

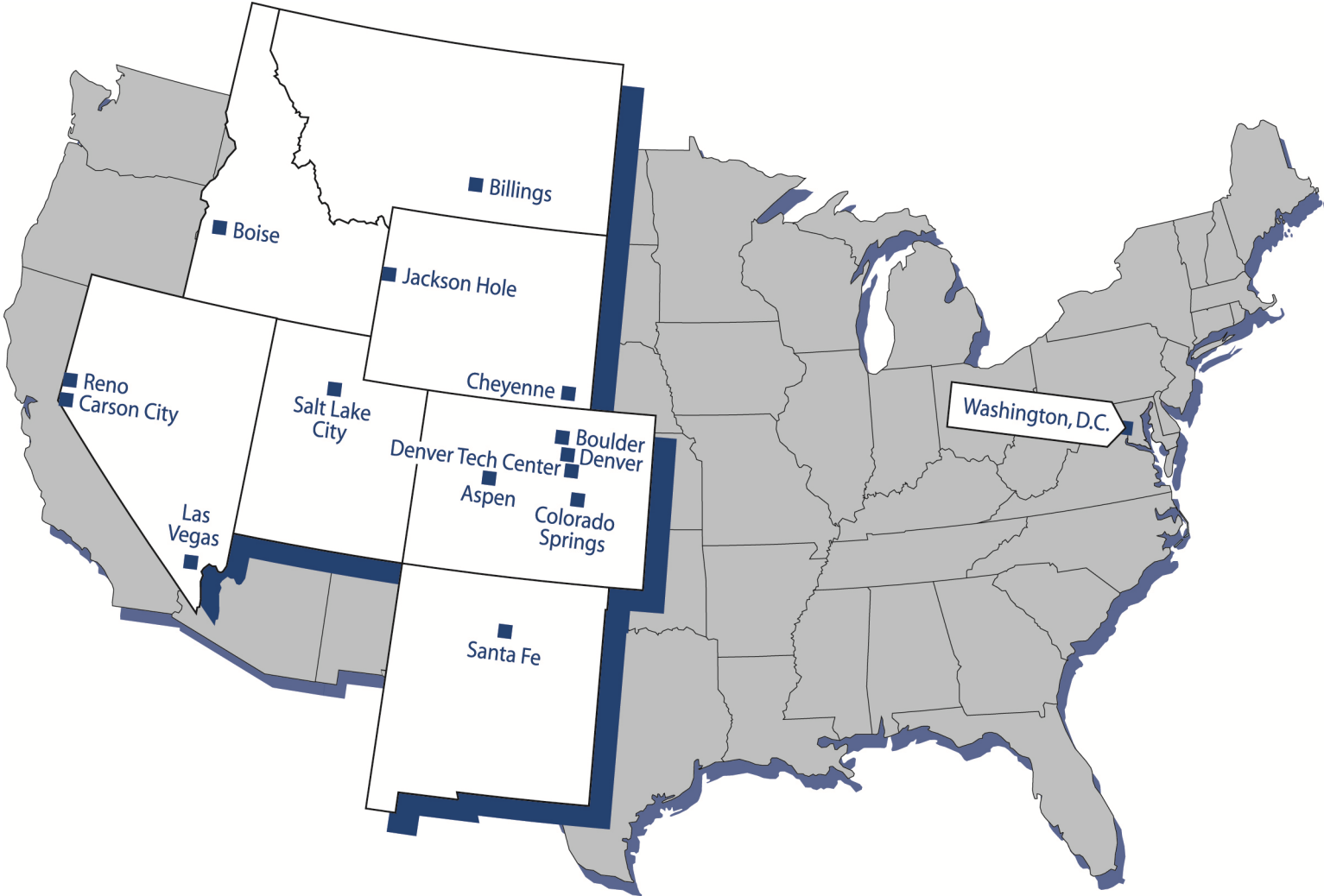
# ACA Nondiscrimination Rules



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(6-16)

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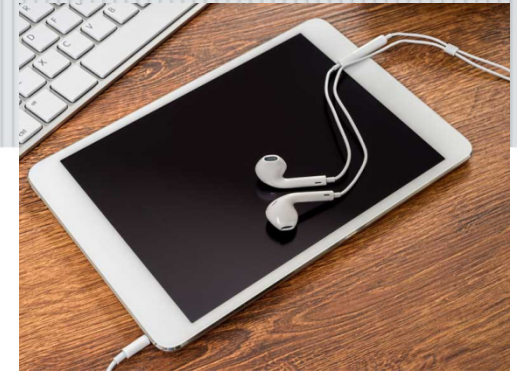
# Written Materials



- Copies of the .ppt presentation.
- ACA Nondiscrimination Rules, 45 CFR part 92
- HHS Commentary to Rules, 81 FR 31376 (5/18/16)
- HHS Samples
  - Notice of Nondiscrimination
  - Statement of Nondiscrimination
  - Taglines
- HHS fact sheets re Nondiscrimination Rules
- Client Alerts available at <https://www.hollandhart.com/healthcare>
  - Sex discrimination
  - Persons with Limited English Proficiency
  - Persons with Disabilities

Available at:  
<http://www.hhs.gov/civil-rights/for-individuals/section-1557/>

# Preliminaries



- Presentation will be recorded and available for download at [www.hhhealthlawblog.com](http://www.hhhealthlawblog.com).
- If you have questions, please submit them using either:
  - Chat line, or
  - E-mail any of us at [pdean@hollandhart.com](mailto:pdean@hollandhart.com), [tlocke@hollandhart.com](mailto:tlocke@hollandhart.com), or [kcstanger@hollandhart.com](mailto:kcstanger@hollandhart.com).



# Overview

- Background
- The New ACA Nondiscrimination Rules
  - Application
  - Notice and Taglines
  - Requirements for Entities with 15+ Employees
    - Compliance Coordinator
    - Grievance Procedure
  - Application to Specific Classes
    - Sex
    - Persons with Limited English Proficiency
    - Persons with Disabilities
  - Enforcement
- Action items



# Overview

- We will focus on the new ACA Nondiscrimination Rules as they apply to healthcare providers, not necessarily health plans.
- Other discrimination laws still apply, e.g.,
  - Federal
    - Titles VI and VII, Civil Rights Act of 1964, 42 USC 2000d, 45 CFR 80.3
    - Title IX, Education Amendments of 1972, 20 USC 1681
    - Section 504, Rehabilitation Act of 1973, 29 USC 701; 45 CFR 84.3
    - Age Discrimination Act of 1975, 42 USC 6101
    - Americans with Disabilities Act of 1990, Title III, 42 USC 12101
    - Executive Order 13166 (8/00) and HHS Guidance re Persons with Limited English Proficiency (8/03)
  - State discrimination statutes

Apply to Specific Situations



# Affordable Care Act

## § 1557

- “[A]n individual shall not, [on the basis of **race, color, national origin, sex, age, or disability**] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under [the Affordable Care Act].”

