

PUBLICATION

How to Comply with HHS' New Nondiscrimination Compliance Infrastructure Requirements in Your Facility

Authors: Layna S. Cook Rush, Tenia L. Clayton, Katherine A. Denney
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The U.S. Department of Health and Human Services Centers for Medicare and Medicaid Services and Office of the Secretary (collectively, HHS) released on May 6, 2024, the agencies' Final Rule governing the implementation of Section 1557 of the Affordable Care Act (Section 1557), the nation's first federal civil rights law specific to health care. Many of its provisions become effective on Friday, July 5, 2024, 60 days after the May 6, 2024 publication date. However, the Final Rule also identifies certain organizational, operational, and notice requirements of the covered entities to which it applies that are phased in over a later timeline.

To which organizations does Section 1557 apply?

Section 1557 applies to all covered entities: generally, these are health programs and activities that receive HHS funding or are administered by HHS, the health insurance Marketplaces (state and federal), and all health plans offered by issuers that participate in those Marketplaces and that receive federal financial assistance. This includes but is not limited to, hospitals, health clinics, health insurance issuers, state Medicaid agencies, community health centers, physician practices, nursing homes, and home health care agencies.

What does Section 1557 require covered entities with more than fifteen (15) employees to do?

In addition to ensuring that discrimination based on protected characteristics does not occur, Section 1557 makes applicable specific requirements of covered entities with fifteen (15) or more full- or part-time employees and/or independent contractors. The covered entities must designate at least one employee as a Section 1557 Coordinator who will be responsible for serving as an internal resource dedicated to coordinating and ensuring the covered entity's compliance with the Rule. One of the Section 1557 Coordinator's significant responsibilities will be to receive, review, and investigate any grievance communicated to the covered entity — be it from a patient, employee, or other source — alleging noncompliance with Section 1557.

In fact, the covered entity must implement written civil rights grievance procedures for its health programs and activities that provide for the "prompt and equitable resolution" of any allegations that would be prohibited by Section 1557. The grievance procedure must be accessible to individuals with limited English proficiency and individuals with disabilities. The covered entity must also establish written procedures and retain records related to grievances filed with it that allege discrimination on the basis of race, color, national origin, sex, age, or disability in its health care programs or activities for no less than three years from the date of the filing of the grievance. Lastly, the covered entity must also keep the identity of the individual who filed the grievance confidential unless disclosure is required by law or necessary to its investigation.

| Section 1557 Requirement | Timeline by which covered entities must | Date by which covered entities must comply |
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| | comply | |
|--|---------------------------------------|------------------|
| Designate a Section 1557 Coordinator who will be responsible for carrying out the covered entity's organizational requirements | Within 120 days of the effective date | November 2, 2024 |

What does Section 1557 require all covered entities to do?

The Final Rule requires all covered entities to develop and implement written policies and procedures designed to facilitate compliance with the requirements of the Rule. Each covered entity and its health care programs and activities are required to adopt and implement a nondiscrimination policy that must, at a minimum, provide the contact information for the Section 1557 Coordinator and state that the covered entity and its health care programs and activities are prohibited from unlawfully discriminating on the basis of race, color, national origin (including limited English proficiency), sex (including pregnancy, sexual orientation, gender identity, and sex characteristics), age, or disability.

Additionally, all covered entities are required to post and provide two notices: a Notice of Nondiscrimination and a Notice of Availability of Language Assistance Services and Auxiliary Aids and Services (Notice of Availability). The Notice of Nondiscrimination must state that the covered entity does not discriminate based on any of the protected characteristics, offer specific information regarding "reasonable modifications" that the covered entity may make to accommodate individuals with disabilities, and provide information to the reader regarding how to file a grievance or complaint. The Notice of Availability must inform the reader, **in each of the area's fifteen (15) most common non-English languages**, that the covered entity provides language assistance services and appropriate auxiliary aids and services free of charge, when necessary for compliance with Section 1557.

Further, the covered entity must develop and implement written language access procedures to support compliance with the Rule and take reasonable steps to provide "meaningful access" to individuals with limited English proficiency, meaning the ability to communicate effectively on a level comparable to that enjoyed by individuals without communication barriers. In addition, the covered entity must develop and implement written communication procedures with requirements to take appropriate steps to ensure that communications in its health care programs and activities with individuals with disabilities are as effective as communications with individuals without disabilities. The covered entity must also develop and implement procedures for making reasonable modifications to their policies, practices, and procedures that allow individuals with disabilities equal opportunity to participate in their health care programs and activities.

| Section 1557 Requirement | Timeline by which covered entities must comply | Date by which covered entities must comply |
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| Develop and implement written policies and procedures to facilitate compliance with Section 1557 | Within one year of the effective date | July 5, 2025 |
| Train relevant employees on the | Begin training employees | No later than May 1, 2025 |

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| covered entity's Section 1557 policies and procedures | no later than thirty (30) days after the covered entity implements its policies and procedures and no later than three hundred (300) days after the effective date | (300 days after the Final Rule's effective date) |
| Post and provide a Notice of Nondiscrimination to participants, beneficiaries, enrollees, and applicants of their health programs and activities, and to the public | Within 120 days of the effective date | November 2, 2024 |
| Post and provide a Notice of Availability of Language Assistance Services and Auxiliary Aids and Services in each of the area's 15 most common non-English languages to inform individuals of the availability of language assistance services and auxiliary aids and services free of charge | Within one year of the effective date | July 5, 2025 |

The policies and procedures must include an effective date and be reasonably designed, taking into account the size, complexity, and type of health programs or activities undertaken by the covered entity, to ensure compliance.

What do I need to do?

Given the rapidly approaching deadlines for action by covered entities, such covered entities should begin to work toward compliance as soon as possible. Legal challenges to the Rule have already begun. The Attorney General of Florida filed a lawsuit on May 6, 2024, alleging that the Rule allows HHS to force doctors to perform gender-affirming care and surgery. While this is likely one of potentially many other legal challenges, in the interim, covered entities should begin to prepare as if there will be no interruption in the applicability dates. Covered entities must begin to:

- Identify which employee(s) will fulfill the Section 1557 Coordinator role and duties and prepare the associated operational procedures;
- Review their current policies and procedures regarding their receipt, evaluation, investigation, and response to grievances from patients and/or residents and employees;
- Develop policies, procedures, and training protocols; and
- Draft sufficient Notices of Nondiscrimination and Availability of Language Assistance Services and Auxiliary Aids and Services.

Section 1557 requires covered entities to be administratively prepared to provide notice of new services, develop policies and procedures accordingly, collect and resolve grievances, and allocate resources toward

proper implementation. We recommend that all covered entities begin immediate preparation for the coming applicability dates of the Rule's provisions. We further recommend that covered entities seek the advice of counsel where prudent and when questions regarding necessary accommodations arise.

For more information on this topic, please contact your Baker Donelson counsel.

***This article does not discuss Section 1557's provisions regarding accessibility for buildings and facilities, accessibility of information and communication technology for individuals with disabilities, nondiscrimination in health insurance coverage and other health-related coverage, the use of patient care decision support tools, or telehealth applications.*