

Final Rule on Nondiscrimination in Health Programs and Activities

On May 13, the Department of Health and Human Services (HHS), and specifically the Office of Civil Rights (OCR), issued a final rule on nondiscrimination in health programs and activities under Section 1557 of the Affordable Care Act (ACA). This section of the ACA serves protected classes of individuals whose health coverage may not be denied, cancelled, limited or refused on the basis of race, color, national origin, sex, age, or disability. The final rule clarifies existing nondiscrimination requirements, and sets new implementation standards for Section 1557.

This rule is effective July 18, 2016. However, health plans that require changes in benefits design are required to comply on the first day of the plan or policy year beginning on or after January 1, 2017.

The broad application of this final rule will affect the federal and state Marketplaces, all health care providers and health insurance issuers and employers that receive federal financial assistance. Financial assistance from HHS includes Medicare Part A, student health plans, advanced premium tax credits and many other programs.

The final rule is broad in scope. Any entity that is subject to the nondiscrimination requirements must also ensure that its own employer-sponsored plans are compliant.

Key provisions and clarifications in the final rules include:

- **Expanded protection for transgender individuals**

Insurers and group health plans cannot limit accessibility to health services typically or exclusively available to one gender. In other words, certain services cannot be denied or limited due to an individual's sex assigned at birth, gender identity, or recorded gender. With that, plans are not required to cover any specific item or service.

- **Required language assistance**

Insurers, employers and other entities sponsoring group health plans must provide nondiscrimination notices and "taglines" to their employees and the general public that explain how individuals can obtain language services. These notices must be provided in at least the top 15 non-English languages spoken in a given state, and must be made available on physical premises, on the web and in significant documents, such as a Summary of Benefits and Coverage (SBC).

Sample tagline provided in regulations: ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).

- **Communication assistance for individuals with disabilities**

Notices must also be readily available for individuals and the general public that confirm how individuals with disabilities can receive auxiliary aids and communication services without charge and in a timely manner. These services include qualified interpreters and information in alternate formats, to ensure equal participation opportunity.

- **Application to administrative services only (ASO) self-insured employer plans** Complaints that involve self-insured plans will be reviewed on a case-by-case basis to determine liability for discriminatory activity between the employer, insurer and/or third party administrators. Third party administrators of self-insured plans will generally be liable only for their own discriminatory actions, such as discriminatory denial of claim. This is in contrast to insured plans, where insurers are liable for any discriminatory benefit design. As a result, benefits design changes in both types of plans may be appropriate to ensure compliance with the final rule.

Expatriate Plans

The final regulations confirm that Section 1557 of the ACA and the final rule do not apply to expatriate health plans, expatriate health insurance issuers, or employer plan sponsors of expatriate plans, as defined in the Expatriate Health Coverage Clarification Act (EHCCA).