(42 USC 18116)



# ACA Nondiscrimination Rules

## 42 CFR part 92



- Proposed rule published September 8, 2015.
- Final rule published **May 18, 2016**
- Effective **July 18, 2016**
- Must comply with notice/tagline rules by **October 16, 2016**
- Prohibit discrimination on the basis of race, color, national origin, sex, age, or disability.
  - Does not preempt or replace other discrimination laws.
  - Does not include religious exemption, but does not replace other protections for religious freedom or conscience, e.g.,
    - Federal (e.g., Religious Freedom Restoration Act (“RFRA”), ACA provisions re abortion or preventive health, etc.)
    - State laws (e.g., provider conscience)

(42 CFR 92.1 to 92.3)



# Covered Entities

- **Nondiscrimination Rules apply to:**
  - Any entity that receives federal financial assistance from HHS, including:
    - Medicare Parts A, C and D; Medicaid; grants; loans; subsidies; etc.
    - Not Medicare Part B
    - ❖ Applies to hospitals, nursing facilities, clinics, medical practices, individual physicians, etc.
  - Any health program that HHS administers.
  - Health insurance marketplaces and issuers that participate in the marketplaces.

(42 CFR 92.2; 81 FR 31383-84)

# Requirements



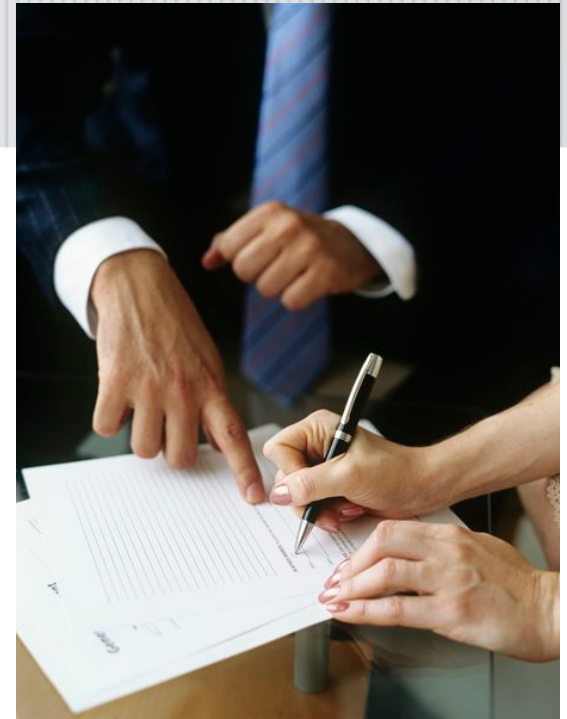
1. Applicants sign HHS form promising to comply.
2. Covered entities with 15 or more employees:
  - a. Appoint compliance coordinator.
  - b. Establish grievance procedure.
3. Post notice of nondiscrimination.
4. Include taglines and statements on significant documents.
5. Do not discriminate on basis of race, color, national origin, sex, age, or disability, including:
  - a. Treat men and women equally in healthcare they receive, and treat individuals consistent with their gender identity.
  - b. Provide language assistance (e.g., interpreters and translations) to persons with limited English proficiency.
  - c. Provide auxiliary aids to those with disabilities.
  - d. Make newly constructed or altered facilities accessible to those with disabilities.

# Assurance

- **Entity applying for federal financial assistance must sign a form assuring that their program will be operated in compliance with rules.**

(42 CFR 92.5)

- **Included in application process, including Assurance of Compliance HHS-690 Form.**
- **Extension of assurances required by other discrimination statutes.**





# Compliance Coordinator

- Covered entities with 15 or more employees must designate at least one employee to coordinate compliance.
  - Compliance with rules.
  - Investigate grievances.

(42 CFR 92.7(a))

- Similar to requirement in Section 504 of the Rehabilitation Act (see 45 CFR 84.7(a)).
- May use same person designated under other discrimination statutes, or others.



# Grievance Procedure



- Covered entities with 15 or more employees must adopt a written grievance procedure that includes:
  - Due process standards.
  - Prompt and equitable resolution of grievances.

(42 CFR 92.7(b))

- Similar to requirements under Section 504 of the Rehabilitation Act (see 45 CFR 84.7(a)).
- May use same process established under Section 504, or other process that complies with regulations.

# Grievance Procedure

## HHS sample grievance procedure

- Complainant may file written grievance within 60 days.
  - Include name, address, problem, and requested remedy.
- Compliance coordinator must conduct thorough investigation within 30 days and report to complainant.
  - Maintain confidentiality and documentation.
- Complainant may appeal to Administrator/CEO/Board within 15 days.
- Administrator/CEO/Board must issue written decision within 30 days.
- May not retaliate against complainant.
- Provide language assistance or auxiliary aids to help with grievance.
- Complainant may file complaint directly with OCR.

(42 CFR part 92, App. C; 81 FR 31473)

**IMPORTANT  
NOTICE**

## Notice of Nondiscrimination

❖ All covered entities must post notice stating:

1. Covered entity does not discriminate based on race, color, national origin, sex, age, or disability.
2. Covered entity provides auxiliary aids to persons with disabilities free of charge and in timely manner.
3. Covered entity provides language assistance (e.g., interpreters and translations) free of charge and in timely manner.
4. How to obtain aids and services.
5. Contact info for compliance coordinator.
6. How to file grievance.
7. How to file complaint with OCR.

(42 CFR 92.8)

- Sample Notice available at 42 CFR part 92, App. A (81 FR 31472), or <http://www.hhs.gov/sites/default/files/Sample%20CE%20Notice%20-%20English%20%28508%29.pdf>.

# Notice of Nondiscrimination

- Only required to post the notice of nondiscrimination in English.
- HHS “encourages covered entities to post the notice of nondiscrimination in one or more of the most prevalent non-English languages frequently encountered by covered entities in their geographic service area.”

(81 FR 31398)

- Must still comply with language assistance rules for LEP persons.
- Must still post taglines in non-English.

# Taglines

- All covered entities must post “taglines”, *i.e.*, short statements written in non-English informing person that language assistance services are available free of charge.
  - E.g.: *“ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).”*
- Post in languages spoken by LEP persons in relevant state or states:
  - Top 15 languages: post in--
    - Physical locations where interact with public
    - Website
    - Significant communications and publications .
  - Top 2 languages: post in small-sized publications.

(42 CFR 92.8(d), (f), and (g))



# Taglines

- **Based on 15 or 2 most prevalent languages in:**
  - Relevant state, or
  - For entities operating in more than one state, in the relevant states.
    - Need only post one set of taglines.
    - Not required to have taglines which vary based on state.
- **Must still take reasonable steps to provide meaningful access to LEP persons.**

# Posting Notice + Taglines

- By October 16, 2016, all covered entities must post notice + taglines in top 15 languages in conspicuously-visible font size:

1. In conspicuous physical locations where interact with public.

2. On covered entity's Website conspicuously accessible from homepage.

- May use prominent in-language links from homepage.

