

New ACA Nondiscrimination Rules: Protecting Individuals Against Sex Discrimination

Insight — June 8, 2016

On May 18, 2016, HHS published its final rules implementing the anti-discrimination provisions of the Affordable Care Act § 1557. This is the third of three alerts discussing various aspects of the new rules. This alert focuses on the rules protecting individuals against discrimination based on sex. The first alert (available [here](#)) focused on the rules' requirement for language assistance for persons with limited English proficiency. The second alert (available [here](#)) focused on the rules ensuring protections for individuals with disabilities. The final rule goes into effect on July 18, 2016.

Relationship to Other Laws. Section 1557 is the first federal civil rights law to prohibit discrimination "on the basis of sex" (including gender identity and sex stereotyping) in covered health programs and activities. In doing so, it builds on HHS Titles VII and IX, and federal case law to clarify what constitutes sex discrimination and prohibit specific discriminatory practices. It does not preempt or alter other laws, and providers must continue to comply with other state and federal laws in addition to the new ACA nondiscrimination rules.

Application. As explained in the earlier alerts, the new rules apply to any entities ("covered entities") that operate a health program or activity that receives federal financial assistance under programs operated by HHS, including but not limited to Medicaid or Medicare parts A, C, and D, but excluding Medicare Part B. (45 C.F.R. § 92.2(a); 81 F.R. 31383). Among others, the rule applies to hospitals, clinics, medical practices, solo practitioners, nursing homes, or other healthcare entities that participate in federal programs other than Medicare Part B. (81 F.R. 31384-85). Covered entities are not required to comply if doing so would violate applicable federal statutory protections for religious freedom and conscience. (45 C.F.R. § 92.2(b)). Also, the regulations do not apply to employment discrimination. (45 C.F.R. § 92.101(a)(2)).

Requirements. The rules generally prohibit covered entities from discriminating on the basis of race, color, national origin, sex, age, or disability in healthcare programs or activities. (45 C.F.R. § 92.101(a)). Specifically, covered entities may not:

1. Deny an individual any service, financial aid, or other benefit provided under the program;
2. Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

3. Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;
4. Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
5. Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;
6. Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program.

(45 C.F.R. § 92.101(b)(1) and 80.3(b)(1)).

Specific Prohibitions Against Discrimination on the Basis of Sex. The final rules clarify what constitutes discrimination "on the basis of sex." They specifically prohibit discrimination based on (1) an individual's sex, (2) pregnancy, childbirth or related medical conditions, (3) gender identity, and (4) sex stereotyping. The new rules provide the following:

1. Women must be treated equally with men in the health care they receive and the insurance they obtain.
2. Individuals cannot be denied health care or health coverage based on their sex, including their gender identity and sex stereotyping.
3. A covered entity may not, in providing or administering health-related insurance or other health related coverage, deny, cancel, limit, or refuse to issue or renew a health-related insurance policy or other health related coverage, or impose additional cost-sharing or other limitations or restrictions on the basis of sex.
4. Categorical coverage exclusions or limitations for all health care services related to gender transition are discriminatory.
5. Individuals must be treated consistent with their gender identity, including access to facilities. Providers may not deny or limit treatment for any health services that are ordinarily or exclusively available to individuals of one gender based on the fact that a person seeking such services identifies as belonging to another gender. The health service sought, however, must be medically appropriate. Nothing in the rules would, for example, require a covered entity to provide a traditional prostate exam to an individual who does not have a prostate, regardless of that individual's gender identity.
6. Sex-specific health programs or activities are permissible only if the entity can demonstrate an exceedingly persuasive justification, that is, that the sex-specific health program or activity is substantially related to the achievement of an important health-related or

scientific objective.

7. The final rules do not resolve whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557. See 81 Fed. Reg. 31390. OCR will evaluate complaints that allege sex discrimination related to an individual's sexual orientation to determine if they involve the sorts of stereotyping that can be addressed under Section 1557. The final rules further indicate that OCR anticipates that the law will continue to evolve on this issue, that it will enforce Section 1557 in light of those developments, and will consider issuing further guidance on this issue as appropriate.

Pregnancy. The final rules are consistent with existing regulation and previous Federal agencies' and courts' interpretations that discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth, or related medical conditions. In addition, the final rules balance an individual's right to access health programs and activities free from discrimination with protections for religious beliefs and practices. Nothing in the new rules displace existing protections afforded by Federal provider conscience laws and the Religious Freedom Restoration Act (42 U.S.C. §200bb).

