

## What Covered Health Care Entities Need to Do to Prepare for Looming ACA Section 1557 Deadlines

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As our colleagues reported earlier this month,<sup>1</sup> on May 18, 2016, the U.S. Department of Health and Human Services (“HHS”) issued a final rule titled “Nondiscrimination in Health Programs and Activities” (“Final Rule”) implementing the nondiscrimination provisions contained in Section 1557 of the Affordable Care Act (“ACA”). The Final Rule became effective July 18, 2016.<sup>2</sup> In less than three weeks, by October 16, 2016, health care providers covered by the ACA must notify the public of their compliance with these nondiscrimination provisions by posting nondiscrimination notices and taglines in multiple languages. With this deadline quickly approaching, it is important for “covered entities” (explained below) to be evaluating their policies and preparing to meet these obligations.

### I. Overview of Section 1557

The aim of Section 1557 is to provide equal access to health care and health coverage.<sup>3</sup> The law incorporates Title VI of the Civil Rights Act of 1964 (“Title VI”),<sup>4</sup> Title IX of the Education Amendments of 1972 (“Title IX”),<sup>5</sup> the Age Discrimination Act of 1975 (“Age Act”),<sup>6</sup> and Section 504 of the Rehabilitation Act of 1973 (“Section 504”)<sup>7</sup> to prohibit discrimination on the basis of race, color, national origin, sex, age, and disability. Individuals cannot, on those grounds, be excluded from participation in, be denied the

<sup>1</sup>Patrick G. Brady, et al., *Take Heed: October 17, 2016 Compliance Deadlines for OCR Final Rule on Nondiscrimination in Health Programs Under Section 1557 of the Affordable Care Act*, AHLA Weekly (Sept. 16, 2016), available at <http://www.ebglaw.com/content/uploads/2016/09/Brady-Celauro-Take-Heed-Oct-17-Compliance-Deadlines-for-OCR-Final-Rule-by-PBrady-LC.pdf>; Helaine I. Fingold, et al., *Nondiscrimination Standards Under ACA Section 1557: Now Is the Time to Act*, EPSTEIN BECKER GREEN (Sept. 15, 2016), available at <http://www.ebglaw.com/news/nondiscrimination-standards-under-aca-section-1557-now-is-the-time-to-act/>.

<sup>2</sup> 81 Fed. Reg. 31,376 (May 18, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-05-18/pdf/2016-11458.pdf>.

<sup>3</sup> 42 U.S.C. § 18116 (2016); 81 Fed. Reg. 31,376, 31,389 (May 18, 2016).

<sup>4</sup> 42 U.S.C. §§ 2000d *et seq.* (2016).

<sup>5</sup> 20 U.S.C. § 1681 *et seq.* (2016).

<sup>6</sup> 42 U.S.C. § 6101 *et seq.* (2016).

<sup>7</sup> 29 U.S.C. § 794 (2016).

benefits of, or be subjected to discrimination under, any covered health program or activity.

Prohibited discriminatory conduct includes:

- with respect to sex, discriminating on the basis of gender, as well as pregnancy, gender identity, or sex stereotypes;
- with respect to race, color, and national origin, discriminating on these grounds and delaying or denying effective language assistance services to individuals with limited English proficiency (“LEP”); and
- with respect to disability, failing to make reasonable changes to facilities, policies, procedures, or practices to provide equal access for individuals with disabilities.

Any entity that receives federal financial assistance of any kind is subject to these nondiscrimination requirements. These “covered entities” include, but are not limited to, hospitals, nursing homes, skilled nursing facilities, home health agencies, retail pharmacies, laboratories, private physicians receiving non-Medicare Part B federal assistance, qualified health plan issuers, and community health centers participating in Medicare or Medicaid or receiving grants, loans, subsidies, tax credits, or cost-sharing reductions.<sup>8</sup> If an entity is subject to Section 1557, all of the covered entity’s programs and activities are subject to the nondiscrimination requirements.

