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New ACA 1557 Non-Discrimination Rules: Checklist For Healthcare Providers

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On May 6, 2024, the Department of Health and Human Services (HHS) published its final rule revamping the non-discrimination regulations issued under § 1557 of the Affordable Care Act.¹ The revised rules apply to all healthcare providers that receive, directly or indirectly, federal financial assistance, including but not limited to participation in Medicare or Medicaid.² The revised rules continue to prohibit discrimination based on race, color, national origin, sex, age, and disability and reaffirm providers' current obligations to provide meaningful access to persons with limited English proficiency or disabilities, but they add a few new twists. The revised rules become effective **July 5, 2024**, but HHS will delay enforcement of certain provisions as described below. Under the final rules, virtually all healthcare providers³ will need to do the following in addition to complying with other state or federal non-discrimination laws:

BY JULY 5, 2024.

- **Individuals with Limited English Proficiency.** Providers must take reasonable steps to provide meaningful access to individuals with limited English proficiency (including both the patient and their companion) as described in 45 C.F.R. § 92.201.⁴ As in the past, the services must be provided without charge, be timely, and be accurate.⁵ Providers may use in-person or remote video or audio interpreters and translators so long as they are qualified and satisfy standards described in the regulations.⁶ Providers may not require a person to provide their own interpreter, nor may they rely on minors or unqualified adults to interpret except as a temporary measure in an emergency.⁷
- **Individuals with Disabilities.** Providers must take appropriate steps—including the use of necessary auxiliary aids—to ensure effective communication with individuals with disabilities (including both the patient and their companion) consistent with standards in 28 C.F.R. §§ 35.130 and 35.160-.164.⁸ Among other things:
 - a. Any auxiliary aids must afford persons with disabilities an equal opportunity to receive the provider's healthcare services, and must be provided free of charge, in accessible formats, and in a timely manner.⁹
 - b. Facilities in which services are provided must satisfy

accessibility requirements described in 45 C.F.R. 92.203.

- c. Services provided through information and communication technology must be accessible unless doing so would result in undue financial burdens or a fundamental alteration of the nature of the health program or activity.¹⁰ Specifically, websites and mobile apps must satisfy Section 504 of the Rehabilitation Act.¹¹
- d. Consistent with the Americans with Disabilities Act (ADA), covered entities must make reasonable modifications to their policies, practices, or procedures as necessary to avoid discrimination unless doing so would fundamentally alter the nature of the program or activity.¹²
- **Equal Access on Basis of Sex.** Providers must provide individuals with equal access to its healthcare services without discriminating based on sex, including but not limited to sex assigned at birth, gender identity, recorded gender, or pregnancy or pregnancy-related condition.¹³
- **Telehealth.** Providers must not discriminate on the basis for race, color, national origin, sex, age, or disability in the provision of telehealth services.¹⁴

BY NOVEMBER 2, 2024 (120 days after July 5, 2024).

- **1557 Coordinator.** If the provider has 15 or more employees, the provider must designate a § 1557 Coordinator to oversee § 1557 compliance, handle investigations and grievances, and perform the duties otherwise specified in 45 C.F.R. § 92.7.
- **Notice of Non-Discrimination.** Providers must publish a notice of non-discrimination to patients and members of the public. The notice must contain the elements listed in 45 C.F.R. § 92.10. The notice must be posted on the provider's website and in prominent physical locations and provided upon request.¹⁵ The Office for Civil Rights (OCR) has published a sample notice on its 1557 website at <https://www.hhs.gov/civil-rights/for-providers/resources-covered-entities/index.html>.

BY MAY 1, 2025 (300 days after July 5, 2024).

