

# HHS Issues New Rule Prohibiting Discrimination Based on Sex and Requiring Interpreters

## Holland & Hart News Alert

Insight — 9/08/2015

On September 3, 2015, the Department of Health and Human Services (HHS) issued a proposed rule intended to advance health equity and reduce disparities in health care. Section 1557 of the Patient Protection and Affordable Care Act (ACA) is the first federal civil rights law to prohibit discrimination, including denial of health services or health coverage, on the basis of race, color, national origin, age, disability, or sex. The proposed rule, *Nondiscrimination in Health Programs and Activities*, codifies and expounds on these protections. The proposed rule applies to any health program or activity which receives funding from HHS, such as providers that accept Medicare or Medicaid patients. In addition, it applies to individuals enrolled in coverage through the Health Insurance Marketplaces (commonly referred to as "Exchanges") and to all health plans offered by insurers that operate in Exchanges.

### Protections against Sex Discrimination

Prior to passage of the ACA, civil rights laws enforced by HHS's Office for Civil Rights (OCR) prohibited discrimination based only on race, color, national origin, disability, or age. With the addition of protections based on sex, HHS intends to address some of the populations that have historically been subject to discrimination. The proposed rule specifically addresses the rights of women and transgendered individuals. If adopted, the proposed rule will include the following protections:

- Women must be treated equally with men in the health care they receive. This protection includes prohibitions on discrimination in the health coverage **and** health services received from providers.
- Individuals cannot be denied health care or health coverage based on their sex, including their gender identity.
- Individuals must be treated consistent with their gender identity, including in access to health care facilities.
- Explicit categorical exclusions in coverage for health care services related to gender transition are facially discriminatory. Other exclusions for gender transition will be evaluated on a case-by-case basis.
- Sex-specific health care cannot be denied or limited solely because the person seeking such services identifies as belonging to another gender. For example, a provider may not deny an individual treatment for ovarian cancer, based on the individual's identification as a transgendered man, where the treatment is medically

indicated.

### **Protections for Individuals with Limited English Proficiency and Disabilities**

The proposed rule adopts the longstanding principal that providers receiving funding from HHS must take reasonable steps to provide meaningful access to individuals with limited English proficiency and disabilities. There is an exception for undue burden. In determining what the standard requires, OCR will evaluate each case on its facts, including the nature of the communication, how often the situation is encountered, and the resources of the entity. Under the proposed rule, covered entities will be required to:

- Post a notice that consumers have a right to communication assistance.
- Post taglines in the top 15 languages spoken by individuals with limited English proficiency nationally, indicating the availability of assistance.

To reduce the burden on covered entities, OCR will provide a sample notice and translated taglines for use by providers. OCR will also translate the notice into 15 languages and provide translated notices to covered entities.

### **Applicability to Health Insurance Exchanges and Other Health Plans**

The proposed rule prohibits insurers in any Exchange from denying, canceling, limiting, or refusing to issue or renew any of its insurance policies or employing marketing practices or benefit designs that discriminate on the basis of race, color, national origin, sex, age, or disability. Similarly, hospitals and other health care providers that receive federal financial assistance from HHS are also accountable for discrimination in the health plans they offer to their employees.

### **Consumer Rights**

OCR has been accepting complaints under the ACA since its passage in 2010. The proposed rule clarifies that individuals who believe they have been subject to discrimination in health care will have a private right of action, giving individuals the ability to file a lawsuit under Section 1557 of the ACA. Complaints can be filed directly with OCR.

### **Public Comment**

HHS is requesting comment to better understand individuals' experience with health care discrimination, including how a final rule can incorporate the most robust set of protections against discrimination based on sexual orientation. In addition, the proposed rule also requests comment on whether Section 1557 should include an exemption for religious organizations and what the scope of any such exemption should include. Nothing in the proposed rule affects the application of existing protections for religious beliefs and practices, including provider conscience laws and

ACA regulations related to contraceptive services.

Members of the public may provide comments until November 6, 2015. Comments, identified by RIN 0945-AA02, can be submitted electronically through <http://www.regulations.gov>, by mail to the U.S. Department of Health and Human Services, Office for Civil Rights, or via hand delivery or courier. The text of the regulation in English is available at <https://www.federalregister.gov>.

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