



HHS Eliminates or Weakens Regulatory Protections Against Discrimination in Health Care

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The Trump administration repeatedly tried and failed to repeal the Patient Protection and Affordable Care Act (ACA), which has extended coverage and improved health care access for millions. Now the administration is continuing its efforts to undermine and sabotage the ACA and civil rights protections. The Department of Health and Human Services (HHS) recently finalized changes to regulations implementing § 1557, the ACA's nondiscrimination provision (also called the Health Care Rights Law).¹ Section 1557's protections extend to discrimination on the basis of race, color, national origin (including language access), sex, age, and disability by referring to pre-existing civil rights laws.² It is the first federal law to ban sex discrimination in health care.

The 2020 § 1557 Final Rule repeals outright, or significantly weakens, important regulations—both existing regulatory provisions implementing § 1557 as well as other regulatory provisions—protecting against discrimination in health programs and activities. The following provides an overview of important changes in the 2020 Final Rule and how they may affect key populations:

- [Exempts most private health plans from nondiscrimination requirements](#)
- [Exempts most federal government agencies and operations from nondiscrimination requirements](#)
- [Eliminates regulations expressly protecting LGBTQ persons from discrimination](#)
- [Eliminates regulations protecting people with disabilities and those with chronic conditions](#)
- [Eliminates regulations protecting people who have received or are seeking reproductive health services from discrimination](#)
- [Eliminates notice requirements to inform individuals of their rights and how to file complaints](#)

- [Eliminates language access requirements so people with limited English proficiency know how to obtain language services](#)
- [Enforcing rights](#)

Fortunately, the administration cannot repeal a statute through regulations. Persons who experience discrimination in health care programs or activities are still protected under the law.

Exempts most private health plans from nondiscrimination requirements

Section 1557 prohibits discrimination in health programs and activities receiving federal financial assistance, health programs and activities administered by the executive branch, as well as entities created under the ACA, including the Marketplaces and health plans sold through the Marketplaces.³

Under the law (and underscored in the 2016 regulations), when an entity is principally engaged in providing or administering health services, all of its activities are covered by § 1557 if any part receives federal financial assistance.⁴ This means, for example, that if a hospital receives federal funding for some of its patients who are on Medicaid or Medicare, then services to **all** patients and the hospital's entire operations, outpatient clinics, surgical units, and labs, must comply with § 1557.

The 2020 Final Rule retains this provision, but creates a major exemption. It declares that health **insurance** companies are not principally engaged in providing health **care**. Insurance companies would only be subject to § 1557 for the specific plans or products that receive federal funding. This would include, for example, Qualified Health Plans sold through the ACA Marketplaces, Medicare Advantage Plans, and Medicaid managed care plans. The 2020 Final Rule would exempt most private employer health plans from nondiscrimination requirements, as well as the Federal Employees Health Benefits Program (FEHBP).⁵ As of 2018, an estimated 58% of persons under age 64, or 153,756,100 individuals, received their health care through employer-sponsored plans.⁶

As NHeLP noted in [comments](#) on the proposed rule, an insurer does not simply process claims.⁷ Insurers design the care individuals receive by determining benefits offered and establishing formularies, payment structures, and networks. Insurers conduct prior authorization, and establish and evaluate other clinical coverage criteria. Insurers exercise considerable control over the health care of enrollees—deciding what providers a patient may see, what hospitals they may visit, and what treatments or medications they may receive.⁸

HHS' tortured interpretation—that health insurance is not health care—will make it harder for people who experience discrimination by private insurers to pursue administrative remedies

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and go to court. The rule's inconsistency with the statute itself will cause confusion for both health care entities and patients, increasing confusion about who is protected and making it harder to enforce their rights through to administrative and judicial complaints.

Exempts most federal government agencies and operations from nondiscrimination requirements

The plain language of § 1557, as well as the 2016 Final Rule, establish that any health "program or activity" administered by an executive agency is subject to the law's provisions.⁹ However, the 2020 Final Rule seeks to exempt most federal agencies from § 1557 compliance. HHS imagines that Congress sought to limit application of § 1557 only to federal agencies administering health programs or activities under Title I of the ACA.

