

ACA COMPLIANCE BULLETIN

Key Regulatory Highlights

Section 1557 Nondiscrimination Regulations and Guidance

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination based on race, color, national origin, sex, age or disability in certain health programs and activities. Section 1557 has been in effect since its enactment in 2010, with the U.S. Department of Health and Human Services' (HHS) Office of Civil Rights (OCR) enforcing the provision.

However, the rules and guidance HHS has published to implement Section 1557 **have been the subject of numerous lawsuits**, dating back to when initial regulations were issued in 2016. The litigation has primarily focused on:

- Which health programs and activities are subject to Section 1557's nondiscrimination requirements; and
- Whether sex discrimination includes discrimination based on gender identity, sexual orientation and termination of pregnancy.

This Compliance Bulletin provides a summary of the statutory requirements of Section 1557, highlights key federal court cases that have interpreted existing regulations and guidance, and outlines how HHS' latest [proposed rule](#) would expand the scope of prior regulations. The latest updates and court rulings can be found on the [OCR Section 1557 webpage](#).

Action Steps

The application of Section 1557 to employer-sponsored health plans **remains unclear** until HHS' proposed rules are finalized. Even if the rule is finalized, it will likely trigger additional lawsuits. As a result, plan administrators and issuers should monitor all legal developments in consultation with benefits counsel and work closely with their benefits advisors in complying with their Section 1557 obligations.

2016 Version of Rules: In 2016, a [final rule](#) implementing Section 1557 provided (among other things) that sex discrimination **includes** discrimination on the basis of pregnancy, gender identity and sex stereotyping. However, a federal court enjoined these provisions.

2020 Implementing Rule: Under the [current implementing rule](#), gender identity and pregnancy termination are **not included** in the definition of "sex discrimination" (another federal court later blocked HHS from enforcing these provisions). The rule also narrows the scope of the 2016 rules.

June 2020 Ruling: The Supreme Court held in [Bostock v. Clayton County](#) that employment discrimination based on gender identity or sexual orientation violates Title VII.

HHS Guidance: Effective May 10, 2021, OCR [announced](#) that it will interpret and enforce Section 1557's prohibition on sex discrimination to **include** discrimination based on sexual orientation and gender identity. On March 2, 2022, it issued [guidance](#) on federal protections for gender-affirming care. Both the announcement and guidance have become the subject of litigation.

2022 Proposed Rule: On July 25, 2022, HHS [proposed](#) to revise and expand the implementing rule from 2020.



Section 1557 Overview

The [text](#) of Section 1557 states that an individual cannot, on the basis of race, color, national origin, sex, age or disability, 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, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title[.]”

Covered Health Programs and Activities

The [current implementing regulation](#) from 2020 interprets Section 1557 as covering:

- Any health program or activity, any part of which receives federal financial assistance (including credits, subsidies or contracts of insurance) from HHS;
- Any program or activity that HHS itself administers under Title I of the ACA; and
- Any program or activity administered by any entity established under Title I of the ACA.

For this purpose, “health program or activity” encompasses all of the operations of entities that are **principally engaged in the business of providing health care** that receive federal financial assistance. For any entity not principally engaged in the business of providing health care, Section 1557 will only apply to the extent the entity’s operations are funded by HHS.

The 2020 regulation explicitly provides that an “entity principally or otherwise engaged in the business of providing health insurance shall **not**, by virtue of such provision, be considered to be principally engaged in the business of providing health care.” (emphasis added). **Thus, to the extent that employer-sponsored group health plans do not receive federal financial assistance, they would not be covered entities under the current implementing regulation.** 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 excepted benefits.