3. In "significant" publications and communications to public and patients.

"Vital"  
documents  
under LEP  
Guidance are  
subset of  
"significant"  
publications

- "Significant" interpreted broadly.
- Includes outreach, education and marketing; patient handbooks; notices requiring response from patient; written notices re rights and benefits; consent forms; complaint forms; etc.
- Not small-sized publications, e.g., postcards, pamphlets, tri-folds.

(42 CFR 92.8; 81 FR 31401-02)

# Posting Notice + Taglines

- Covered entities have discretion in how they post notice + taglines so long as satisfy regulatory standards, e.g.,
  - May combine with other notices.
  - May include at beginning of significant documents.
  - May include as separate insert.
  - May include on separate webpage.
- **Test: “whether the content is sufficiently conspicuous and visible that individuals seeking services...could reasonably be expected to see and be able to read the information.”**  
(81 FR 31397)

# Small-Sized Publications

- By October 16, 2016, must include the following in significant publications and communications that are small-sized (e.g., postcards, tri-fold brochures, etc.) in conspicuously-visible font size:
  - Statement of nondiscrimination.
    - “*[Covered entity] does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities.*”
  - Taglines in top 2 languages spoken by LEP persons in relevant state(s).
    - “*ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).*”

(42 CFR 92.8(b)(2) and (g))

# http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html

Resources x

www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html

HHS.gov  
Civil Rights

U.S. Department of Health & Human Services



Information for Individuals

Filing a Complaint

Information for Providers

Newsroom

Advocates

Race, Color, National Origin

Disability

Age Discrimination

Sex Discrimination

Religion

Section 1557

Hill-Burton

Health Care Conscience Protection

Section 1553

Special Topics

Civil Rights FAQs

Fact Sheets

## Sample

- Notice of nondiscrimination
- Statement of nondiscrimination
- Taglines in multiple languages

## Translated Resources for Covered Entities

### Translated Resources for Covered Entities

Under Section 1557 of the Affordable Care Act (ACA), covered entities are required to post notices of nondiscrimination and taglines that alert individuals with limited English proficiency (LEP) to the availability of language assistance services. The translated resources below are available for use by covered entities.

- [Sample Notice of Nondiscrimination](#)

[Español](#), [繁體中文](#), [Tiếng Việt](#), [한국어](#), [Tagalog](#), [Русский](#), [العربية](#), [Kreyòl Ayisyen](#), [Français](#), [Polski](#), [Português](#), [Italiano](#), [Deutsch](#), [日本語](#), [فارسی](#), [हिंदी](#), [Հայերեն](#), [ગુજરાતી](#), [Hmoob](#), [أَرُمُو](#), [இந்திய](#), [বাংলা](#), [ਪੰਜਾਬੀ](#), [සිංහල](#), [አማርኛ](#), [ភាសាខ្មែរ](#), [Oroomiffa](#), [Ilokano](#), [ພາສາລາວ](#), [Shqip](#), [Srpsko-hrvatski](#), [Українська](#), [नेपाली](#), [Nederlands](#), [unD](#), [Gagana fa'a Sāmoa](#), [Kajin Majōl](#), [Română](#), [Foosun Chuuk](#), [Tonga](#), [Bisaya](#), [Ikirundi](#), [Kiswahili](#), [Bahasa Indonesia](#), [Türkçe](#), [کوردی](#), [ਊਰਦੂ](#), [Thuonjan](#), [Norsk](#), [Català](#), [ελληνικά](#), [Igbo asusu](#), [èdè Yorùbá](#).

[This information will be translated into additional languages and will be made available on this webpage.]

- [Statement of Nondiscrimination](#)

[Español](#), [繁體中文](#), [Tiếng Việt](#), [한국어](#), [Tagalog](#), [Русский](#), [العربية](#), [Kreyòl Ayisyen](#), [Français](#), [Polski](#), [Português](#), [Italiano](#), [Deutsch](#), [日本語](#), [فارسی](#), [हिंदी](#), [Հայերեն](#), [ગુજરાતી](#), [Hmoob](#), [أَرُمُو](#), [இந்திய](#), [বাংলা](#), [ਪੰਜਾਬੀ](#), [සිංහල](#), [አማርኛ](#), [ភាសាខ្មែរ](#), [Oroomiffa](#), [Ilokano](#), [ພາສາລາວ](#), [Shqip](#), [Srpsko-hrvatski](#), [Українська](#), [नेपाली](#), [Nederlands](#), [unD](#), [Gagana fa'a Sāmoa](#), [Kajin Majōl](#), [Română](#), [Foosun Chuuk](#), [Tonga](#), [Bisaya](#), [Ikirundi](#), [Kiswahili](#), [Bahasa Indonesia](#), [Türkçe](#), [کوردی](#), [ਊਰਦੂ](#), [Thuonjan](#), [Norsk](#), [Català](#), [ελληνικά](#), [Igbo asusu](#), [èdè Yorùbá](#).

[This information will be translated into additional languages and will be made available on this webpage.]

- [Taglines](#)

[Español](#), [繁體中文](#), [Tiếng Việt](#), [한국어](#), [Tagalog](#), [Русский](#), [العربية](#), [Kreyòl Ayisyen](#), [Français](#), [Polski](#), [Português](#), [Italiano](#), [Deutsch](#), [日本語](#), [فارسی](#), [हिंदी](#), [Հայերեն](#), [ગુજરાતી](#), [Hmoob](#), [أَرُمُو](#), [இந்திய](#), [বাংলা](#), [ਪੰਜਾਬੀ](#), [සිංහල](#), [አማርኛ](#), [ភាសាខ្មែរ](#), [Oroomiffa](#), [Ilokano](#), [ພາສາລາວ](#), [Shqip](#), [Srpsko-hrvatski](#), [Українська](#), [नेपाली](#), [Nederlands](#), [unD](#), [Gagana fa'a Sāmoa](#), [Kajin Majōl](#), [Română](#), [Foosun Chuuk](#), [Tonga](#), [Bisaya](#), [Ikirundi](#), [Kiswahili](#), [Bahasa Indonesia](#), [Türkçe](#), [کوردی](#), [ਊਰਦੂ](#), [Thuonjan](#), [Norsk](#), [Català](#).



## Languages of HHS Samples

Español, 繁體中文, Tiếng Việt, 한국어, Tagalog, Русский, العربية, Kreyòl Ayisyen, Français, Polski, Português, Italiano, Deutsch, 日本語, हिंदी, فارسی, Հայերեն, ગુજરાતી, Hmoob, اردو, ਪੰਜਾਬੀ, বাংলা, , שׂוֹמְרֵי חַיִּים, ภาษาไทย, Oroomiffa, Ilokano, မာလာယု, Shqip, Srpsko-hrvatski, Українська, नेपाली, Nederlands, unD, Gagana fa'a Sāmoa, Kajin Majōl, Română, Foosun Chuuk, Tonga, Bisaya, Ikirundi, Kiswahili, Bahasa Indonesia, Türkçe, كوردی, Thuᵛᵛjaᵛ, Norsk, Català, ελληνικά, Igbo asusu, èdè Yorùbá,

(available at <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html>)

# Sex Discrimination



# Sex Discrimination

- **Section 1557 is the first federal civil rights law to prohibit discrimination “on the basis of sex.”**
  - **It does not preempt or alter other laws, and providers must continue to comply with other state and federal laws in addition to the new ACA nondiscrimination rules.**



# Sex Discrimination

- The new rules specifically prohibit discrimination based on:
  - an individual's sex;
  - pregnancy, childbirth, or related medical conditions;
  - gender identity; and
  - sex stereotyping.