- **Decision Support Tools.** Providers must not discriminate on the basis for race, color, national origin, sex, age, or disability through its use of patient care decision support tools, including the use of artificial intelligence. They must take care to identify risks (including input based on prohibited factors) and mitigate risks resulting from the tools.¹⁶
- **Train Employees.** Providers must train relevant employees concerning the provider's § 1557 policies and procedures and document the training. Curiously, the regulations do not require

the written policies and procedures until July 5, 2025, but the training regulations require that training concerning the policies be conducted “as soon as possible, but no later than 30 days following a covered entity's implementation of the policies and procedures required by § 92.8, and no later than 300 days following July 5, 2024,”¹⁷ e.g., by May 1, 2025.

BY JULY 5, 2025 (1 year after July 5, 2024).

The HHS commentary that accompanied the final § 1557 rules indicates that the OCR has made available template policies and procedures on its website, www.hhs.gov/1557; however, as of the date of this article, the templates do not appear to be posted.²⁰

- **Policies and Procedures.** Providers must create and implement specific written policies and procedures implementing the § 1557 requirements as described in 45 C.F.R. § 92.8, including:
 - a. A written nondiscrimination policy confirming that the provider does not discriminate on the basis of race, color, national origin, sex, age, or disability, and that the provider provides the language assistance and auxiliary aids and takes the other actions as described above.¹⁸
 - b. If the provider has 15 or more employees, a grievance procedure for the prompt and equitable resolution of 1557 compliance concerns.¹⁹
 - c. Written procedures describing how language access services will be provided to persons with limited English proficiency, including the minimum procedural elements required in 45 C.F.R. § 92.8(d).
 - d. Written procedures for ensuring effective communication with persons with disabilities, including the minimum procedural elements listed in 45 C.F.R. § 92.8(e).
 - e. Written procedures for modifying policies, practices, and procedures as necessary to avoid disability discrimination, including the minimum procedural elements listed in 45 C.F.R. § 92.8(f).
- **Notice of Availability of Services.** Providers must publish a notice of language assistance and auxiliary aids as required by 45 C.F.R. § 92.11. The notice must contain the elements listed in § 92.11; must be provided in English and at least the 15 languages most commonly spoken by individuals with limited English proficiency in the state in which the provider operates; and must be provided in alternate formats for individuals with disabilities who require auxiliary aids.²¹ The notice must also be provided with and will likely require modification of the following documents:

- a. Notice of nondiscrimination required by § 92.10;
- b. HIPAA notice of privacy practices required;
- c. Application and intake forms;
- d. Notices of denial or termination of eligibility, benefits or services, and notices of appeal and grievance rights;
- e. Communications related to an individual's rights, eligibility, benefits, or services that require or request a response from an individual;
- f. Consent forms and instructions related to medical procedures or operations, medical power of attorney, or living will;
- g. Discharge papers;
- h. Communications related to the cost and payment of care with respect to an individual, including medical billing and collections materials, and good faith estimates required by the No Surprise Billing Rules;
- i. Complaint forms; and
- j. Patient and member handbooks.²²

Significantly, the OCR has published sample notices in various languages on its 1557 website, <https://www.hhs.gov/civil-rights/for-providers/resources-covered-entities/index.html>.

ONGOING COMPLIANCE.

In addition to the foregoing implementation steps, providers should continue to do the following to ensure continued compliance:

- Review and revise the provider's § 1557 policies and procedures as necessary.²³
- Train relevant employees concerning § 1557 policies and procedures within a reasonable period of time after they become employed and after a change in the policies, and contemporaneously document such training.²⁴
- Provide the notice of non-discrimination required in 45 C.F.R. § 92.10 on an annual basis in addition to providing the notice on request and posting it on the provider's website and at the provider's location.²⁵