Title I of the ACA establishes the Marketplaces, premium tax credits, health insurance reforms such as guaranteed issue, and streamlined eligibility systems for Medicaid and the Children's Health Insurance Program (CHIP).¹⁰ Under the 2020 Final Rule, § 1557 applies only to HHS administration of these programs and activities.¹¹ However, HHS administration of non-Title I health programs or activities, including most of Medicaid, Medicare, programs administered by the Centers for Disease Control and Prevention (CDC), the Health Resources Services Administration (HRSA), the Substance Abuse and Mental Health Services Administration (SAMSHA), and others, would be exempt from § 1557.

This theory stands contrary to the statutory text, design, and intent of the ACA to require all federal health programs and activities to comply with § 1557's nondiscrimination protections.

Thus while entities like state Medicaid agencies and community health centers receiving funds through federal programs would be subject to § 1557 (as recipients of federal financial assistance), portions of federal agencies administering non-title I programs, such as the Center for Medicaid and CHIP Services (CMCS) and HRSA, would be exempt.¹²

For some HHS personnel, the new § 1557 applicability rules will be especially challenging. For example, CMCS administration of streamlined eligibility systems for Medicaid and CHIP would be subject to § 1557 because they were established under Title I of the ACA. However, administering other aspects of Medicaid and CHIP would be exempt from § 1557 compliance.¹³

As a result, federal agencies and their personnel will be splintered, with some activities and actions subject to § 1557, and others not. By fracturing the applicability of § 1557 to federal agencies, HHS will make monitoring and compliance near impossible.

Eliminates regulations expressly protecting LGBTQ persons from discrimination

Section 1557 prohibits discrimination on the basis of sex. The 2016 regulations expressly prohibit coverage exclusions for gender-affirming care, and prohibit plans from imposing limits or restrictions on health services provided to transgender persons for services traditionally provided to persons of one sex.¹⁴

However, the 2020 Final Rule completely eliminates gender identity as part of the definition of sex discrimination. It also removes sections of the existing regulations that prohibit health plans from excluding gender-affirming care. This opens the door for health plans, Medicaid programs, and other payers to attempt to refuse to cover medically necessary gender-affirming care. Moreover, by removing express protections against discrimination based on someone's gender identity, the 2020 Final Rule will exacerbate the mistreatment and abuse by providers that transgender individuals experience all too often.¹⁵ The elimination of these regulations goes against the findings of federal courts in multiple jurisdictions concluding that § 1557 protections extend to gender identity.¹⁶

The 2020 Final Rule also eliminates provisions in the 2016 regulations that recognize sex stereotyping, including:

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.¹⁷

Lesbian, Gay, and Bisexual (LGB) persons who experience discrimination in health care settings have filed sex discrimination complaints based upon sex stereotyping. Eliminating this provision seems designed to discourage LGB persons from filing complaints.

Moreover, HHS insisted on going forward with revising these provisions even though the Supreme Court was considering whether Title VII protections against sex discrimination extend to sexual orientation and gender identity. HHS acknowledged "the meaning of 'on the basis of sex' under Title VII will likely have ramifications for the definition of 'on the basis of sex' under Title IX" (referenced in § 1557). In a decision on June 15, 2020, the Supreme Court concluded that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."¹⁸ The ruling will likely have far reaching implications for § 1557 and other civil rights laws prohibiting sex discrimination.

Eliminates regulations protecting people with disabilities and those with chronic conditions

Section 1557 and the 2016 implementing regulations prohibit health insurance companies from discriminating through marketing practices and benefit design. These protections are especially important for people with disabilities and those with other serious or chronic conditions. For example, in 2014 the National Health Law Program and The AIDS Institute filed a complaint with HHS Office for Civil Rights charging that four Florida health insurers discriminated against persons living with HIV/AIDS by placing all drugs used in the treatment of HIV, including generics, in the highest cost sharing tiers.¹⁹ HHS agreed, and prohibited discriminatory plan benefit design and marketing in the 2016 regulations.²⁰

The 2020 Final Rule eliminates provisions expressly prohibiting discriminatory plan design and marketing. While the law still provides such protections and the regulations include other provisions related to discrimination on the basis of disability, the rule changes as well as the exemption for private insurers (discussed above) will make it harder for persons pursuing claims of discrimination on the basis of disability, particularly against employer plans sold outside the ACA Marketplaces.