# Sex Discrimination

**This means:**

- 1. Women must be treated equally with men in the health care they receive and the insurance they obtain.**
- 2. Individuals cannot be denied health care or health coverage based on their sex, including their gender identity and sex stereotyping.**
- 3. A covered entity may not, in providing or administering health - related insurance or other health related coverage, deny, cancel, limit, or refuse to issue or renew a health-related insurance policy or other health related coverage, or impose additional cost-sharing or other limitations or restrictions on the basis of sex.**



# Sex Discrimination

4. **Categorical coverage exclusions or limitations for all health care services related to gender transition are discriminatory.**
5. **Individuals must be treated consistent with their gender identity, including access to facilities.**
6. **Providers may not deny or limit treatment for any health services that are ordinarily or exclusively available to individuals of one gender based on the fact that a person seeking such services identifies as belonging to another gender.**
  - **The health services sought, however, must be medically appropriate.**
  - **For example, nothing in the new rules would require a covered entity to provide a traditional prostate exam to an individual who does not have a prostate, regardless of that individual's gender identity.**

# Sex Discrimination

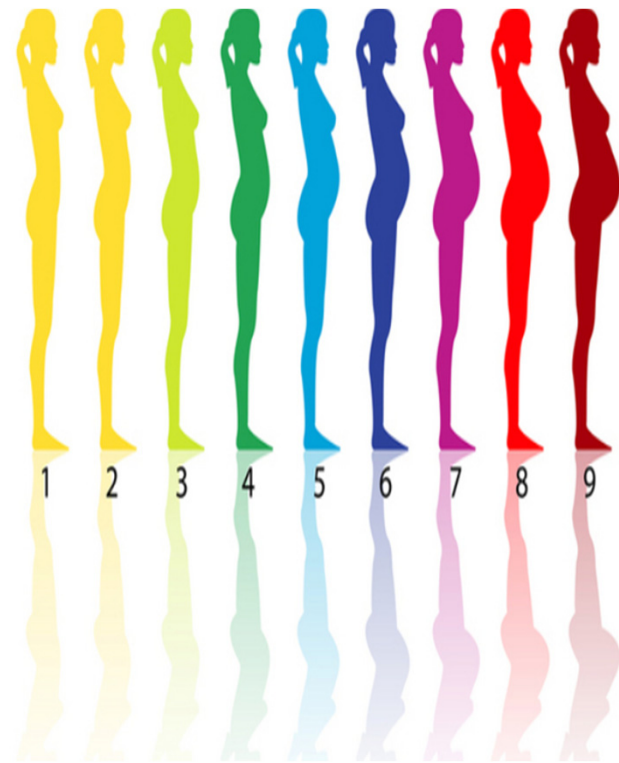
7. **Sex-specific health programs or activities are permissible only if the entity can demonstrate an exceedingly persuasive justification, that is, that the sex-specific health program or activity is substantially related to the achievement of an important health-related or scientific objective.**
  - **Examples may include research that requires either two X chromosomes or an X and Y chromosome.**
  - **Beware – OCR will evaluate sex-specific health programs or activities strenuously. Only those programs that have a legitimate reason for excluding an individual on the basis of sex will likely pass muster.**

# Sex Discrimination

8. The final rule does not resolve whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557. (*See* 81 F.R. 31390.)
  - However, OCR will evaluate complaints that allege sex discrimination related to an individual's sexual orientation to determine if they involve the sorts of stereotyping that can be addressed under the new nondiscrimination rules.
  - The new rules indicate that OCR anticipates that the law will continue to evolve on this issue, that it will enforce Section 1557 in light of those developments, and will consider issuing further guidance on this issue as appropriate.

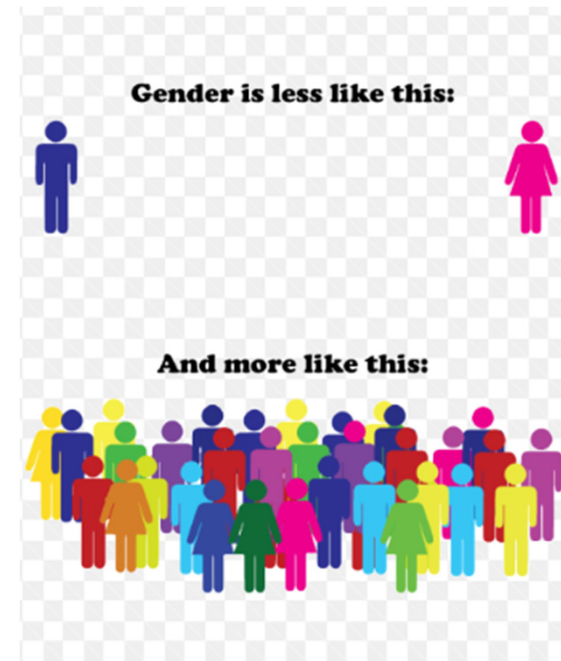
# Sex Discrimination – Pregnancy

- The law prohibits discrimination on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions.
  - Nothing in the new rules displace existing protections afforded by the federal provider conscience laws and the Religious Freedom Restoration Act. (42 U.S.C § 200bb).



# Sex Discrimination– Gender Identity

- The final rules defines “gender identity” as an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth.
- A "transgender individual" is an individual whose gender identity is different from the sex assigned to that person at birth.



# Sex Discrimination– Sex Stereotyping

- The new rules prohibit discrimination on the basis of “sex stereotyping,” which is defined as stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others such as behavior, clothing, hairstyles, activities, voice, mannerisms, and body characteristics.
- The final rules add an additional reference not found in the proposed rule that clarifies that sex stereotypes include gender expectations related to the appropriate role of a certain sex.
  - OCR adopts the position that sex stereotypes encompass not only stereotypes concerning the biological differences between the sexes, but also include stereotypes concerning gender norms.
  - "Sex stereotypes can also include a belief that gender can only be binary and thus that individuals cannot have a gender identity other than male or female...the gender identity spectrum includes an array of possible gender identities beyond male and female." (81 Fed. Reg. 31392).



