

# New HHS Rule Narrows Scope of ACA Nondiscrimination Rules

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The U.S. Department of Health and Human Services (HHS) has proposed a new rule implementing the nondiscrimination rules of Section 1557 of the Affordable Care Act (ACA). If finalized in its current form, the proposed rule would revise the scope of the ACA's nondiscrimination rules and impose fewer requirements on employer group health plans.

The proposed rule would:

- **Reduce the number of covered entities** subject to the Section 1557 nondiscrimination rules, excluding many third-party administrators (TPAs) and health insurers from the scope of the rule;
- **Eliminate the requirements for covered entities to have a Section 1557 compliance coordinator, a written grievance procedure, a nondiscrimination notice, and language service taglines;** and
- **Revise the prohibition against discrimination “on the basis of sex”** to exclude the categories of gender identity, sex stereotyping, and termination of pregnancy.

The proposed rule will not take effect until sixty days after the rule is finalized. While the current HHS rule remains in effect, HHS announced that it will not enforce any Section 1557 guidance or other subregulatory guidance to the extent it is inconsistent with the proposed rule.

## Background on Section 1557 of the ACA

Section 1557 prohibits individuals from being excluded from participation in, denied the benefits of, or subjected to discrimination under any health programs or activities on the basis of race, color, national origin, sex, age, and disability. Section 1557 applies to “covered entities,” which under the current regulation includes:

- A health program or activity, any part of which receives federal financial assistance provided by HHS, including credits, subsidies, or contracts of insurance;
- A health program or activity that is administered by HHS; and
- A health program or activity administered by Title I of the ACA (federal- or state-run health insurance Exchanges).

An employer group health plan is a covered entity if the plan or the employer receives federal financial assistance from HHS (e.g., by having an Employer Group Waiver Plan or accepting an Retiree Drug Subsidy). Under the current regulations, a covered entity includes a health insurer of a fully insured group health plan and a TPA of a self-insured group health plan, since these entities provide health-related insurance coverage and receive federal financial assistance from the Exchanges, Medicaid contracts, or Medicare Advantage plans.

## Proposed Rule Results in Fewer Covered Entities

Under the proposed rule, an entity is subject to Section 1557 if it is principally engaged in the business of health care and receives federal financial assistance from HHS. An entity that is not principally engaged in the business

of health care will not be subject to Section 1557 unless it maintains a health program or activity that receives federal financial assistance from HHS. In that event, however, only the health program or activity receiving such assistance will be subject to Section 1557. In addition, the proposed rule states that an entity is not principally engaged in the business of health care if it is principally engaged in the business of health insurance.

Under the proposed rule, TPAs and employer group health insurers would not be covered under Section 1557, except to the extent they maintain a health program or activity receiving HHS funds. However, employers that provide health care and receive federal financial assistance, such as hospitals, physician groups, and other health care providers, will remain covered under Section 1557. The group health plans sponsored by these entities would also be subject to Section 1557.

## Proposed Rule Eliminates Requirements for Compliance Coordinator, Written Grievance Procedure, Notice, and Language Service Taglines

The proposed rule eliminates the following administrative requirements for covered entities:

- The requirement to appoint a compliance coordinator to address allegations of noncompliance with Section 1557;
- The requirement to establish a written grievance procedure; and
- The requirement to provide and post a nondiscrimination notice, along with language service taglines for individuals with limited English proficiency.

Covered entities must continue to provide language assistance services (such as foreign language translators), ensure physical access to health care facilities for disabled individuals, and provide communication technology for visually-impaired or hearing-impaired individuals.

## Proposed Rule: Section 1557 Does Not Extend to Gender Identity, Sex Stereotyping, and Termination of Pregnancy

Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability. While the current rule interprets “on the basis of sex” to include gender identity, sex stereotyping, and termination of pregnancy, the proposed rule eliminates those categories from the definition of “on the basis of sex”. As a practical matter, however, the current rule’s broader interpretation never became effective, since a federal district court in 2016 enjoined HHS from enforcing the broader interpretation.

If the proposed rule becomes final, covered entities would not be barred from excluding benefits or services for transgender services or making distinctions in benefit coverage based on the treatment of gender dysmorphia or an individual’s birth, biological, or perceived gender. However, any employer group health plan considering such distinctions would have to consider the impact of such exclusions under other laws, including but not limited to the Americans with Disabilities Act, the Mental Health Parity and Addiction Equity Act, and applicable state laws. Additionally, the proposed rule states that Section 1557 will not require the performance of or payment for pregnancy termination.

## Resources

The proposed rule can be found [here](#).

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