Eliminates regulations protecting people who have received or are seeking reproductive health services from discrimination

Section 1557 was the first federal law to prohibit health care discrimination on the basis of sex. The 2016 regulations explicitly defined “on the basis of sex” to include pregnancy status, including termination of pregnancy, miscarriage, abortion or related conditions, and childbirth or related medical conditions.²¹

In an effort to drastically limit the scope of § 1557 protections, the 2020 Final Rule removes the 2016 regulations’ definition of “on the basis of sex.” In doing so, HHS attempts to eliminate the express protections that apply to someone who has received or is seeking reproductive health care. Protections under § 1557 still stand, yet without unambiguous implementing regulations and enforcement, illegal health care discrimination on the basis of sex will likely abound.

The 2020 Final Rule also unlawfully attempts to add new exemptions to § 1557’s protections against discrimination on the basis of sex. Section 1557 references Title IX solely for the ground on which it prohibits discrimination—sex (including pregnancy status). The plain language of the statute does not import Title IX’s religious exemption, yet the 2020 Final Rule attempts to do so. In addition, the 2020 Final Rule attempts to add a number of exemptions from religious refusal laws not mentioned in § 1557, such as the Coats-Snowe Amendment, the Church Amendments, and the Weldon Amendment.²² By attempting to add exemptions

beyond those expressly included in § 1557, the Final Rule is designed to empower religiously-affiliated health care providers and entities to discriminate against people who have previously received or are seeking reproductive health services, with far-reaching consequences.

The 2020 Final Rule's regulatory rollbacks and new exemptions will exacerbate sex discrimination in our health care system, disproportionately harming women who often suffer compounded discrimination at the intersection of multiple identities, including women who are Black, Indigenous, or People of Color; transgender women; and women with disabilities.

Eliminates notice requirements to inform individuals of their rights and how to file complaints

Civil rights protections are of little worth if people do not know what their rights are and how to fight back if their rights are violated. The 2016 regulations reflected this by requiring covered entities to post notices in conspicuous public locations and on the entity's website. It also required notices in significant communications. The notices informed beneficiaries, enrollees, applicants, and members of the public of their right to receive health care services without discrimination.²³

The 2016 regulations outlined seven requirements to specify in notices:

- the covered entity does not discriminate;
- the covered entity provides auxiliary aids and services for people with disabilities free of charge and in a timely manner;
- the covered entity provides language assistance services for limited English proficient individuals free of charge and in a timely manner;
- how to obtain the auxiliary aids and services and language services;
- identification of and contact information for an employee designated to ensure the entity's compliance with § 1557;
- the availability of a grievance procedure and how to file a grievance; and
- how to file a discrimination complaint with OCR.²⁴

The 2020 Final Rule eliminates the notice requirements, even though, as HHS acknowledged, "an unknown number of persons are likely not aware of their right to file complaints with the HHS OCR and some unknown subset of this population may suffer remediable grievances, but will not complain to OCR absent notices informing them of the process."²⁵

Eliminates language access requirements so people with limited English proficiency know how to obtain language services

Current § 1557 regulations require covered entities to take reasonable steps to provide meaningful access to **each** individual with limited English proficiency (LEP) eligible to be served or likely to be encountered.²⁶ These include requirements for in-language taglines in the top 15 languages of the state on all significant communications and access to qualified interpreters and translators.²⁷

The 2020 Final Rule eliminates the tagline requirements. While it maintains requirements that interpreters and translators be “qualified,” it does this more indirectly than the 2016 regulations and not through a definition provision. The 2020 Final Rule maintains prohibitions of the use of minors as interpreters except in emergencies and the use of accompanying adults as interpreters except in an emergency or upon the request of the patient.