# Sex Discrimination – OCR Investigations

- **The following are examples of OCR enforcement efforts under Section 1557:**
  - ❖ Hospital policy automatically assigned a male spouse as the grantor (sole financially responsible party) when a female spouse received medical services. When a male spouse received services, however, his female spouse would not automatically be assigned as the guarantor. Policy revised to ensure equal treatment.
  - ❖ Complaint from the male victim of domestic violence that he was subjected to rude comments by hospital staff. Abuse protocol revised and training for staff on identifying and assisting abuse victims.
  - ❖ Wellness program denied a transgender individual mammograms because she transitioned from male-to-female rather than male-to-male. Policy based on CDC guidelines. Guidelines revised to allow mammograms to transgender women who have taken or are taking hormones.

# Sex Discrimination– OCR Investigations (cont.)

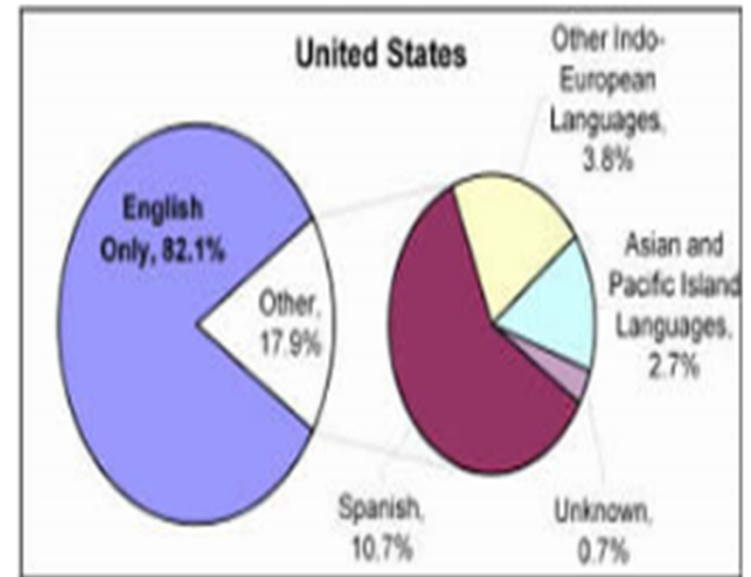
- ❖ Insurance company denied transgender individual gender reassignment surgery on the basis that it was cosmetic surgery. Policy changed so that requests for gender reassignment surgery are determined on the basis of medical necessity.
- ❖ Man who received transportation services to his doctors' appointments from a private medical transportation service complained that multiple drivers harassed him because of his feminine gender expression. Staff received training on how to avoid sex stereotyping and the usage of appropriate terminology.
- ❖ Medical center received multiple complaints from transgender individuals about procedures, including questioning in public waiting rooms regarding the gender listed on their patient forms and not allowing transgender individuals to change their gender in medical records without documentation of a completed gender reassignment surgery. Policy changed and training provided to staff.

# Persons with Limited English Proficiency



# Persons with Limited English Proficiency

- The new rules require language assistance for persons with limited English proficiency.
- These new rules build on but extend beyond HHS's 2003 Guidance Regarding Limited English Proficiency Persons (68 F.R. 47311).



# Persons with Limited English Proficiency

## Interpreters

- Covered entities must offer a qualified interpreter to an individual with limited English proficiency when oral interpretation is a **reasonable step to provide meaningful access**. (45 C.F.R. § 92.201(d)(1)).
  - A "qualified interpreter" generally means one who, via a remote interpreting service or in person:
    1. Adheres to generally accepted interpreter ethics principals, including client confidentiality; and
    2. Has demonstrated proficiency in speaking and understanding both spoken English and the relevant spoken language; and
    3. Is able to interpret effectively, accurately, and impartially, both receptively and expressly, to and from such language(s) and English, using any necessary specialized vocabulary, terminology, and phraseology. (45 C.F.R. § 92.4).
- The interpreter need not be licensed under state law, but must have the relevant proficiency. Simply having above average familiarity with speaking or understanding the relevant foreign language does not necessarily qualify him/her as an interpreter. (81 F.R. 31391).

# Persons with Limited English Proficiency

## Interpreters (cont.)

- A covered entity that provides a qualified interpreter through video remote interpreting services must provide:
  1. Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
  2. A sharply delineated image that is large enough to display the interpreter's face and the participating individual's face regardless of the individual's body position;
  3. A clear, audible transmission of voices; and
  4. Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the video remote interpreting. (45 C.F.R. § 92.201(f))

# Persons with Limited English Proficiency

## Interpreters (cont.)

- In providing an interpreter, a covered entity may not:
  1. Require an individual with limited English proficiency to provide his or her own interpreter;
  2. Rely on an adult accompanying the individual with limited English proficiency to interpret or facilitate communication, except:
    - a) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no qualified interpreter for the individual with limited English proficiency immediately available; or
    - b) Where the individual with limited English proficiency specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances;
  3. Rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no qualified interpreter for the individual with limited English proficiency immediately available; or



# Persons with Limited English Proficiency Interpreters (cont.)

4. Rely on staff other than qualified bilingual/multilingual staff to communicate directly with individuals with limited English proficiency. (45 C.F.R. § 92.92.201(e)).

– “Qualified bilingual/multilingual staff” means:

A member of a covered entity's work force who is designated by the covered entity to provide oral language assistance as part of the individual's current, assigned job responsibilities and who has demonstrated to the covered entity that he or she:

1. Is proficient in speaking and understanding both spoken English and at least one other spoken language, including any necessary specialized vocabulary, terminology and phraseology, and
2. Is able to effectively, accurately, and impartially communicate directly with individuals with limited English proficiency in their primary languages.

(45 C.F.R. § 92.4).

# Persons with Limited English Proficiency

## Translators

- Covered entities must use a qualified translator when translating written content in paper or electronic form. (45 C.F.R. § 92.201(d)(2)).
- A "qualified translator" is one who:
  1. Adheres to generally accepted translator ethics principles, including client confidentiality;
  2. Has demonstrated proficiency in writing and understanding both written English and at least one other written non-English language; and
  3. Is able to translate effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary, terminology and phraseology. (45 C.F.R. § 92.4).
- A qualified interpreter may not necessarily qualify as a translator. (81 F.R. 31392).
- HHS cautions against the use of automatic translation technologies without the involvement of a qualified translator. (81 F.R. 31417).
- The regulations and accompanying commentary provide little guidance on when and which documents should be translated.

# Persons with Disabilities



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# ACA Nondiscrimination: Assistance for Persons with Disabilities

- “[A]n individual shall not, [on the basis of race, color, national origin, sex, age, or **disability**] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under [the Affordable Care Act].”

(42 USC 18116)

## ACA Rules' Definition of "Disability"

- **“Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment, as defined and constructed in the Rehabilitation Act, 29 U.S.C. 705(9)(B), which incorporates the definition of disability in the ADA, 42 U.S.C. 12102, as amended. Where this part cross-references regulatory provisions that use the term ‘handicap,’ ‘handicap’ means ‘disability’ as defined in this section.”**

**(45 CFR 92.4)**

# ADA's Definition of Disability

- Same except it defines “major life activities” – “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”
- Further, “a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

(42 USC 12102)

# ADA's Definition of Disability

- Definition shall be construed in favor of broad coverage, to the maximum extent permitted.
- Only one major life activity need be limited.
- An impairment that is episodic or in remission is still a disability if it would substantially limit a major life activity when active.
- Determination made without regard to ameliorative effects of mitigating measures (except eyeglasses and contact lenses).

