

HHS Finalizes Regulation to Include Gender Identity as Sex Discrimination

The Department of Health and Human Services (HHS) through its Office of Civil Rights (OCR) on May 13 finalized a **regulation** that implements the nondiscrimination provisions of Section 1557 of the Affordable Care Act (ACA) of 2010. Section 1557 provides that an individual shall not 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 (e.g., Medicare and Medicaid), or under any program or activity that is administered by an Executive agency, on the basis of race, color, national origin, sex, age or disability. Most notably, despite seemingly contradictory language within the explanatory materials accompanying the rule, HHS has made it clear that the final rule prohibits discrimination against transgendered individuals as a form of sex discrimination. The regulation will become effective on July 18, 2016, except for those provisions that require changes to health insurance or group health plan benefit design. Those provisions carry an effective date of the first day of the first plan year beginning on or after January 1, 2017.

- Applicability - The final rule applies to:
 - Any health program or activity, any part of which receives funding from HHS
 - A health program or activity includes the provision or administration of health-related services. For an entity principally engaged in providing or administering health services, such as a nursing facility, all of its operations are considered part of the health program or activity.
 - Any health program that HHS itself administers (e.g., Medicare Part D)
 - Health Insurance Marketplaces and issuers that participate in those Marketplaces.

Those covered by the final rule are referred to in the rule as “covered entities.” The universe of covered entities is large. For ease of reference in providing this summary to LeadingAge members, we are merely referencing providers.

- Key Provisions
 - Sex Discrimination – As noted above, the final rule prohibits sex discrimination, not only in the traditional sense of discrimination (i.e., between health services afforded to men and those afforded to women), but also discrimination based on pregnancy, gender identity, and sex stereotyping. The final rule also requires

covered health programs and activities to treat individuals consistent with their gender identity. LeadingAge expressed concern about the intersection of these discrimination provisions and the person-centered care movement. Specifically, we noted that one of the hallmarks of the person-centered care movement involves the nursing home provider respecting the privacy rights and preferences of each individual resident, such as the resident's preference to sleep late, dine at certain hours of the day or to have a roommate of their choice. The person-centered care movement, which has been incorporated and implemented within the CMS regulatory framework, reflects the fundamental notion that the nursing home is the resident's home and not merely a healthcare institution like a hospital. Accordingly, we asked for clarification that a nursing home resident's preference regarding roommates not be imputed to the provider as discrimination. We found no discussion of this concern in the final rule and have reached out to HHS for an answer.

- While the final rule does not include a specific religious exemption, HHS notes that the rule “does not displace existing protections for religious freedom and conscience.” Whether a religious exemption can be claimed by religiously-affiliated members within the context of the final rule, however, is something that should be discussed with legal counsel as there currently is great uncertainty regarding the intersection of Federal and state laws in this area.
- Disabled Individuals
 - Disability Requirements – The final rule requires providers to:
 - Make all programs and activities provided through electronic and information technology accessible to disabled individuals. This presumably requires providers to make their websites, email systems and phone systems accessible to disabled individuals.
 - Ensure the physical accessibility of newly constructed or altered facilities.
 - Provide appropriate auxiliary aids and services for individuals with disabilities.

- Covered entities are also prohibited from using marketing practices or benefit designs that discriminate on the basis of disability and other prohibited bases.
- Individuals with Limited English Proficiency
 - Providers must take reasonable steps to afford meaningful access to each individual with limited English proficiency eligible to be served or likely to be encountered in their health programs and activities. To facilitate compliance with this requirement, HHS encourages providers to develop and implement a language access plan.
 - The final rule requires that providers post notices of nondiscrimination and taglines that alert individuals with limited English proficiency to the availability of language assistance services. To facilitate compliance with this requirement, OCR has translated a **sample notice and taglines** for use by covered entities into 64 languages.
 - As a general rule, providers must post taglines in at least the top 15 non-English languages spoken in the State in which they are located or do business. However, for small-sized, significant communications such as postcards, the final rule requires entities to post a nondiscrimination statement and taglines in at least the top two non-English languages spoken by individuals with limited English proficiency in the State.
- Compliance Coordinator and Grievance Procedures – Under the final rule, providers with 15 or more employees are required to designate at least one employee to coordinate the provider’s efforts to comply with the rule and carry out its responsibilities thereunder. Additionally, the provider must establish a grievance procedure for employees alleging a violation of Section 1557. The procedure must incorporate appropriate due process standards that provide for the prompt and equitable resolution of such grievances. Appendix C to the rule contains a model grievance procedure for covered entities.
- Enforcement

- OCR will have primary enforcement authority under the final Rule. OCR notes that the existing enforcement mechanisms under Title VI, Title IX, Section 504 and the Age Act apply for redress of violations of Section 1557. These mechanisms include requiring providers to keep records and submit compliance reports to OCR, conducting compliance reviews and complaint investigations, and providing technical assistance and guidance.
- Where noncompliance or threatened 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 Department of Justice with a recommendation to bring proceedings to enforce any rights of the United States; and any other means authorized by law.
- The final rule provides for a right of civil action for individuals who wish to challenge a Section 1557 violation. Compensatory damages, presumably including attorneys' fees, are available in such actions.

OCR has made [additional information, including fact sheets and a FAQ](#), available both to providers and individuals.

This final rule contains significant compliance obligations for LeadingAge members. We, therefore, urge all members to begin their efforts to comply with the rule now and to consult with their legal counsel regarding the finer points of the rule.

<https://www.gpo.gov/fdsys/pkg/FR-2016-05-18/pdf/2016-11458.pdf>

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

www.hhs.gov/civil-rights/for-individuals/section-1557