



Prohibited Discrimination under Section 1557 of the Affordable Care Act

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Section 1557 of the Affordable Care Act and its implementing regulations prohibit discrimination on the basis of race, color, national origin (including ancestry and ethnic characteristics and limited English proficiency), disability, age, and sex (including sexual orientation, gender identity, and sex characteristics), or any combination thereof. Section 1557 applies to all health programs and activities of recipients of federal financial assistance,¹ to all federally conducted programs and activities,² and to all programs and activities of entities created under Title I of the Affordable Care Act (including health care marketplaces and the qualified health plans that participate in them).³ Like other Federal civil rights laws, Section 1557 is enforced by Federal agencies and may also be enforced through private litigation.⁴

Section 1557 generally prohibits **different treatment** (also referred to as “intentional discrimination”) and **discriminatory effects** (also referred to as “disparate impact”). These theories recognize that discrimination shows up in many forms — sometimes there may be an explicit reference to categorization on the basis of a protected identity, but it may also be the case that a facially neutral policy has the result of treating people differently and subjecting them to unfair treatment.⁵

A number of ways exist to assess claims of **different treatment**.

First, different treatment can be shown when a policy is explicit that people are treated differently based on a protected characteristic (their race, color, national origin, sex, age, or disability). This means that the receipt of benefits or services is conditioned on one’s race, color, national origin, sex, age, or disability, or that one of these characteristics is a reason that someone experiences a negative action. Different treatment can also be shown when a decision-maker has made a statement that shows a discriminatory motive. This is considered direct evidence of intentional discrimination.

The below examples may be violations of Section 1557:

- A Medicare Advantage plan imposes additional cost-sharing for health services for people who are deaf because of the cost of sign-language interpreters.
- A hospital prohibits a doctor with admitting privileges from using its operating rooms for gender affirming surgeries for transgender individuals but allows such operations when not provided as gender affirming care for transgender individuals (*e.g.*, mastectomies).
- A hospital provides a free at-home nurse visit to new parents for patients who have delivered a child at their facility, but the scheduling nurse has shared with staff that she deprioritizes young parents because she assumes they will have support from their own parents.

Second, different treatment can also be shown through other methods, such as when other circumstances surrounding the policy or action, when taken together, can demonstrate intent. This is called indirect evidence or circumstantial evidence and can include many factors, such as statistical and anecdotal information.⁶ Intent can also be demonstrated when similarly situated individuals are treated differently because of a protected characteristic.⁷

The below examples may be violations of Section 1557:

- A state Medicaid agency has been made aware of the harms experienced by Spanish-speaking applicants and enrollees based on the agency's failure to provide Spanish language services in administering the state Medicaid program. Though it is aware of the harm and the burden the lack of interpreter and translation services places on Spanish-speakers, and that this may foreseeably lead to eligible individuals not being able to access Medicaid, it fails to assure the provision of language services.
- A residential treatment facility for youth imposes different disciplinary measures for two residents — a Black resident and a non-Black resident — who were both found to have violated the facility's rule against using the telephone after a set time. While the youth have a similar disciplinary history, the facility dismisses the Black resident and allows the non-Black resident to remain, though on probation.

If a real, nondiscriminatory reason exists (and not just a pretext) to treat people differently, then the policy or practice may not be illegal discrimination.

Discriminatory effects examine whether neutral government policies have discriminatory effects. These claims focus on the consequences of the recipient's practices, rather than the recipient's intent,⁸ and looks at whether:

- some protected people or groups are harmed more than others;
- the policy is justifiable; and
- the policy could be reasonably modified in ways that could meet the same goals and alleviate the identified harm?

The below examples may be violations of Section 1557:

- A city health department engages in a consistent pattern of failing to address problems in its sewage system. This inaction causes significant health risks specifically in a majority Black neighborhood compared to the rest of the city. While the health department was aware of the health risks and disproportionate burden and impact placed on Black residents, it did not take meaningful actions to remedy the conditions.
- A health insurance issuer imposes overly restrictive utilization management techniques. The impact of these techniques causes all HIV/AIDS medications to be placed on the highest cost-sharing tier, which has the effect of discouraging people living with HIV and AIDS from enrolling in those plans. Absent a substantial, legitimate nondiscriminatory reason and a demonstration that no less discriminatory alternative is available, this action would likely be unlawful discrimination.

To achieve an America as good as its ideals where all people can live, learn, work, and grow to their fullest potential, we must work together to end discrimination in all forms. Access to health care and health coverage free from discrimination is critical to realizing this ideal, and this is the promise of Section 1557.

ENDNOTES

¹ Health programs and activities of recipients of federal financial assistance generally include, but are not limited to: State and local health agencies, hospitals, health clinics, health insurance issuers, physician practices, pharmacies, community-based health care providers, clinicians, nursing facilities, residential or community-based treatment facilities, State Medicaid programs, Children's Health Insurance Programs, and Basic Health Programs. *See* 45 C.F.R. § 92.4.

² This would include programs and activities such as Medicare, www.healthcare.gov, and research conducted by the National Institutes of Health.

³ 42 U.S.C. § 18116.

⁴ For many years both the government and individuals were able to challenge a policy or practice under Title VI of the Civil Rights Act because it discriminated on the basis of different treatment or disparate impact. In 2001 the Supreme Court ruled in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that private plaintiffs could not bring disparate impact claims, an interpretation that has also been applied to claims of race, color, and national origin discrimination under Section 1557.

⁵ Section 1557 also prohibits the failure to reasonably modify policies and practices that discriminate against people on the basis of disability. As such, failure to reasonably accommodate is an additional theory of disability discrimination under Section 1557.

⁶ *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (once plaintiff makes a prima facie case of discrimination, burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for the challenged action).

⁸ *Lau v. Nichols*, 414 U.S. 563, 568 (1974).