(42 USC 12102)



# ACA Rules: What Must a Covered Entity Do?

- “Take appropriate steps to ensure that communications with individuals with disabilities are as effective as communication with others in health programs and activities, in accordance with the standards found at 28 CFR 35.160 through 35.164. Where the regulator provisions referenced in this section use the term ‘public entity,’ the term ‘covered entity’ shall apply in its place.”

(45 CFR 92.202(a))

# ACA Rules: What Must a Covered Entity Do?

- Provide “appropriate auxiliary aids and services to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.”

(45 CFR 92.202(b))

- Post a notice of individuals' rights, stating that the covered entity provides appropriate auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternate formats, free of charge and in a timely manner.

(45 CFR 92.8(a)(2))

## Standards in 28 CFR 35.160-.164

- A covered entity shall take appropriate steps to ensure communications with patients with disabilities or companions with disabilities.
- “Companion means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a [covered entity], who, along with such individual, is an appropriate person with whom the [covered entity] should communicate.”

(28 CFR 35.160(a))

## Standards in 28 CFR 35.160-.164

- A covered entity “shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in” health care.
  - The type of aid or service “will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.”
  - Covered entity “shall give primary consideration to the requests of the individuals with disabilities.”
  - To be effective, must be in accessible format, timely and protect privacy and independence.

(28 CFR 35.160(b))

# Auxiliary Aids

- DOJ has suggested that interpreters may be required when complex information is being conveyed, e.g.,
  - symptoms, medical condition, and history
  - treatment options and tests
  - medications and surgical procedures
  - obtaining informed consent
  - offering diagnosis, prognosis
  - recommendations for treatment and instructions
  - psychotherapy counseling
  - complex billing or insurance matters.

*(DOJ, ADA Business Brief: Communicating with People Who Are Deaf in Hospital Settings (10/03))*

# What are Auxiliary Aids and Services?

- For deaf or hard of hearing:
  - “Qualified interpreters on-site or through video remote interpreting services . . .; note takers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, text telephones, videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.”

(45 CFR 92.4)

# What are Auxiliary Aids and Services?

- **For blind or low vision:**
  - “Qualified readers; taped texts; audio recordings; Braille materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs; large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision.”

(45 CFR 92.4)



# What are Auxiliary Aids and Services?

- A "qualified interpreter" for an individual with a disability is one who, via a remote interpreting service or in person,
  - (1) Adheres to generally accepted interpreter ethics principles, including client confidentiality; (2) is able to interpret effectively, accurately, and impartially, both receptively and expressly, using any necessary specialized vocabulary, terminology and phraseology.
  - E.g., sign language interpreters, individuals who represent or spell in the characters of another alphabet, and individuals who represent or spell by using a small number of handshapes.

(45 CFR 92.4)

- The interpreter need not be licensed as an interpreter under state law, but must have the relevant proficiency.

(81 FR 31391).

# Auxiliary Aids: Factors to consider

- Effectiveness of method of communication without and with the proposed auxiliary aid.
- Nature and complexity of communication.
- Nature of treatment or procedure.
- Size of practice or facility.
- Cost of alternatives.
- Number of patients who will require auxiliary aids.
- Patient's preferences.
- Provider's risk tolerance.
- Other?

## Standards in 28 CFR 35.160-.164

- The covered entity shall not require an individual with a disability to bring another individual to interpret for him or her.
- The covered entity shall not rely on an adult accompanying an individual with a disability to facilitate communication except (a) “In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available”; or (b) “Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.”

(28 CFR 35.160(c))

## Standards in 28 CFR 35.160-.164

- The covered entity “shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.”

(28 CFR 35.160(c))

# Standards in 28 CFR 35.160-.164

- A covered entity using qualified interpreters via video remote interpreting (VRI) services shall ensure that it provides
  - Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
  - A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;
  - A clear, audible transmission of voices; and
  - Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

## Standards in 28 CFR 35.160-.164

- If a covered entity communicates with patients by telephone, “text telephones (TTY) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.”
- If a covered entity uses an automated-attendant system, such as voicemail and messaging or an interactive voice response system, “the system must provide effective real-time communication with individuals using auxiliary aids and services, including TTY and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.”
- A covered entity “shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.”

(28 CFR 35.161)

## Standards in 28 CFR 35.160-.164

- A covered entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.
- A covered entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities.
- The international symbol for accessibility shall be used at each accessible entrance of a facility.

(28 CFR 35.163)



## Standards in 28 CFR 35.160-.164

- Entity not required to take any action that “it can demonstrate would result in a fundamental alternation in the nature of a service, program, or activity or in undue financial or administrative burdens.”
- Entity has the burden of proving that compliance would result in such alterations or burdens.
- If an action required would result in such alteration or such burden, covered entity “shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, the maximum extent possible, individuals with disabilities receive the benefits or services provided.”

# ACA Rules' Facility Accessibility Standards

- Applies to facility or part of facility in which health programs or activities are conducted.
- If construction or alteration is commenced on or after July 18, 2016:
  - Must ensure that buildings and facilities are compliant with the 2010 Americans with Disabilities Act Standards for Accessible Design, 28 CFR 35.104, which consists of the 2004 Americans with Disabilities Act Accessibility Guidelines and the requirements contained in 28 CFR 35.151;
  - Must comply with the requirements for a “public building or facility” as defined in Section 106.5 of the 2010 Standards.

(28 CFR 92.203(a))

# ACA Rules' Facility Accessibility Standards

- **Exception – if facility was not covered by 2010 Standards prior to July 18, 2016, facility shall comply with 2010 Standards if construction commenced after Jan. 18, 2018.**
- **“Departures from particular technical and scoping requirements by the use of other methods are permitted where substantially equivalent or greater access to and usability of the facility is provided.”**

(28 CFR 92.203(a))

# ACA Rules' Facility Accessibility Standards

- If construction or alteration is commenced on or after July 18, 2016 and was done in conformance with the 1991 ADA Standards for Accessible Design or the 2010 Standards, it shall be deemed to comply with 28 CFR 92.203 and with 45 CFR 84.23(a) and (b), cross-referenced in § 92.101(b)(2)(i).
- Compliance with Rules also deemed if construction:
  - done in conformance with the Uniform Federal Accessibility Standards as defined in § 92.4;
  - construction was commenced before July 18, 2016; and
  - facility was not covered by 1991 Standards or 2010 Standards.

