Health Advocate

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Nondiscrimination and the ACA

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Key Resources

NHeLP Comments on Information Regarding Nondiscrimination - Section 1557

Open Doors for All: Sexual Orientation and Gender Identity Protections in Health Care

Coming in October's *Health Advocate*:

Autism Spectrum Disorders

Is it "fair" if an individual who speaks little English is told to bring her own interpreter when she arrives for chemotherapy treatment? Can a healthcare provider turn away a transgender person or refuse to touch a person with HIV? What if a woman is denied a mammogram because she is in a wheelchair?

While virtually everyone would agree these situations should not occur, too many examples still abound of ongoing discrimination throughout all kinds of healthcare settings, from hospitals to clinics and nursing homes.

When President Obama signed the Affordable Care Act (ACA) into law on March 23, 2010, it included a nondiscrimination provision that both reiterated longstanding law and expanded nondiscrimination protections in important ways. The first week in September 2015, HHS released a Notice of Proposed Rulemaking (NPRM) to clarify and implement Section 1557 of the ACA.

Section 1557 prohibits discrimination on the basis of race, "color," national origin (including immigration status and English language proficiency), sex, age, and disability. The proposed rule builds on standards of four longstanding federal civil rights laws referenced in Section 1557 and their implementing regulations: Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975.

Section 1557 explicitly prohibits discrimination by:

- any health program or activity that receives federal financial assistance, including credits, subsidies, or contracts of insurance (*e.g.*, Medicaid and CHIP as well as qualified health plans receiving APTC/CSR payments from or on behalf of enrollees);
- any program or activity that is administered by a federal agency (*e.g.*, Medicare and the federally facilitated marketplace); and
- any entity created under Title I of the ACA (*e.g.*, state-based, state partnership and the federally facilitated marketplaces).

Most of the prohibitions on discrimination that are addressed by Section 1557 have been longstanding. However, Section 1557 provides new prohibitions against sex discrimination in health care and applies those prohibitions, as well as other nondiscrimination provisions, directly to the marketplaces and health programs administered by HHS. So, for example, the proposed regulations clarify that Qualified Health Plans – as entities receiving federal financial assistance as well as subcontractors to entities created under Title I – have a responsibility to provide appropriate language services under Section 1557 (in addition to the original protections of Title VI of the Civil Rights Act of 1964).

According to the HHS Office for Civil Rights, which enforces Section 1557:

The proposed rule combines and harmonizes existing, well-established federal civil rights laws and clarifies the standards HHS would apply in implementing Section 1557 of the Affordable Care Act, which says that individuals cannot be denied access to health care or health coverage or otherwise discriminated against because of their race, color, national origin, sex, age, or disability. Building on long-standing and familiar civil rights principles, the proposed rule takes important steps forward. Section 1557 is the first federal civil rights law to prohibit discrimination on the basis of sex in health care.[1]

The following sections provide an overview of some of the highlights of the proposed regulation implementing Section 1557. Comments on the proposed regulation are due November 9, 2015.

Sex Discrimination

While Title IX has long protected against sex discrimination in education, the same principles did not apply to health care until enactment of Section 1557 of the ACA.

The proposed regulation directly prohibits discrimination on the basis of, among other factors, pregnancy and the termination of pregnancy, as well as recovery from pregnancy, childbirth, or related medical conditions.

The proposed regulation also takes the groundbreaking step of prohibiting discrimination on the basis of gender identity and sex stereotyping. These new protections include a prohibition on insurance plan exclusions that categorically exclude transgender individuals from coverage for health care services related to gender transition; a requirement that health care providers and insurance carriers must provide access to medically necessary services regardless of the individual's sex assigned at birth, gender identity, or legal gender marker (for example, a transgender man cannot be denied treatment for ovarian cancer); a requirement to treat transgender individuals in accordance with their gender identity in, for example, assigning hospital rooms; and a prohibition on discrimination related to sex stereotyping.[2]

The proposed regulation seeks comments as to whether discrimination on the basis of sexual orientation should also be covered by Section 1557. Given recent decisions by the Equal Employment Opportunity Commission and the courts, we believe the answer to this question should be "yes."[3]

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[1] Frequently Asked Questions, Section 1557 of the Affordable Care Act: Notice of Proposed Rulemaking, *available at* http://www.hhs.gov/ocr/civilrights/understanding/section1557/nprmprqas.html.

[2] Sex stereotyping is defined in the regulation 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, or body characteristics".