New Definition of “Health Program or Activity” Proposed

*The 2022 proposed rule would expand the scope of the 2020 regulation, in part by clarifying that health insurance issuers are generally included. However, the proposal **does not explicitly include group health plans** in the list of covered entities, as many group health plans are not recipients of federal financial assistance. If OCR receives a complaint against a group health plan, it will evaluate the facts on a **case-by-case basis** to determine whether the group health plan is a covered entity subject to Section 1557. In addition, the proposal clarifies that other entities that contract with a group health plan or plan sponsor may be covered entities.*

Section 1557 Sex Discrimination Prohibition

In 2016, the initial rule implementing Section 1557 provided (among other things) that sex discrimination includes discrimination based on pregnancy, gender identity and sex stereotyping. The current 2020 regulation eliminated these provisions, stating that sex discrimination does not encompass gender identity and termination of pregnancy, and defined “sex” as biologically binary. However, a [federal court](#) blocked HHS from enforcing the 2020 version of the rule that removed gender identity and sex stereotyping from Section 1557’s nondiscrimination protections, using the Supreme Court’s *Bostock* ruling as part of its rationale (the court did not rule on the issue of including pregnancy termination in the definition of “sex discrimination”).

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Effective May 10, 2021, OCR [announced](#) that it would interpret and enforce Section 1557's prohibition on sex discrimination to include discrimination based on sexual orientation and gender identity. Thereafter, on March 2, 2022, OCR issued [guidance](#) stating that restricting an individual's ability to receive gender-affirming care solely on the basis of their sex or gender identity likely violates Section 1557. **The announcement and subsequent guidance have become the subject of litigation, with numerous federal courts ruling differently on the issue.**

For example, on Oct. 1, 2022 (after the issuance of the proposed rule), a federal district court [invalidated](#) the March 2022 HHS guidance on gender-affirming care. One month later, the same court set aside the May 2021 HHS announcement, ruling (among other things) that *Bostock* does not apply to Section 1557 and that "on the basis of sex" does not include sexual orientation or gender identity. More recently, on the other hand, a different federal district court ruled that an insurer violated Section 1557 when it denied coverage for gender-affirming care. **Due to this ongoing litigation, and pending final regulations, the application of Section 1557's protections to employer-sponsored health plans remains in flux.** In addition, more lawsuits will likely be filed when the rule is finalized, so it is important for employers and plan administrators to work closely with their benefits advisors to monitor the latest developments.

New Definition of Discrimination "On the Basis of Sex" Proposed

The 2022 proposal would codify nondiscrimination protections based on sex as including discrimination based on sexual orientation and gender identity. It would also clarify that sex discrimination includes discrimination based on sex stereotypes, sex characteristics (including intersex traits), and pregnancy or related conditions, including pregnancy termination.

Notice Requirements

The initial final rule from 2016 required covered entities to post notices of Section 1557's nondiscrimination protections, along with taglines alerting individuals with limited English proficiency (LEP) to the availability of language assistance services. HHS had provided sample notices and taglines in a variety of languages on a [prior webpage](#).

The 2020 regulation **eliminated** the notice and tagline requirement. Instead, the regulation requires covered entities to take "reasonable steps" to ensure meaningful access to its health programs or activities by individuals with LEP.

New Disclosure Requirements Proposed

The 2022 proposal would require covered entities to provide a notice of nondiscrimination and a notice of the availability of language assistance services on an annual basis, upon request, in prominent physical locations, and in conspicuous locations on their websites. In addition, covered entities would be required to develop and implement written Section 1557 anti-discrimination policies and procedures, and train relevant staff on these policies and procedures.

Penalties

The enforcement mechanisms available for employment discrimination under existing federal laws also apply for purposes of Section 1557. The U.S. Equal Employment Opportunity Commission provides a set of [Q&As](#) that list the remedies where discrimination is found under these laws (refer to section XIII). Compensatory damages for violations of Section 1557 may also be available.

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Other Changes in the 2022 Proposed Rule

According to HHS, the [proposed rule](#) (issued on July 25, 2022) attempts to address gaps identified in prior regulations to advance protections under Section 1557. In addition to expanding the scope of the 2020 implementing regulation as discussed above, the proposal would:

- Prohibit discrimination in the use of clinical algorithms to support decision-making in covered health programs and activities;
- Clarify that nondiscrimination requirements apply to health programs and activities provided through telehealth services;
- Interpret Medicare Part B as federal financial assistance; and
- Provide a clear process for raising conscience and religious freedom objections.

While it is undertaking this rule-making, the latest updates on Section 1557's requirements can be found on the [OCR Section 1557 webpage](#).