Gender Identity and Sex Stereotyping. The final rules define "gender identity" as an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth. A "transgender individual" is an individual whose gender identity is different from the sex assigned to that person at birth. In defining what includes "sex stereotyping," the new rules reflect the Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) that stereotypical notions of appropriate behavior, appearance, or mannerisms for each gender constitutes sex discrimination. The new rules thus define "sex stereotypes" as stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. Stereotypes can include the expectation that individuals will consistently identify with only one gender and that they will act in conformity with the gender-related expressions stereotypically associated with the gender.

The final rules add an additional reference in the regulatory text to clarify that sex stereotypes include gender expectations related to the appropriate roles of a certain sex. In so doing, OCR adopts the position that sex stereotypes encompass not only stereotypes concerning the biological differences between the sexes, but also include stereotypes concerning gender norms. In particular, OCR recognizes that sex stereotypes can include the expectation that individuals consistently identify with only one of two genders (male or female), and that they act in conformity with the gender-related expressions stereotypically associated with that gender. "Sex stereotypes can also include a belief that gender can only be binary and thus that individuals cannot have a gender identity other than male or

female. OCR recognizes that an individual's gender identity involves the interrelationship between an individual's biology, gender, internal sense of self and gender expression related to the perception; thus, the gender identity spectrum includes an array of possible gender identities beyond male and female." 81 Fed. Reg. 31392.

OCR Enforcement Under Section 1557. A review of OCR's investigations of complaints alleging discrimination on the basis of sex helps to illustrate the use and scope of Section 1557. The following examples highlight OCR's enforcement efforts under Section 1557:

- Medical centers in Arkansas and Minnesota had similar policies and practices that treated married individuals differently on the basis of sex. Both medical centers automatically assigned a male spouse as the guarantor (sole financially responsible party) when a female spouse received medical services. When a male spouse received services, however, his female spouse would not automatically be assigned as the guarantor. As a result of OCR's investigations, both medical centers changed their billing practices to ensure equal treatment regardless of the sex of the patient.
- An individual alleged that he was denied the benefits of appropriate care and treatment at a Louisiana emergency department after a domestic violence incident in which he was subjected to rude comments from hospital staff because he was the male victim of domestic violence. After an OCR initiated investigation, the emergency department revised its abuse protocol to provide gender-neutral procedures for reporting incidents involving domestic violence and provide training to its emergency staff on identifying and assisting victims of domestic abuse.
- A transgender individual alleged that a Colorado wellness program denied coverage of her mammogram because she transitioned from male-to-female rather than female-to-male. The wellness program was funded primarily by the National Breast and Cervical Cancer Early Detection Program, administered by the CDC. Under the program, CDC's position was to cover only individuals who were genetically female. After OCR's investigation, CDC issued guidance clarifying that recipients of CDC grants may cover mammogram services for transgender women who have taken or are taking hormones.
- A transgender individual alleged that Aetna discriminated against him by denying him coverage for gender reassignment surgery and making inappropriate comments. Initially, Aetna told the complainant that the surgery was not covered under the terms of the complainant's health plan. However, during OCR's investigation, Aetna recognized that its original denial had inappropriately been based on an exclusion for cosmetic procedures. Aetna changed its policy so that requests for gender reassignment surgery are determined on the basis of medical necessity.
- OCR investigated a complaint from a Georgia man who received transportation services to his doctors' appointments from a private

medical transportation service. The complainant alleged that multiple drivers harassed him because of his feminine gender expression. As a result of OCR's investigation, staff received training on how to avoid sex stereotyping and the usage of appropriate terminology.

- As a result of two complaints, a Massachusetts medical center took several corrective actions involving transgender individuals, including no longer questioning transgender individuals in public waiting rooms regarding the gender listed on their patient forms and ceasing the practice of not allowing transgender individuals to change their gender in medical records without documentation of the completed gender reassignment surgery

Additional General Requirements. In addition to implementing policies and procedures to prohibit discrimination on the basis of sex, covered entities also must do the following:

1. Notice to Public. Within 90 days of the effective date of the regulations (*i.e.*, by October 16, 2016), covered entities must notify program beneficiaries and the public of their rights as described below:
 - a. **Written Notice and Taglines.** Covered entities must provide written notice that contains the following information:
 - i. The covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities;
 - ii. The covered entity provides appropriate auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternate formats, free of charge and in a timely manner, when such aids and services are necessary to ensure an equal opportunity to participate to individuals with disabilities;
 - iii. The covered entity provides language assistance services, including translated documents and oral interpretation, free of charge and in a timely manner, when such services are necessary to provide meaningful access to individuals with limited English proficiency;
 - iv. How to obtain the aids and services described above;
 - v. If applicable, identification of, and contact information for, the employee responsible for coordinating the covered entity's compliance as described below;
 - vi. If applicable, the availability of the grievance procedure described below and how to file a grievance; and
 - vii. How to file a discrimination complaint with OCR.