(28 CFR 92.203(b))

# ACA Rules' Technology Accessibility Standards

- **Make all programs and activities provided through electronic and information technology accessible to individuals with disabilities:**
  - unless doing so would impose undue financial or administrative burdens or would result in a fundamental alteration in the nature of the covered entity's health program or activity;
  - if unduly burdensome, then provide information in format other than an electronic that will ensure, to the maximum extent possible, that individuals with disabilities receive the benefits and services that are provided through technology.

(45 CFR 92.204(a))

# ACA Rules' Technology Accessibility Standards

- “Recipients and State-based Marketplaces shall ensure that their health programs and activities provided through Web sites comply with the requirements of Title II of the ADA.”

(45 CFR 92.204(b))

# ACA Rules' Re: Reasonable Modifications

- Covered entity must make reasonable changes to policies, practices, and procedures where necessary to provide equal access for individuals with disabilities unless the covered entity can demonstrate that making the changes would fundamentally alter the nature of the health program or activity.
- Term “reasonable modifications” to be interpreted consistent with the reasonable modification requirement of the ADA, 28 CFR 35.130(b)(7).

(45 CFR 92.205)



## Enforcement of the ACA Rules

- The HHS Office for Civil Rights (OCR) is responsible for accepting and investigating Section 1557 complaints.
- OCR has been receiving and investigating discrimination complaints since 2010.
- Enforcement mechanisms provided for in the following statutes also apply for purposes of enforcing Section 1557:
  - Title VI of the Civil Rights Act of 1964
  - Title IX of the Education Amendments of 1972
  - Section 504 of the Rehabilitation Act of 1973
  - Age Discrimination Act of 1975

(28 CFR 92.301)

# Enforcement of the ACA Rules

- **Enforcement mechanisms include:**
  - requiring covered entities to keep records and submit compliance reports to OCR
  - conducting compliance reviews and compliance investigations
  - providing technical assistance and guidance
- **Where noncompliance cannot be corrected by informal means, available enforcement mechanisms include:**
  - suspension of, termination of, or refusal to grant or continue Federal financial assistance
  - referral to the DOJ with a recommendation to bring proceedings to enforce any rights of the United States
  - any other means authorized by law

## Enforcement of the ACA Rules

- **Compensatory damages for violations of Section 1557 are available in “appropriate administrative and judicial actions.”**

(28 CFR 92.301(b))

- **Individuals can file a complaint through the OCR.**
- **Individuals may bring a civil challenge to a Section 1557 violation.**

(28 CFR 92.302)

# Action Items

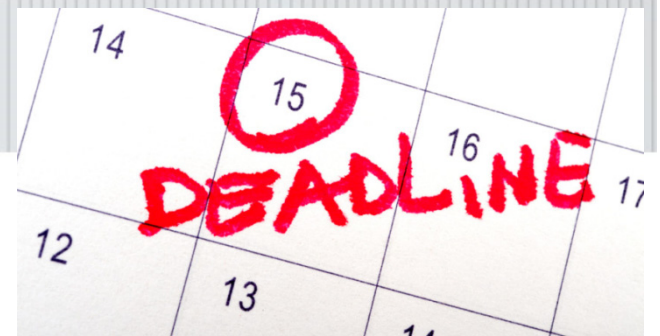


# By July 18, 2016



- Covered entities with 15 or more employees:
  - Appoint and train compliance coordinator.
  - Draft and implement grievance procedure.
- Review and, as necessary, update policies or procedures for addressing discrimination situations, e.g.,
  - Avoid sex discrimination.
  - Provide language assistance to LEP persons.
    - Assess and arrange for interpreters in relevant languages
    - Translate “vital” documents in relevant languages as needed
  - Provide auxiliary aids to persons with disabilities.
  - Assess physical structures and access by those with disabilities.
- Train staff concerning obligations and document training.

# By October 16, 2016



- Post notices + taglines (15 languages)
  - In physical, public locations.
  - On website
    - May include in-language links from home page.
  - In significant publications or communications
    - Identify “significant” publications and communications.
  - ❖ See samples provided.
- Include statement of nondiscrimination + taglines (2 languages) in small publications.
  - “Significant” brochures, postcards, trifold publications, etc.
  - ❖ See samples provided.

# Ongoing

- Watch for additional guidance and samples from HHS and OCR.
- Train new employees and periodically retrain all employees.
- Monitor ongoing compliance.
  - Changes in personnel.
  - Changes in your policies and practices.
  - New “significant” publications or communications.
  - Changes in LEP population.
- Respond promptly to complaints and problems.
  - Use grievance procedure.
  - Educate and sanction employees, as appropriate.
  - Document appropriate response.
- Provide ongoing training.



# Additional Resources



I'm looking for...



[HHS A-Z Index](#)



Information for  
Individuals



Filing a  
Complaint



Information for  
Providers



Newsroom

[HHS Home](#) > [Civil Rights](#) > [For Individuals](#) > Section 1557 of the Patient Protection & Affordable Care Act

Civil Rights for Individuals and  
Advocates —

[Race, Color, National Origin](#)

[Disability](#)

[Age Discrimination](#)

[Sex Discrimination](#)

[Religion](#)

[Section 1557](#)

[Hill-Burton](#)

[Health Care Conscience Protection](#)

[Section 1553](#)

[Special Topics](#)

[Civil Rights FAQs](#)

[Fact Sheets](#)

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## Section 1557 of the Patient Protection and Affordable Care Act

Section 1557 is the nondiscrimination provision of the Affordable Care Act (ACA). The law prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. Section 1557 builds on long-standing and familiar Federal civil rights laws: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. Section 1557 extends nondiscrimination protections to individuals participating in:

- Any health program or activity any part of which received funding from HHS
- Any health program or activity that HHS itself administers
- Health Insurance Marketplaces and all plans offered by issuers that participate in those Marketplaces.

Section 1557 has been in effect since its enactment in 2010 and the HHS Office for Civil Rights has been enforcing the provision since it was enacted. If you believe you have been discriminated against on one of the bases protected by Section 1557, [you may file a complaint](#) with OCR.

### Issuance of the Final Rule

On May 13, 2016, the HHS Office for Civil Rights issued the final rule implementing of Section 1557.



Information for Individuals	Filing a Complaint	Information for Providers	Newsroom
<b>Advocates</b>			
Race, Color, National Origin			
Disability			
Age Discrimination			
Sex Discrimination			
Religion			
Section 1557			
Hill-Burton			
Health Care Conscience Protection			
Section 1553			
Special Topics			
Civil Rights FAQs			
Fact Sheets			

## Sample

- Notice of nondiscrimination
  - Statement of nondiscrimination
  - Taglines
- in multiple languages

## Translated Resources for Covered Entities

### Translated Resources for Covered Entities

Under Section 1557 of the Affordable Care Act (ACA), covered entities are required to post notices of nondiscrimination and taglines that alert individuals with limited English proficiency (LEP) to the availability of language assistance services. The translated resources below are available for use by covered entities.

