

PUBLICATION

The New Law of the Land: HHS Finalizes Health Care Nondiscrimination Provisions in Section 1557 Final Regulation

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 the Office of the Secretary (collectively, HHS) released 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 to focus exclusively on nondiscrimination in health care. Most of its nondiscrimination provisions become effective on Friday, July 5, 2024, 60 days after the May 6, 2024 publication date. Section 1557 prohibits covered entities that administer health programs and activities from denying program benefits to, excluding from participation, or discriminating against individuals based on certain characteristics.

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. Section 1557 expands protections for individuals who are directly affected by a covered entity's health programs and activities, such as through the receipt of health care services.

What are Section 1557's nondiscrimination provisions and how do they apply?

Section 1557 prohibits covered entities from discriminating against individuals on the basis of any of the following, or any combination of the following, regardless of the health care they seek:

- Race;
- Color;
- National origin (including in language);
- Age; and
- Disability.
- Sex, including:
 - Pregnancy or related conditions;
 - Sexual orientation;
 - Gender identity;
 - Sex stereotypes; and
 - Sex characteristics, including intersex traits.

Assisting Individuals with Limited English Proficiency

Section 1557 expands protections for individuals with limited English proficiency (LEP) and their companions, who may be a family member, friend, or associate with the individual who assists in communication. The Rule requires that covered entities provide language assistance services to ensure that individuals with LEP have "meaningful access" to services and benefits, meaning the ability to communicate effectively on a level comparable to that enjoyed by individuals without communication barriers. Covered entities must provide individuals with LEP language assistance services free of charge, in an accurate and timely manner, and in a way that protects the privacy of the individual with LEP. In some cases, this may require the provision of a qualified interpreter to translate information for the individual with LEP. Inaccurate and incomplete translations or interpretations may not meet this standard.

Assisting Individuals with Disabilities

Similarly, covered entities must provide appropriate auxiliary aids and services where necessary to afford individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, health programs or activities. Such auxiliary aids must be provided free of charge, in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability. The Rule also requires that covered entities make "reasonable modifications" to policies, procedures, and practices when the modifications are necessary to avoid discrimination based on a disability unless doing so would fundamentally alter the nature of the health program or activity.

Providing Equal Program Access on the Basis of Sex

Section 1557 is the nation's first federal civil rights law to prohibit discrimination on the basis of sex in health care. The Rule prohibits covered entities from imposing restrictions on the care, including gender-affirming care, that individual providers give based on a patient's gender identity or sex assigned at birth. The Rule does not require the provision of any specific services, and providers do not have an affirmative obligation to offer any health care, including gender-affirming care, that they do not think is clinically appropriate or if religious freedom and conscience protections apply.

Nothing in the Rule prohibits a covered entity from operating programs or facilities that are separated by sex, so long as the operation does not subject anyone, including transgender and nonbinary individuals, to more than minimal harm. A covered entity must not deny a nonbinary individual access to a health program or facility, such as some nursing homes or hospitals, on the basis that the program or facility separates patients and/or residents based on sex or offers separate male and female programs or facilities.

Prohibiting Sex Discrimination Related to Marital, Parental, or Family Status

A covered entity must not take an individual's sex into account in applying any rule concerning an individual's current, perceived, or past marital, parental, or family status. Section 1557 is designed to prevent, for example, the denial of care of some women because they are single, unmarried, childless, or not in the presence of a male partner when seeking birth control. It also protects families headed by same-sex couples who may be denied the right to make medical decisions for their children.

Prohibiting Discrimination on the Basis of Association

Section 1557 prohibits discrimination against an individual or entity on the basis of the race, color, national origin, sex, age, or disability of an individual with whom the individual or entity is known to have a relationship or association. It also prohibits a covered entity from discriminating against another entity because that entity serves people protected under this Rule (i.e., individuals with substance use disorders or disabilities, race or national origin, age, etc.)

What if my organization does not agree with some of Section 1557's nondiscrimination provisions?

Section 1557 prohibits discrimination on certain bases and does not interfere with individual clinical judgment about the appropriate course of care for a patient. HHS' Office of Civil Rights (OCR), the entity that enforces Section 1557, has established an administrative process under which recipients of federal funds can notify OCR of their views that they are exempt from certain provisions of Section 1557 due to an applicable federal conscience or religious freedom law. Upon notification, OCR may grant the recipient a temporary exemption that will remain in effect while OCR reviews the request and during any administrative appeal. Notably, Section 1557 also provides an alternative remedy of a private right of action for an individual who believes that a covered entity has violated their rights, meaning that the individual will be able to file a lawsuit against the covered entity for an alleged violation of Section 1557, separate and apart from any complaint the individual may file with OCR.

What do I need to do?

Covered entities should prepare for a new legal landscape in seeking to avoid allegations of discrimination in providing activities, programs, and services to their patients and/or residents. 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, the nondiscrimination provisions of Section 1557 will become the law of the land.

For example, after the Rule becomes effective:

- A covered entity cannot rely on a companion to interpret or otherwise facilitate communication with an individual with a disability unless the individual specifically requests that the companion be used, the companion agrees, and it is appropriate under the circumstances;
- When a nonbinary individual seeks participation in a single-sex health program or activity, or a health program or activity that maintains sex-separate facilities — for example, some nursing homes and hospitals — the covered entity should work with that individual to determine where they will be best served and where they can benefit the most from the health program or activity without experiencing trauma, distress, or threats to their safety due to an incorrect placement; and
- A covered entity cannot discriminate against individuals (including friends, caregivers, and family members) based on their association with an individual in recovery from substance use disorder or with a history of drug use.

Section 1557 requires covered entities to demonstrate a heightened sensitivity to the needs of all of their patients and/or residents and to plan, in advance, the accommodations that the covered entity must be prepared to make. We recommend that all covered entities begin to review their policies, procedures, and abilities to make accommodations to their current operations so that they may quickly come into compliance with Section 1557 and avoid inadvertently discriminating against any of their patients and/or residents. 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.*