The 2020 Final Rule also rescinded provisions in the 2016 regulations requiring covered entities to identify the specific needs of each individual needing language services. Instead, the 2020 Final Rule adopts an outdated four-factor test, originally utilized in OCR’s 2003 LEP Guidance.²⁸ While this test was developed to implement Title VI of the Civil Rights Act of 1964, the specific statutory language of § 1557 justified the more precise focus on the needs of an individual rather than all LEP individuals an entity may encounter. Gone too is a recognition of the importance of developing and implementing language access plans to ascertain compliance.

Enforcing rights

Despite the issuance of these new regulations, § 1557 is still the law. Expected legal challenges to the final rule may prevent or delay it from going into effect. Individuals who experience discrimination by a health care provider or program can still file complaints under the statute with their [state insurance commission](#), state Medicaid agency, or [HHS’ Office for Civil Rights](#). They may also go to court to stop discrimination. Further, some states have laws that prohibit discrimination. Individuals who encounter health care discrimination should contact an attorney, such as a [local legal services provider](#) or state bar association, for help.

ENDNOTES

- ¹ 42 U.S.C. § 18116. HHS, Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 - 37248 (June 12, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-11758.pdf> (hereinafter 2020 Final Rule).
- ² Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), section 794 of title 29, and the Age Discrimination Act of 1975 [42 U.S.C. § 6101 et seq.].
- ³ 42 U.S.C. § 18116.
- ⁴ 45 C.F.R. § 92.4.
- ⁵ See 2020 Final Rule, “To the extent that employer-sponsored group health plans do not receive Federal financial assistance and are not principally engaged in the business of providing healthcare (as set forth in the rule), they would not be covered entities. The same analysis would apply to employer-sponsored plans not covered by ERISA, such as self-insured church plans or non-Federal governmental plans, as well as to excepted benefits.” 85 Fed. Reg. 37173.
- ⁶ See Kaiser State Health Facts, Health Insurance Coverage of Nonelderly 0-64, <https://www.kff.org/other/state-indicator/nonelderly-0-64/?dataView=1¤tTimeframe=0&selectedDistributions=employer&sortModel=%7B%22collid%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited June 15, 2020).
- ⁷ Letter from Elizabeth Taylor, Exec. Dir., Nat’l Health L. Program, to Alex Azar II, Sec’y, U.S. Dep’t Health & Hum. Servs., Roger Severino, Dir. Office Civ. Rts., U.S. Dep’t Health & Hum. Servs. (Aug. 12, 2019), <https://healthlaw.org/resource/nhelp-comments-on-proposed-rulemaking-for-section-1557-nondiscrimination-in-health-and-health-education-programs-or-activities/>.
- ⁸ See, e.g., Institute of Medicine, *Controlling Costs and Changing Patient Care? The Role of Utilization Management* 13 (1989); Joseph B. Clamon, *Does My Health Insurance Cover It - Using Evidence-Based Medicine and Binding Arbitrator Techniques to Determine What Therapies Fall under Experimental Exclusion Clauses in Health Insurance Contracts*, 54 Drake L. Rev. 473, 508 (2006).
- ⁹ 42 U.S.C. § 18116 (a); 42 C.F.R. §§ 92.1, 92.2, 92.4.
- ¹⁰ ACA § 1321, 42 U.S.C. §18041 (exchanges/marketplaces); ACA § 1401, 26 U.S.C. § 36B (premium tax credits); ACA § 2702, 42 U.S.C. § 300gg-1 (guaranteed issue); ACA § 1413, 42 U.S.C. § 18083 (streamlined Medicaid/CHIP eligibility).
- ¹¹ See new Scope of Application, 45 C.F.R. § 92.3(a)(2): “Any program or activity administered by the Department under Title I of the Patient Protection and Affordable Care Act.” 85 Fed. Reg. 37244 – 37245.
- ¹² Under Executive Order 13166, Title VI applies to all federal agencies. <https://www.justice.gov/crt/executive-order-13166>.
- ¹³ For example, the ACA’s Title II establishes the Medicaid expansion for low income adults.
- ¹⁴ See, e.g., Rebekah Rollston, MD, MPH, PROMOTING CERVICAL CANCER SCREENING AMONG FEMALE-TO-MALE TRANSMASCULINE PATIENTS, The Fenway Institute (May 22, 2019), https://fenwayhealth.org/wp-content/uploads/TFIP-28_TransMenCervicalCancerScreeningBrief_web.pdf.
- ¹⁵ See 2020 Final Rule, “[u]nprofessional conduct such as inappropriate jokes or questions, excessive precautions, or concealment of treatment options, may be covered under State medical malpractice, tort, or battery laws.” 85 Fed. Reg. 37191.
- ¹⁶ See *Flack v. Wis. Dept. of Health Svcs.*, 328 F.Supp.3d 931, 951 (W.D. Wis. 2018) (granting preliminary injunction barring application of state law blocking Medicaid to cover gender-affirming surgery on the grounds that singling out transgender patients amounted to sex discrimination under the ACA); *Kadel v. Folwell*, 2020 WL 1169271 (M.D.N.C. Mar. 11, 2020) (plaintiff’s claim that gender identity discrimination constituted discrimination on the basis of sex under the plain text of §1557, even given HHS’s indication it would not enforce gender identity protections, survived a motion to dismiss); ***HHS eliminates or weakens regulatory protections against discrimination in health care***