- [Sample Notice of Nondiscrimination](#)

[Español](#), [繁體中文](#), [Tiếng Việt](#), [한국어](#), [Tagalog](#), [Русский](#), [العربية](#), [Kreyòl Ayisyen](#), [Français](#), [Polski](#), [Português](#), [Italiano](#), [Deutsch](#), [日本語](#), [فارسی](#), [हिंदी](#), [Հայերեն](#), [ગુજરાતી](#), [Hmoob](#), [أَرُو](#), [இந்திய](#), [বাংলা](#), [ਪੰਜਾਬੀ](#), [සිංහල](#), [አማርኛ](#), [ភាសាខ្មែរ](#), [Oroomiffa](#), [Ilokano](#), [ພາສາລາວ](#), [Shqip](#), [Srpsko-hrvatski](#), [Українська](#), [नेपाली](#), [Nederlands](#), [unD](#), [Gagana fa'a Sāmoa](#), [Kajin Majōl](#), [Română](#), [Foosun Chuuk](#), [Tonga](#), [Bisaya](#), [Ikirundi](#), [Kiswahili](#), [Bahasa Indonesia](#), [Türkçe](#), [کوردی](#), [ਊਰਦੂ](#), [Thuonjan](#), [Norsk](#), [Català](#), [ελληνικά](#), [Igbo asusu](#), [èdè Yorùbá](#).

[This information will be translated into additional languages and will be made available on this webpage.]

- [Statement of Nondiscrimination](#)

[Español](#), [繁體中文](#), [Tiếng Việt](#), [한국어](#), [Tagalog](#), [Русский](#), [العربية](#), [Kreyòl Ayisyen](#), [Français](#), [Polski](#), [Português](#), [Italiano](#), [Deutsch](#), [日本語](#), [فارسی](#), [हिंदी](#), [Հայերեն](#), [ગુજરાતી](#), [Hmoob](#), [أَرُو](#), [இந்திய](#), [বাংলা](#), [ਪੰਜਾਬੀ](#), [සිංහල](#), [አማርኛ](#), [ភាសាខ្មែរ](#), [Oroomiffa](#), [Ilokano](#), [ພາສາລາວ](#), [Shqip](#), [Srpsko-hrvatski](#), [Українська](#), [नेपाली](#), [Nederlands](#), [unD](#), [Gagana fa'a Sāmoa](#), [Kajin Majōl](#), [Română](#), [Foosun Chuuk](#), [Tonga](#), [Bisaya](#), [Ikirundi](#), [Kiswahili](#), [Bahasa Indonesia](#), [Türkçe](#), [کوردی](#), [ਊਰਦੂ](#), [Thuonjan](#), [Norsk](#), [Català](#), [ελληνικά](#), [Igbo asusu](#), [èdè Yorùbá](#).

[This information will be translated into additional languages and will be made available on this webpage.]

- [Taglines](#)

[Español](#), [繁體中文](#), [Tiếng Việt](#), [한국어](#), [Tagalog](#), [Русский](#), [العربية](#), [Kreyòl Ayisyen](#), [Français](#), [Polski](#), [Português](#), [Italiano](#), [Deutsch](#), [日本語](#), [فارسی](#), [हिंदी](#), [Հայերեն](#), [ગુજરાતી](#), [Hmoob](#), [أَرُو](#), [இந்திய](#), [বাংলা](#), [ਪੰਜਾਬੀ](#), [සිංහල](#), [አማርኛ](#), [ភាសាខ្មែរ](#), [Oroomiffa](#), [Ilokano](#), [ພາສາລາວ](#), [Shqip](#), [Srpsko-hrvatski](#), [Українська](#), [नेपाली](#), [Nederlands](#), [unD](#), [Gagana fa'a Sāmoa](#), [Kajin Majōl](#), [Română](#), [Foosun Chuuk](#), [Tonga](#), [Bisaya](#), [Ikirundi](#), [Kiswahili](#), [Bahasa Indonesia](#), [Türkçe](#), [کوردی](#), [ਊਰਦੂ](#), [Thuonjan](#), [Norsk](#), [Català](#).

## Additional Help?

- HHS LEP Guidance (8/03)
- OCR, *Compliance Review Initiative: Advancing Effective Communication in CAHs* (4/13)
- ADA regulations concerning public accommodation, 28 CFR part 36
- DOJ, *ADA Business Brief: Communicating with People Who are Deaf in Hospital Settings* (10/03)

# Additional Help?

- OCR website, [www.hhs.gov/ocr/civilrights/index.html](http://www.hhs.gov/ocr/civilrights/index.html)
  - Guidance and education
  - Sample policies and procedures
    - Nondiscrimination policy
    - Notifications of rights
    - LEP policy
    - Auxiliary aids policy
    - Program accessibility policy
    - Grievance procedures
- ADA website, <http://www.ada.gov/>
  - Guidance and education
  - Technical guidance
- Lots of stuff on internet, but be careful.



# Holland & Hart Resources

- [www.hollandhart.com/healthcare](http://www.hollandhart.com/healthcare)
  - Webinar recordings
  - Articles
  - Forms
  - Checklists



# www.hollandhart.com/healthcare

https://www.hollandhart.com/healthcare

Healthcare | Holland & Hart

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## Healthcare

### Overview

Holland & Hart provides a comprehensive health law practice serving the dynamic healthcare industry. In recent years, health care has changed, extraordinary competition, and increasingly complex regulatory requirements. Our attorneys and staff skillfully respond to these challenges. As a result of our expertise in healthcare law, we are able to provide coordinated services to meet the business, transactional, litigation, and regulatory needs of our clients.

Our healthcare clients include hospitals, individual medical providers, medical groups, managed care organizations (MCOs), third-party administrators (TPAs), health information exchanges (HIEs), practice managers and administrators, independent practice associations (IPAs), owners of healthcare assets, imaging centers, ambulatory surgery centers, medical device and life science companies, rehabilitation centers, and extended and eldercare facilities. We have also assisted clients with the significant changes enacted by the Affordable Care Act, including advice regarding employer and health plan compliance, health insurance exchanges, accountable care organizations, and nonprofit cooperative health plans.

[+ Read More](#)

View our [blog](#) and [webinar recordings](#) that cover HIPAA, antitrust, compliance, and more!

Webinars

Articles and Forms

- Publications

HIPAA Privacy Rule Modified to Permit Covered Entities to Make Certain Limited Disclosures to the National Instant Criminal Background System

[+ Expand All](#)



# Future Webinars



- *Health Law Basics* monthly webinar series
  - 6/23/16: Laws that Board Members Should Know
  - 6/30/16: Data Breach Response Readiness
  - 7/12/16: Provider Compensation Arrangements: Employees, Contractors, and Groups
  - 7/21/16: Network Adequacy
  - 7/28/16: Accountable Care Organizations 2.0
- *Healthcare Update and Health Law Blog*
  - Under “Publications” at [www.hollandhart.com](http://www.hollandhart.com).
  - E-mail me at [kcstanger@hollandhart.com](mailto:kcstanger@hollandhart.com).

# Questions?



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