

Immediate Action Required by Health Care Providers to Comply With Section 1557 of the Affordable Care Act by October 16, 2016

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The U.S. Department of Health and Human Services (“HHS”) Office of Civil Rights (“OCR”) has finalized new nondiscrimination rules, which implement section 1557 of the Affordable Care Act (“ACA”) (the “Final Rule”) (81 Fed. Reg. 31376). Under Section 1557, individuals are protected from discrimination in health care on the basis of race, color, national origin, age, disability and sex, including discrimination based on pregnancy, gender identity and sex stereotyping.

The Final Rule applies to those who provide or administer health-related services or insurance coverage and receive “federal financial assistance,” which includes Medicare, Medicaid, meaningful use payments, Centers for Medicare and Medicaid Services gain-sharing demonstration projects, and other federal funds. Every health care provider must determine whether this rule applies to its operations.

Dentists who receive payment from Medicaid and Children’s Health Insurance Fund (CHIP), as well as physicians who participate in Medicare Part B and are receiving meaningful use incentive payments, will be impacted by the Final Rule. Affected health care providers must arrange for full compliance by **October 16, 2016** (90 days after the July 18, 2016 effective date of the Final Regulation).

What Are The Requirements Of The Final Rule?

Under the Final Rule, affected health care providers must, in part, do the following:

- a. Post notices regarding the provider/entity’s discrimination policies (as detailed below);
- b. Develop and implement a language access plan;
- c. Designate a compliance coordinator and adopt grievance procedures (applicable to group practices with 15 or more employees); and
- d. Submit an assurance of compliance form to OCR.

What Information Must Be Included in the Posted Notice?

Posted notices must inform beneficiaries, enrollees, applicants, and members of the public of:

- The entity’s nondiscrimination policy;
- The availability of auxiliary aids and services where necessary, at no cost;
- Translation and language assistance services;
- How to receive these supplemental services;
- The name and contact information of the compliance contact (for larger entities only);
- Complaint and grievance procedures; and
- How to file a discrimination complaint with OCR.

In order for posted notices to meet the requirements of the Final Rule, they must be printed in a conspicuously visible font and posted in visible physical locations, such as where the entity interacts with the public. For medical

and dental practices, this is likely the waiting area of the practice. Notices should also be visibly posted on the entity's website (accessible from the homepage). The notices are required to be included on in significant publications that the provider may produce, although significant publications that are small-sized, such as postcards and tri-fold brochures, may include a shorter non-discrimination statement in lieu of the full notice. All posted notices must also include taglines in the top 15 languages spoken by individuals with limited English proficiency in the provider's state. In Illinois, the top 15 languages (according to HHS guidance) are: Spanish, Polish, Chinese, Korean, Tagalog, Arabic, Russian, Gujarati, Urdu, Vietnamese, Italian, Hindi, French, Greek, and German. The taglines provide guidance as to where the individual can obtain information in their native language. This means that providers will likely need to contract with an outside company that can provide interpretation services for its patients. There is no reimbursement provided for the cost of such interpretation services in most states and this expense cannot be passed on to the patient.

A sample notice and a sample statement of nondiscrimination, as well as the taglines in different translated languages, can be found at <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html>. HHS also suggests that the notices be posted in other languages if your practice has significant patient populations that speaks those languages.

Compliance with Section 1557 and the Final Rule also requires covered entities to take reasonable steps to provide meaningful access to patients with limited English proficiency, as well as to take appropriate steps to provide effective communication for patients with disabilities. Health care providers must review all existing nondiscrimination policies and procedures to make sure the protections include discrimination based on gender identity.

What Steps Should Providers Take Immediately?

- Prepare and post all required "notice" communications and make sure websites are updated accordingly.
- Establish a means of providing required language support. This may require contracting with an outside vendor and/or addressing other forms of access to language support within the practice.
- Review all existing entity policies and/or create new policies, procedures addressing non-discrimination (including gender identity and gender transition) in health services, auxiliary aid, and language access requirements.
- Educate and train employees and staff.
- Create and document a grievance procedure.
- Appoint a compliance coordinator (if 15 or more employees).

Failure to act quickly will expose health care providers to considerable penalties or legal sanctions. Complaints to OCR can result in investigations by HHS and the Department of Justice. The Final Rule also allows for a private right of action, along with the potential for compensatory damages, resulting from discrimination without any requirement to first exhaust administrative remedies.

If you have any other questions regarding this topic, please contact one of the listed Roetzel attorneys below.

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