Tovar v. Essentia Health Sys, 342 F.Supp.3d 947, 953 (D. Minn. 2018) (“Because Title VII, and by extension Title IX, recognize that sex discrimination encompasses gender-identity discrimination, the Court concludes that § 1557 also prohibits discrimination on the basis of gender identity.”); *Boyden v. Conlin*, 341 F.Supp.3d 979, 997 (W.D. Wis. 2018) (“the exclusion on its face treats transgender individuals differently on the basis of sex, thus triggering the protections of Title VII and the ACA’s anti-discrimination provision”).

¹⁷ 45 C.F.R. § 92.4 (81 Fed. Reg. 31471).

¹⁸ *Bostock v. Clayton County, Georgia*, Slip opinion No. 17–1618 (June 15, 2020)

https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.

¹⁹ National Health Law Program & The AIDS Institute, *Re: Discriminatory Pharmacy Benefits Design in Select Qualified Health Plans Offered in Florida, Administrative Complaint filed with the HHS Office for Civil Rights* (May 28, 2014), <https://healthlaw.org/resource/nhelp-and-the-aids-institute-complaint-to-hhs-re-hiv-aids-discrimination-by-fl/>.

²⁰ 45 C.F.R. § 92.207 (81 Fed. Reg. 31471 – 31472). See also HHS Nondiscrimination in Health Programs and Activities; Final Rule, 81 Fed. Reg. 31,376, 31,429 (May 18, 2016); HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,822 (Feb. 17, 2015); CMS CCIIO, QHP Master Review Tools for 2015, Non-Discrimination in Benefit Design (2015).

²¹ 45 C.F.R. § 92.4 (81 Fed. Reg. 31471).

²² 42 U.S.C. § 238n; 42 U.S.C. § 300a-7; Consolidated Appropriations Act, 2019, Pub. L. 115- 245, Div. B sec. 209 and sec. 506(d) (Sept. 28, 2018).

²³ 45 C.F.R. § 92.8 (81 Fed. Reg. 31472).

²⁴ 45 C.F.R. § 92.8(a)(1)–(7).

²⁵ 84 Fed. Reg. 27883.

²⁶ 45 C.F.R. §§ 92.201–92.204, 45 C.F.R. Appendix B_to_part_92 - Sample Tagline Informing Individuals With Limited English Proficiency of Language Assistance Services (81 Fed. Reg. 31472 - 31473); See also, Jane Perkins, *et. al.*, NAT’L. HEALTH LAW PROGRAM, *Highlights of the Section 1557 Final Rule* (May 16, 2016), <https://healthlaw.org/resource/issue-brief-highlights-of-the-section-1557-final-rule/>.

²⁷ Taglines are short 1-2 sentence descriptions in a non-English language that inform an individual with LEP how to access language services. After finalizing the 2016 regulations, OCR provided model taglines translated in multiple languages.

²⁸ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,

<https://www.federalregister.gov/documents/2003/08/08/03-20179/guidance-to-federal-financial-assistance-recipients-regarding-title-vi-prohibition-against-national> (Aug. 8, 2003).