatens to expose an employee's transgender or disability status to his or her employer.

**Employer Liability**

**OCR will typically address the complaint against that employer in cases where:**

- **The alleged discrimination relates to a self-insured plan's benefit design** (for example, a plan that excludes coverage for all health services related to gender transition); and
- **OCR has jurisdiction over a claim against an employer under Section 1557 because the employer is separately subject to Section 1557** (for example, the employer is a hospital that receives federal funding and provides health benefits to its employees).

However, if OCR does not have jurisdiction over an employer responsible for benefit design, it typically will refer or transfer the matter to the Equal Employment Opportunity Commission (EEOC) and allow that agency to address the matter.

## Protections for Exchange Coverage and Other Federally Funded Health Plans

The final rule prohibits discrimination in the provision of health insurance and related coverage by health insurers that participate in the Exchanges or otherwise receive federal funding from HHS. Under this rule, the following actions are prohibited on the basis of race, color, national origin, sex, age or disability.

Under the final rule, covered entities may not, on a discriminatory basis:

- Deny, cancel, limit or refuse to issue or renew a health-related insurance plan or coverage;
- Deny or limit a claim or impose additional cost-sharing or other limitations or restrictions on coverage;
- Engage in discriminatory marketing practices or adopt or implement discriminatory benefit designs in health-related insurance or other health-related coverage;
- Deny or limit coverage or a claim, or impose additional cost-sharing or other limitations or restrictions on coverage, for sex-specific health services provided to transgender individuals just because the individual seeking such services identifies as belonging to another gender; or
- Categorically exclude coverage for all health services related to gender transition, or deny or limit (or impose additional cost-sharing or other limitations or restrictions on) coverage for specific health services related to gender transition if those result in discrimination against a transgender individual.

## Protections Against Sex Discrimination

The final rule's prohibition against sex discrimination in health care includes discrimination based on:

- An individual's sex;
- Pregnancy, childbirth and related medical conditions;
- Gender identity; and
- Sex stereotyping.

Under the final rule, individuals cannot be denied health care or health coverage based on their sex, including their gender identity and sex stereotyping. This means that women must be treated equally with men regarding the health care and insurance they receive. In addition, categorical coverage exclusions or limitations for all health care services related to gender transition are discriminatory.

In general, the rule provides that individuals must be treated consistent with their gender identity, including in access to facilities. However, 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 those services identifies as belonging to another gender. Sex-specific health programs or activities are permissible only if the entity can demonstrate an exceedingly persuasive justification (that is, that the sex-specific health program or activity is substantially related to the achievement of an important health-related or scientific objective).

The final rule does not resolve whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557. However, OCR will evaluate complaints that allege sex discrimination related to an individual's sexual orientation in order to determine if they involve the type of stereotyping that can be addressed under Section 1557. HHS supports prohibiting sexual orientation discrimination as a matter of policy, and will continue to monitor legal developments on this issue.

## Protections for Individuals with Limited English Proficiency

Consistent with longstanding principles under civil rights laws, the final rule clarifies that the prohibition on national origin discrimination requires covered entities to take reasonable steps to provide meaningful access to each individual with limited English proficiency who is eligible to be served or likely to be encountered within the entities' health programs and activities. An **individual with limited English proficiency** is a person whose primary language for communication is not English and who has a limited ability to read, write, speak or understand English.

Reasonable steps may include the provision of language assistance services, such as oral language assistance or written translation. The standards in the final rule are flexible and context-specific, taking into account factors such as the nature and importance of the health program and the communication at issue, as well as other considerations, including whether an entity has developed and implemented an effective language access plan.

Covered entities are required to **post a notice** of individuals' rights, providing information about communication assistance for individuals with limited English proficiency, among other information. In each state, covered entities must post taglines in the top 15 languages spoken by individuals with limited English proficiency in that state that indicate the availability of language assistance. OCR has translated a sample notice of nondiscrimination and the taglines for use by covered entities into 64 languages. For translated materials, visit HHS' website.

Covered entities are prohibited from using low-quality video remote interpreting services or relying on unqualified staff or translators when providing language assistance services. Instead, they are encouraged to develop and implement a language access plan to ensure they are prepared to take reasonable steps to provide meaningful access to each individual who may require assistance.

## Protections for Individuals with Disabilities

Consistent with existing requirements, Section 1557 requires covered entities to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communication with others. Section 1557 also requires covered entities to provide appropriate auxiliary aids and services (such as alternative formats and sign language interpreters) where necessary for effective communication.

Section 1557 incorporates the 2010 Americans with Disabilities Act (ADA) Standards for Accessible Design as the standards for physical accessibility of new construction or alteration of buildings and facilities. Almost all covered entities are already required to comply with these standards.

In addition, under Section 1557, covered entities:

- ✓ Must post a notice of individuals' rights, providing information about communication assistance among other information;

- Must make all programs and activities provided through electronic and information technology accessible to individuals with disabilities, unless doing so would impose undue financial or administrative burdens or would result in a fundamental alteration in the nature of the covered entity's health program or activity;
- Cannot use marketing practices or benefits designs that discriminate on the basis of disability; and
- Must make reasonable changes to policies, practices and procedures, where necessary, to provide equal access for individuals with disabilities, unless the covered entity can demonstrate that making the changes would fundamentally alter the nature of the health program or activity.

## More Information

For more information about Section 1557 and the final rule, visit HHS' website. HHS has also issued a set of frequently asked questions (FAQs) on the Section 1557 final rule.

*Source: The Department of Health and Human Services*