

NEW NONDISCRIMINATION REQUIREMENTS UNDER ACA SECTION 1557: DO YOU HAVE TO COMPLY?

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Employee Benefits Alert

This summer, the U.S. Department of Health and Human Services ("HHS") issued final regulations under Section 1557 of the Affordable Care Act ("ACA"), which impacts entities principally engaged in providing or administering healthcare or health services, including group health plans. There are several questions employers should consider in light of these newly released regulations.

1. WHAT IS SECTION 1557?

Section 1557 is a new nondiscrimination provision under the ACA and provides that an individual cannot, on the grounds of race, color, nation origin, sex, age, or disability, be excluded from participation in, denied benefits, of or be subject to discrimination under any health program or activity that is receiving federal financial assistance.

2. IS MY COMPANY SUBJECT TO THE NEW REGULATIONS UNDER SECTION 1557?

Your company is subject to the new regulations if it is a "covered entity." A covered entity is an entity that is a "health program or activity" and that receives federal financial assistance from HHS. Examples of health programs or activities include group health plans, hospitals, health clinics, health insurance issuers, and physicians' practices. Examples of federal financial assistance from HHS include funds, services of federal personnel, and real and personal property (e.g., research grants, Medicare payments, Medicare Part D subsidies).

3. CAN THESE NEW REQUIREMENTS IMPACT MY COMPANY IF THE COMPANY ITSELF IS NOT A COVERED ENTITY?

Yes. An employer can be impacted by the regulations, even if the employer itself is not a covered entity. For example, if the employer sponsors a self-insured group health plan that accepts federal funds, such as Medicare Part D subsidies for retiree medical coverage, the **plan** will be subject to these new requirements. In that case, the employer should ensure that the plan complies with the regulations.

That being said, private employers who are not in the health care industry, who do not receive federal financial assistance of any kind and who sponsor self-insured health plans do not have to comply with these new requirements **unless** those **plans** receive federal financial assistance (e.g., Medicare Part D subsidies).

4. WHAT IS REQUIRED OF ENTITIES SUBJECT TO THE REGULATIONS?

Anti-Discrimination: The new regulations prohibit discrimination on the basis of race, color, national origin, age, or disability in health programs and activities. The regulations focus on discrimination based on sex, which includes discrimination based on sexual stereotyping and gender identity. For example, plans cannot deny coverage or services due to an individual's gender identity or sex assigned at birth being different from the one to which such services are normally available. In addition, employers that sponsor a group health plan subject to the Section 1557 regulations should ensure that:

- the plan does not include a categorical exclusion for all health services related to gender transition; and
- any denial of coverage for gender transition is made on a nondiscriminatory basis and based on medical evidence.

A covered entity should closely review the regulations and consult with counsel and service providers to ensure that it is complying with the final regulations.

Notice Requirements: There are several specific notice requirements in the regulations. For example, a covered entity must notify employees that it does not discriminate on the basis of race, color, national origin, sex, age, or disability and it must provide guidance for disabled individuals and non-English speakers regarding how to obtain certain assistance. The notice requirements are very detailed, so a covered entity should closely review the requirements to ensure that it is complying with the final regulations.

Designation of Responsible Employee and Adoption of Grievance Procedures: A covered entity with 15 or more employees must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Section 1557 and the final regulations, including the investigation of any grievance communicated to it alleging noncompliance or alleging any action that would be prohibited by these new requirements. Such a covered entity must also adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of grievances alleging any action that would be prohibited by these new requirements. A sample grievance procedure is included in the final regulations.

Covered entities can increase the scope of the existing grievance procedures required under Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act to accommodate complaints of discrimination addressing all bases prohibited under Section 1557, and nothing in the rule bars a covered entity from combining the grievance procedure required under Section 1557 with procedures it uses to address other grievances, including those unrelated to individuals' civil rights.

5. WHEN MUST MY COMPANY OR MY PLAN COMPLY WITH THE NEW REGULATIONS IF IT IS A COVERED ENTITY?

The substantive provisions of the rule became effective on July 28, 2016, so covered entities should already be complying with the nondiscrimination provisions of the regulations. The notice requirements became effective on October 16, 2016. If the covered entity is a group health plan that requires a plan amendment to comply with the regulations, such amendment must be adopted by the first day of the first plan year on or after January 1, 2017.

6. IF MY COMPANY AND MY PLAN DO NOT RECEIVE FEDERAL FINANCIAL ASSISTANCE FROM HHS, IS THERE ANY RISK IN FAILING TO COMPLY WITH SECTION 1557?

An employer still faces some risk if it fails to comply with Section 1557 and the HHS regulations, even if it is not technically subject to HHS's jurisdiction because it is not receiving federal financial assistance from HHS. For example, HHS has indicated that it can refer an employer to another federal agency (such as the Equal Employment Opportunity Commission) if HHS finds discrimination. In addition, as we have seen recently in the courts, there is a litigation risk associated with discrimination under Section 1557. Therefore, an employer may consider voluntary compliance with these new requirements in order to mitigate these risks.

7. HOW DOES THE RECENT PRESIDENTIAL ELECTION IMPACT MY COMPANY'S OBLIGATIONS UNDER THE NEW REGULATIONS?

It is unclear how the presidential election may impact the new regulations but, at this point, the regulations are currently in full effect. We will continue to monitor developments regarding these nondiscrimination regulations, as well as all aspects of the ACA.

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