The enforcement mechanisms of Title VI, Title IX, Section 504, and the Age Act apply to Section 1557 violations, and enforcement may include settlement or conciliation agreements with the HHS Office of Civil Rights (“OCR”), suspension or termination from federal financial assistance, and private civil suits. Compensatory damages may be awarded in administrative and judicial actions.

## **II. Meeting the Obligations for the October 16 Deadline**

To avoid these enforcement mechanisms and the corresponding penalties, by October 16, 2016, covered entities must take initial and continuing steps to notify the public of their nondiscrimination policies and individuals’ rights under Section 1557.<sup>9</sup> Specifically, a covered entity must post a notice that includes:

1. a statement that the entity does not discriminate on the basis of race, color, national origin, sex, age, or disability;
2. a statement that the entity provides appropriate auxiliary aids and services, free of charge and in a timely manner, to individuals with disabilities;

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<sup>8</sup> 81 Fed. Reg. at 31,445–6.

<sup>9</sup> 45 C.F.R. § 92.8 (2016).

3. a statement that the entity provides language assistance services, free of charge and in a timely manner, to individuals with LEP;
4. how to obtain the aforementioned aids and services;
5. contact information for the Section 1557 compliance officer (required for covered entities with 15 or more employees);
6. the availability of the grievance procedure, and how to file a grievance (required for covered entities with 15 or more employees);
7. how to file a discrimination complaint with OCR.

A sample nondiscrimination notice is provided in Appendix A of the Final Rule,<sup>10</sup> but covered entities may devise their own notices. Although the notice only needs to be posted in English, OCR encourages entities to publish the notice in one or more non-English languages.<sup>11</sup>

This notice must be posted, in a conspicuously visible font, in the following places:

- significant publications or communications,
- conspicuous physical locations where the entity interacts with the public, and
- a conspicuous location on the covered entity's website.

“Significant publications or communications” are those targeted to beneficiaries, enrollees, applicants, or the public, and include LEP guidance, outreach, education, marketing materials, written notices to an individual pertaining to rights and benefits or services, consent forms, patient handbooks, complaint forms, and applications to participate in a program or activity or to receive benefits or services.

In small-sized publications, such as postcards, tri-fold brochures, targeted fliers, and pamphlets, less information needs to be included. The nondiscrimination policy notice only needs to say that the covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability. A sample small-sized publication notice is available in Appendix A of the Final Rule.

Covered entities also must be prepared to post taglines in the same locations. Taglines are short statements written in non-English languages indicating the availability of language assistance services free of charge. In larger-sized publications, taglines must be written in *at least the top 15 languages* spoken by individuals with LEP in the relevant state. Tagline translations can be found on the HHS website.<sup>12</sup> Multistate

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<sup>10</sup> 81 Fed. Reg. at 31,472.

<sup>11</sup> 81 Fed. Reg. at 31,398.

<sup>12</sup> OFFICE OF CIVIL RIGHTS, *Translated Resources for Covered Entities*, available at <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/>.

entities are permitted to post the top 15 languages spoken by the aggregate populations of those states in which they operate. The taglines on small-sized publications are required in at least the top two languages spoken by individuals with LEP in the relevant state. A sample tagline is provided in Appendix B of the Final Rule.<sup>13</sup>

### III. What Covered Entities Should Do Now

With the deadline looming on October 16, 2016, it is imperative that covered entities assess their readiness to comply with Section 1557's obligations. In addition to posting the notices of a nondiscrimination policy and taglines informing individuals of language assistance services, covered entities should be taking the steps to make these mandatory services and policies a reality. If they have not done so, covered entities urgently should begin revising policies and procedures as necessary, including providing a compliant grievance procedure, training staff, designating a Section 1557 civil rights compliance officer, hiring appropriate interpreters, and coordinating auxiliary aids and services. These obligations, of course, parallel existing obligations for those entities receiving federal financial assistance under Section 504 of the Rehabilitation Act for individuals with disabilities. These proactive steps should help insulate health care entities from enforcement actions by OCR or litigation by individuals or advocacy groups and avoid the negative public relations of such claims.

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<sup>13</sup> 81 Fed. Reg. at 31,473.