

Fact Sheet: Nondiscrimination in Health Programs and Activities Proposed Rule

Section 1557 of the Affordable Care Act

The Department of Health and Human Services (HHS) has issued a proposed rule to advance health equity and reduce disparities in health care. The proposed rule, *Nondiscrimination in Health Programs and Activities*, will assist some of the populations that have been most vulnerable to discrimination and will help provide those populations equal access to health care and health coverage. It harmonizes protections provided by existing, well-established federal civil rights laws,^[1] and clarifies the standards HHS would apply in implementing Section 1557 of the Affordable Care Act, which provides that individuals cannot be subject to discrimination based on their race, color, national origin, sex, age, or disability.

Building on long-standing and familiar civil rights principles, the proposed rule takes important steps forward. Section 1557 is the first federal civil rights law to prohibit discrimination on the basis of sex in health care. It extends nondiscrimination protections to individuals enrolled in coverage through the Health Insurance Marketplaces and certain other health coverage plans. And it provides that HHS's health programs are covered by the rule.

The proposed rule explains consumers' rights under the law and provides clarity to covered entities about their obligations. Section 1557 has been in effect since its enactment in 2010 and the HHS Office for Civil Rights (OCR) has been enforcing the provision since it was enacted.

Specific Provisions

The basic requirement of the law is that consumers cannot be denied health services or health coverage or discriminated against in other ways in health services or coverage because of their race, color, national origin, sex, age, or disability. The proposed rule addresses some of the populations that have historically been subject to discrimination. For example, the proposed rule includes prohibitions on gender identity discrimination as a form of sex discrimination, enhances language assistance for people with limited

English proficiency, and requires effective communication for individuals with disabilities. Overall, the proposed rule ensures consumers have the equal access to health care and health coverage provided by the Affordable Care Act.

The proposed rule applies to any health program or activity, any part of which receives funding from HHS, such as hospitals that accept Medicare patients or doctors who treat Medicaid patients. It applies to any health program that HHS itself administers. And it applies to the Marketplaces and to all plans offered by issuers that participate in those Marketplaces.

Protections Against Sex Discrimination

The proposed rule requires that women have equal access to the health care they receive and the insurance they obtain. Moreover, the rule makes clear that sex discrimination includes discrimination based on gender identity. For example -

- Individuals cannot be denied health care or health coverage based on their sex, including their gender identity.
- Individuals must be treated consistent with their gender identity, including in access to facilities.
- Sex-specific health care cannot be denied or limited just because the person seeking such services identifies as belonging to another gender. For example, a provider may not deny an individual treatment for ovarian cancer, based on the individual's identification as a transgender man, where the treatment is medically indicated.
- Explicit categorical exclusions in coverage for all health care services related to gender transition are facially discriminatory. Other exclusions for gender transition care will be evaluated on a case-by-case basis.

HHS is seeking feedback and public comment on the proposed rule. With regard to the proposed rule's provisions on sex discrimination, for example:

- The proposed rule makes clear HHS's commitment, as a matter of policy, to banning discrimination based on sexual orientation, and requests comment on how a final rule can incorporate the most robust set of protections against discrimination that are supported by the courts on an ongoing basis.

- The proposed rule also requests comment on whether Section 1557 should include an exemption for religious organizations and what the scope of any such exemption should be. Nothing in the rule would affect the application of existing protections for religious beliefs and practices, such as provider conscience laws and the regulations issued under the ACA related to preventive health services.

Communication with Individuals with Limited English Proficiency and with Individuals with Disabilities

The proposed rule adopts the longstanding principle that covered entities must take reasonable steps to provide meaningful access to individuals with limited English proficiency. In determining what the standard requires, OCR will evaluate each case on its facts, including the nature of the communication, and, as applicable, how often the entity encounters individuals who speak the language at issue and the resources of the entity.

Under the proposed rule, covered entities would be required to:

- Post a notice of consumer rights providing information about communication assistance; and
- Post taglines in the top 15 languages^[2] spoken by individuals with LEP nationally, indicating the availability of such assistance.

To reduce burden and costs, OCR will provide a sample notice and translated taglines for use by covered entities. In addition, OCR will translate the notice into 15 languages and provide the translated notices to covered entities, should they wish to post one or more of those notices for their consumers.

Consistent with existing requirements, the proposed rule also requires covered entities to provide effective communication for individuals with disabilities by providing access to auxiliary aids and services, including alternative formats and sign language interpreters, unless the entity can show an undue burden or a fundamental alteration. The notice that covered entities must post provides information about these services as well. The proposed rule also incorporates familiar requirements related to the accessibility of facilities and technology and requires reasonable modifications of policies and practices where necessary to provide equal access for people with disabilities.

Coverage of Health Insurance in Marketplaces and Other Health Plans

The proposed rule prohibits discrimination in health insurance coverage on the basis of race, color, national origin, sex, age, or disability. Among other things, this means that an issuer that participates in the Marketplace cannot deny, cancel, limit, or refuse to issue or renew any of its insurance policies or employ marketing practices or benefit designs that discriminate on any of these bases. The Marketplaces themselves must also operate in a nondiscriminatory way. And hospitals and certain other health care providers that receive federal financial assistance from HHS are also accountable for discrimination in the health plans they offer to their employees.

Consumer Rights

If individuals believe they have been subject to discrimination in health care, they can file complaints directly with OCR. In line with existing federal civil rights laws, the proposed rule provides for a private right of action, giving individuals the ability to file a lawsuit under Section 1557.

Public Comment

The NPRM seeks comment on a variety of issues to better understand individuals' experiences with health care discrimination and covered entities' experiences in complying with federal civil rights laws. The record will be open for 60 days – until November 9, 2015 -- for members of the public to provide comments on the proposed rule. OCR will consider those comments as it drafts a final rule to implement Section 1557.

The text of the regulation in English is available at <https://www.federalregister.gov>. Translated summaries of the regulation will be available soon at www.hhs.gov/ocr. If you need the regulation or summary in an alternative format, please call (800) 368-1019 or (800) 537-7697 (TDD) for assistance or email 1557@hhs.gov.

You can submit comments, identified by RIN 0945-AA02, electronically through <http://www.regulations.gov>, by mail to the U.S. Department of Health and Human Services, Office for Civil Rights, or via hand delivery or courier.

For more information, please go to OCR's website at www.hhs.gov/ocr.

[1] Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975.

[2] Spanish, Chinese, Vietnamese, Korean, Tagalog, Russian, Arabic, French Creole, French, Portuguese, Polish, Japanese, Italian, German, and Persian (Farsi).