[3] For more information on general identity and sexual orientation discrimination, see Open Doors for All: Sexual Orientation and Gender Identity Protections in Health Care, https://www.americanprogress.org/issues/lgbt/report/2015/04/30/112169/open-doors-for-all/.

National Origin Discrimination

The proposed regulation clarifies some of the longstanding requirements regarding language access for limited English proficient (LEP) individuals. A LEP individual is one whose primary language for communication is not English and who has a limited ability to read, write, speak, or understand English.

In addition to incorporating existing protections under Title VI, the proposed regulation picks up on previous agency guidance and specifically prohibits using a minor as an interpreter (except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where no qualified interpreter is immediately available). An adult accompanying an LEP individual may not be relied on to interpret except in an emergency or if the LEP individual specifically requests the accompanying adult interpret or facilitate communication. Further, the regulation requires the use of a "qualified" interpreter, which it defines as an individual who adheres to interpreter ethics; has demonstrated language proficiency; and can interpret effectively, accurately, and impartially including knowing specialized terminology. So, an adult accompanying an LEP patient may not be qualified even if the patient wants the individual to interpret because the adult may not have sufficient language proficiency or knowledge of medical terminology in both languages. Thus, a covered entity should likely have a qualified interpreter available, in addition to the accompanying adult, to ensure effective communication and compliance with this regulation as well as Title VI.

Disability Discrimination

The proposed regulation also clarifies longstanding prohibitions against discrimination on the basis of disability. New requirements would ensure that websites and all information provided through electronic and information technology comply with Title II of the Americans with Disabilities Act. Further, interpreters for individuals with disabilities – including sign language interpreters, oral transliterators (individuals who represent or spell in the characters of another alphabet), and cued-language transliterators (individuals who represent or spell by using a small number of handshapes) must be able to interpret effectively, accurately, and impartially.

The proposed regulation uses the definition of disability as defined in the Rehabilitation Act as updated by the ADA Amendments Act. This includes individuals who have a physical or mental impairment that substantially limits one or more major life activities. A separate provision in the ACA also prohibits Qualified Health Plans from employing "marketing practices or benefit designs that have the effect of discouraging the enrollment in such plan by individuals with significant health needs."[4] Thus, if an individual has significant health needs but does not meet the definition of disability used in the NPRM, Section 1557 would not apply.

Notices and Remedies

All covered entities will have to take initial and continuing steps to communicate with beneficiaries, enrollees, applicants, and the public about its nondiscrimination policies. Entities must provide a notice encompassing seven factors, including that the entity does not discriminate and that it provides appropriate interpreters and auxiliary aids and services, free of charge, to ensure effective communication for individuals who are LEP or have a disability. These notices must include taglines in the top 15 languages spoken nationally. Taglines must also be included in significant publications and communications targeted to covered individuals, in a conspicuous location accessible from the entity's website and in conspicuous physical locations where the entity interacts with the public. Further, entities with at least 15 employees must: 1. designate at least one employee to carry out the responsibilities under Section 1557; and 2. adopt grievance procedures that incorporate appropriate due process standards to resolve any action prohibited under Section 1557.

[4] 42 U.S.C. 18031(c)(1)(a).

As outlined in the regulation, individuals who experience discrimination may file an administrative complaint with the HHS Office for Civil Rights. In addition, Section 1557 is enforceable through the courts, and individuals who suffer discrimination can pursue that avenue in addition to (or in lieu of) filing an administrative complaint.

While the statutory text of Section 1557 delegates rulemaking authority to the Secretary of HHS, the NPRM only applies to programs and activities under HHS' domain. We will recommend that the final rule explicitly apply the NPRM to all covered agencies. In the alternative, other agencies operating health programs – such as the Department of Defense, Veterans Administration and the Office of Personnel Management (which oversees the Federal Employee Health Benefit Program) – should quickly adopt the rule to cover their relevant programs and activities rather than initiate additional rulemaking.

Conclusion

While much of the discrimination prohibited by Section 1557 dates back to the 1960's, the provision provides a 21st century update by prohibiting sex, gender identity, and sex stereotyping discrimination, as well as clarifying standards regarding discrimination based on language, disability, and other protected groups. NHeLP looks forward to the finalization of this critical rule to ensure that all individuals can enroll in and access high quality health care without regard to their race, ethnicity, language, immigration status, sex, gender identity, sexual orientation, age, or disability.

About Us

The National Health Law Program protects and advances the health rights of low income and underserved individuals. NHeLP advocates, educates and litigates at the federal and state level.

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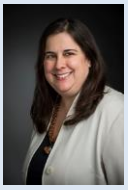

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