(45 C.F.R. § 92.8(a) and (b)(1)). HHS has published a sample notice, which is available here. Covered entities are not required to use the sample notice. Additional requirements relevant to persons who are not proficient in English are discussed in our prior alert. The required notice and taglines must be posted in a conspicuously-visible font size in the following locations:

1. In significant publications and significant communications targeted to beneficiaries, enrollees, applicants, and members of the public, except for small-sized publications described below. (42 C.F.R. § 92.8(f)). The OCR warns that it will interpret "significant communications and significant publications" broadly. (81 F.R. 31401). HHS declined to provide a list of such communications, but confirmed they would include outreach, education, and marketing materials; patient handbooks; notices requiring a response from individuals; and written notices such as those pertaining to rights or benefits. (81 F.R. 31402). Significant communications would likely also include those that were considered "vital documents" under HHS's LEP Guidance, e.g., consent and complaint forms, written notices of eligibility criteria, rights, denial, loss or decreases in benefits or services; applications to participate in services or programs; etc. (81 F.R. 31402).
2. In conspicuous physical locations where the entity interacts with the public. (45 C.F.R. § 92.8(f)).
3. In a conspicuous location on the covered entity's website accessible from the home page of the covered entity's website. (45 C.F.R. § 92.8(f)). A covered entity may satisfy this obligation by including a prominent link on its home page to the notice, and links written in non-English languages to taglines. (81 F.R. 31396).

Covered entities have discretion in determining the exact size, location, and manner in which they post the notice and taglines so long as they satisfy the regulatory standards. (81 F.R. 31398). They may be combined with other notices if the combined notice clearly informs individuals of their civil rights per the regulations. (45 C.F.R. § 92.8(h)). They may be included at the beginning of significant documents, or as a separate insert or on a webpage. (81 F.R. 31401). Ultimately, the test will be "whether the content is sufficiently conspicuous and visible that individuals seeking services ... could reasonably be expected to see and be able to read the information." (81 F.R. 31397).

2. **Written Notice—Small Publications.** For significant

publications and significant communications that are small-sized (e.g., postcards, pamphlets and tri-fold brochures), the covered entity must post in a conspicuously-visible font size the following information:

- a. The covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities; and
 - b. Taglines in at least the top two languages spoken by individuals with limited English proficiency in the relevant state, presumably Spanish and one other non-English language. (45 C.F.R. § 92.8(b)(2), (d)(2), and (g); 81 F.R. 31399). HHS has published a sample nondiscrimination statement and tagline, which are available here.
2. **Covered Entities with 15+ Employees.** If a covered entity employs 15 or more persons, they must also do the following:
- a. **Responsible Employee.** The covered entity must designate at least one employee to coordinate and carry out the responsibility to comply with the anti-discrimination efforts, including the investigation of any complaints, grievances or alleged violations. (45 C.F.R. § 92.7(a)).
 - b. **Grievance Procedures.** The covered entity must adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of grievances alleging any violations of the regulations. (45 C.F.R. § 92.7(b)). HHS has published a sample grievance procedure, which is available here.

Enforcement. If HHS determines that a covered entity has violated the rules, HHS may require the entity to take remedial action or impose compensatory damages as allowed by other anti-discrimination statutes. (45 C.F.R. § 92.6, 92.301(b)). Injured individuals may also assert a private cause of action to recover damages from a covered entity. (81 F.R. 31440).

Conclusion. As stated in our previous two client alerts, in most cases, the ACA regulations will require covered entities to take additional steps to comply. Covered entities should immediately evaluate their policies and processes to assess whether they are discriminatory on the basis of sex and, where necessary, modify them to comply with the new, heightened standards by July 18, 2016. Among other things, they will need to prepare the required notices and taglines by October 16, 2016.

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