- Provide the notice of language assistance services and auxiliary aids required by 45 C.F.R. § 92.11 on an annual basis in addition to providing the notice upon request and posting it on the provider's website and at the provider's location.²⁶ The regulations do allow the individual to opt out of receiving such notice on an annual basis subject to certain requirements.²⁷
- If appropriate, consider applying for a religious or conscience objection per the standards and process in 45 C.F.R. §§ 92.3 and 92.302. The § 1557 rules expressly recognize and incorporate protections offered under federal protections for religious freedom, conscience, and willingness or refusal to provide or participate in an abortion.²⁸
- Retain required documents, including:
 - a. Retain documentation of employee training for three (3) years;²⁹ and
 - b. Retain records relating to grievances as described in 45 C.F.R. § 92.8(c)(2) for at least three (3) years from the date the grievances were resolved.³⁰
- Monitor developments. HHS and the OCR have published and periodically publish helpful guidance; providers should periodically check the OCR's 1557 page, <https://www.hhs.gov/civil-rights/for-individuals/section-1557/faqs/index.html>. Earlier iterations of the § 1557 rules were limited through litigation, and lawsuits have already been brought challenging the revised rules. Finally, the 1557 rules have shifted with different administrations. If a new President is elected, it is entirely possible that the rules may change again.

OTHER LAWS AND REGULATIONS.

The § 1557 rules add another layer to but do not replace other state and federal discrimination laws. Healthcare providers must continue to comply with those other laws in addition to 1557, including but not limited to:

- Title VI of the Civil Rights Act of 1964.³¹
- The Age Discrimination Act of 1975.³²
- Section 504 of the Rehabilitation Act of 1973, including the new 504 regulations that were published on May 9, 2024.³³

If and to the extent another law is less protective or creates exceptions not permitted in the § 1557 rules, HHS takes the position that the § 1557 rules preempt the other law.³⁴

ADDITIONAL RESOURCES.

HHS and the OCR maintain a website for § 1557 compliance. In addition to general guidance, the website contains Fact Sheet and FAQs. These may be accessed at <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>. As mentioned above, HHS has indicated that it has or will post sample policies and procedures on its website. In addition, Holland & Hart will present a webinar and intends to publish more specific guidance concerning various aspects of § 1557 rules. To access those additional resources, visit our website at <https://www.hhhealthlawblog.com/>.

¹ 42 U.S.C. § 18116; 45 C.F.R. part 92; 89 F.R. 37522 (5/6/24).

² 45 C.F.R. § 92.2(a).

³ The regulations do recognize federal protections for religious freedom and conscience and establish a process for obtaining exemptions based on religion or conscience. 45 C.F.R. § 92.302.

⁴ 45 C.F.R. § 92.201(a).

⁵ 45 C.F.R. § 92.201(b).

⁶ 45 C.F.R. § 92.201(c), (f), and (g).

⁷ 45 C.F.R. § 92.201(e).

⁸ 45 C.F.R. § 92.202(a).

⁹ 45 C.F.R. § 92.202(b).

¹⁰ 45 C.F.R. § 92.204(a).

¹¹ 45 C.F.R. § 92.204(b).

¹² 45 C.F.R. § 92.205.

¹³ 45 C.F.R. § 92.206(a).

¹⁴ 45 C.F.R. § 92.211.

¹⁵ 45 C.F.R. § 92.10(a)(2).

¹⁶ 45 C.F.R. § 92.210(b), (c).

¹⁷ 45 C.F.R. § 92.9(b)(1).

¹⁸ 45 C.F.R. § 92.8(b).

¹⁹ 45 C.F.R. § 92.8(c).

²⁰ See <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>.

²¹ 45 C.F.R. § 92.11(a), (b).

²² 45 C.F.R. § 92.11(c)(5).

²³ 45 C.F.R. § 92.8(h).

²⁴ 45 C.F.R. § 92.9(b).

²⁵ 45 C.F.R. § 92.10(a)(2).

²⁶ 45 C.F.R. § 92.11(c).

²⁷ 45 C.F.R. § 92.11(d).

²⁸ 45 C.F.R. § 92.3(c) and 92.302.

²⁹ 45 C.F.R. § 92.9(c).

³⁰ 45 C.F.R. § 92.8(c)(2).

³¹ 42 U.S.C. § 2000d *et seq.*

³² 42 U.S.C. § 6101 *et seq.*

³³ 29 U.S.C. § 794.

³⁴ 89 F.R. 40066 (5/9/2024).

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