



WHAT EMPLOYERS NEED TO KNOW RIGHT NOW ABOUT HEALTH CARE REFORM

## HHS Proposes First of Anticipated Nondiscrimination Regulations

The Department of Health and Human Services (HHS) has issued the first of the anticipated nondiscrimination rules, which sets forth [proposed regulations](#) to implement Section 1557 of the Patient Protection and Affordable Care Act (ACA). Section 1557 provides that individuals shall not be excluded from participation, denied the benefits of, or subjected to discrimination under any health program or activity which receives federal financial assistance, on the basis of race, color, national origin, sex, age, or disability. The proposed regulations also apply to any program administered by an agency of the federal government or an entity established under Title I of the ACA. These applicable entities are “covered entities” and include a broad array of providers, employers, and facilities. State-based Marketplaces are covered as Title I entities, as are Federally-Facilitated Marketplaces.

Although the proposed regulations are aimed primarily at preventing discrimination by health care providers and insurers, it would also apply to the employee benefits programs of an employer that is principally or primarily engaged in providing or administering health services or health insurance coverage, or employers who receive federal financial assistance to fund their employee health benefit program or health services. Employee benefits programs include fully insured and self-funded plans, employer-provided or sponsored wellness programs, employer-provided health clinics, and longer-term care coverage provided or administered by an employer, group health plan, third party administrator, or health insurer.

Affected employers can and likely will include:

- Hospitals
- Nursing homes
- Home health agencies
- Laboratories
- Community health centers
- Therapy service providers (physical, speech, etc.)
- Physicians' groups
- Health insurers
- Ambulatory surgical centers
- End stage renal dialysis centers
- Health related schools receiving federal financial assistance through grant awards to support 40 health professional training programs

A physician or physicians' group determining if it receives federal financial assistance through Medicaid payments, meaningful use payments, or other payments would not count Medicare Part B payments because that is not considered federal financial assistance. HHS estimates that, despite that, most physicians will be a covered entity because they accept federal financial assistance from other sources.

Covered entities would be required to post notices that they do not discriminate on the grounds prohibited by Section 1557, and that the entity will provide free (and timely) aids and services to individuals with limited English proficiency, and disabilities. These notices must be posted in conspicuous physical locations where the entity interacts with the public, in its significant public-facing publications, and on its website homepage.

## **Sex, Gender, and Sexual Orientation Discrimination**

The proposed rule bans discrimination based on sex, gender, sexual orientation, and gender identity. Sex discrimination includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery from childbirth or related medical conditions.

The proposed rule also seeks to prohibit discrimination faced by transgender individuals trying to access coverage of health services. The proposed rule would prohibit denying or limiting coverage, denying a claim, or imposing additional cost sharing on any health service due to the individual's sex assigned at birth, gender identity, or gender otherwise recorded by the plan or issuer which is different from the one to which services are ordinarily or exclusively possible.

For example, a pelvic or prostate exam could not be denied based on a person's sex assigned at birth, gender identity, or recorded gender, if it was medically appropriate. Medically appropriate coverage could not be denied for a pelvic exam or ovarian cancer treatment for an individual who identifies as a transgender man, or is enrolled in a health plan as a man.

Furthermore, blanket exclusions for coverage of care associated with gender dysphoria or associated with gender transition would be prohibited. Categorical or automatic exclusion of coverage for services related to gender transition would be unlawful. Denials for these services would be discrimination if the denial results in discrimination against a transgender individual. These provisions do not require covered entities to cover any particular procedure or treatment nor do they preclude neutral standards that govern the circumstances under which it will offer coverage.

The regulations do not prohibit single-sex toilets (or locker rooms or shower facilities) so long as comparable facilities are provided regardless of sex. HHS is seeking comment on whether single sex programs should be permitted; for example, women's health clinics or domestic violence clinics catering to one sex.

## **Discrimination against Persons with Limited English Proficiency and Disabilities**

An individual with limited English proficiency is someone for whom English is not the primary language for communication, and who has a limited ability to read, speak, write, or understand English. The proposed rule would increase assistance for individuals with limited English proficiency so that they can communicate with their health care providers.

Covered entities would be required to post a notice of consumer rights providing information about communication assistance; and post taglines in the top 15 languages spoken by individuals with limited English proficiency, indicating the availability of communication assistance. Covered entities would be

required to provide access to auxiliary aids and services, including alternative formats and sign language interpreters, unless the entity can show undue burden or fundamental alteration. The proposed rule would require modifications where necessary to facilities and technology to provide equal access for people with disabilities.

### **Marketplace and Other Health Plans**

Marketplaces must operate in a nondiscriminatory way. Issuers that participate in the Marketplace cannot deny, cancel, limit, or refuse to issue or renew any policies that employ practices or benefit designs that discriminate on any of the protected bases.

An insurer that participates in a Marketplace would be subject to the nondiscrimination rules in the Marketplace, in its individual market business, in the group market, or when it serves as a third party administrator for a self-insured plan.

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