



# Final HHS Regulations on Health Care Discrimination: Frequently Asked Questions

## A. SECTION 1557 AND THE HHS REGULATIONS GENERALLY

### What is Section 1557?

Section 1557 is the part of the Affordable Care Act (ACA) that prohibits discrimination in health coverage and care. It bans discrimination on the basis of race, color, national origin, sex, age or disability in health programs and activities that fall into any one of the following categories:

- (1) Programs that **receive federal funding**, such as many health insurance carriers and hospitals;
- (2) Programs **administered by a federal agency**, such as Medicaid, Medicare, TRICARE, Veterans' Health Administration programs, the Children's Health Insurance Program, and the Indian Health Service; or
- (3) Programs **governed by any entity established under Title I of the ACA**, including the federal Health Insurance Marketplace (Healthcare.gov) and state-run Marketplaces.

### What are the HHS regulations?

The Department of Health and Human Services (HHS) has released a regulation that lays out how HHS interprets Section 1557 and what the statute requires. The final regulation doesn't create any new nondiscrimination law—it just explains what the ACA already means. The regulation says that, when Section 1557 prohibits discrimination based on sex, **that includes discrimination based on gender identity**, and it explains in detail what kind of policies or practices count as discriminatory. The regulations discuss many other aspects of Section 1557, including protections from discrimination on the basis of sex stereotyping, language assistance and disability access in health care settings, and equal treatment for pregnant individuals. You can read the entire regulation at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-11458.pdf>.

### Why are the Section 1557 regulations important?

The regulation makes it clear that most insurers can't deny or limit coverage simply because the treatment someone is getting is related to their gender identity. That means that **most insurers are violating Section 1557 if they automatically deny coverage for transition-related care**. They are also violating Section 1557 if they deny coverage in a way that discriminates against transgender people in another way, like by refusing to cover a health service when it's used to help people transition even when they cover a similar service for people with other conditions or refusing to cover a service without a legitimate reason, such as one that is supported by science rather than discriminatory motives. The regulation also says that health service providers need to treat everyone in a way that matches their gender identity and guarantees transgender people equal access to health programs and facilities.

### When does the regulation go into effect?



Section 1557 of the ACA has been in effect since it was enacted in 2010, and the HHS Office for Civil Rights (OCR) is currently receiving and investigating complaints under Section 1557. The final regulation goes into effect on July 18, 2016, except for insurance requirements, which go into effect in 2017, depending on the date of the plan year. That means that any discriminatory action under Section 1557 is illegal now, but some specific requirements (such as procedural changes to health care systems) will be effective on July 18 or, in the case of insurance requirements, in 2017.

## **B. SECTION 1557'S NONDISCRIMINATION PROTECTIONS**

### **According to HHS' regulations, does Section 1557 ban discrimination against transgender people?**

Yes. HHS explains that “discrimination based on sex” includes discrimination based on gender identity. That includes discrimination against transgender people whose gender identity is either male or female, as well as people whose gender is neither male nor female or a combination of male and female. The regulation also clarifies that “discrimination based on sex” includes stereotypical expectations of how men and women are supposed to behave, dress, and express their gender, as well as the assumption that there are no genders other than male and female.

### **Does Section 1557 ban discrimination against lesbian, gay, bisexual, and queer people?**

Yes. HHS explains that “discrimination based on sex” includes discrimination based on sex stereotyping, which generally includes aspects of sexual orientation such as attraction to the same or different genders, as well as nonconformity with stereotypes of masculinity or femininity. The HHS Office for Civil Rights is currently accepting complaints of sex discrimination from gay, lesbian, and bisexual individuals in addition to transgender individuals.

### **What kinds of health insurance practices are prohibited?**

Section 1557 prohibits most insurers from discriminating on the basis of race, color, national origin, age, disability, or sex—including gender identity—when providing health coverage. That means that an insurer cannot use someone's gender identity or transgender status as a reason to deny a claim, limit coverage, or impose other restrictions.

Discrimination on the basis of gender identity includes:

- Blanket exclusions of any transition-related health care, or automatic exclusions of services related to transition
- Refusing to cover gender-specific treatment (like prostate exams or Pap smears) because an individual identifies with a different gender or is listed as having a different gender in their medical records or on their ID.

### **What treatments are insurance companies required to cover?**

HHS' regulation doesn't list specific treatments that insurance carriers do or don't need to cover. However, an insurance company can't automatically deny coverage for transition-related care. And if an insurance company covers a treatment for other people, the carrier cannot refuse to



cover that same treatment simply because it's being used by a transgender individual, or because it's being used to treat gender dysphoria.

For example, an insurer can't refuse to cover hormone therapy when it's being used to help people transition, but cover hormone therapy when used to treat the effects of menopause or hypogonadism. Since most treatments used for transitioning are also used by non-transgender people for the treatment of other conditions—including hormone therapy, counseling, hysterectomies, orchiectomies, and reconstructive surgeries—it would be discriminatory for an insurer to deny those health services to transgender people.

Insurance carriers are still permitted to make a case-by-case determination of whether a treatment is medically necessary for a particular individual (just as they do with every condition), though they cannot apply a higher standard for medical necessity for transgender people.

### **What do health service providers, like doctor's offices or hospitals, need to do to comply with the nondiscrimination regulation?**

The regulation makes it clear that Section 1557 prohibits discrimination by health service providers against transgender and gender nonconforming people. It requires providers to treat individuals in a manner consistent with their gender identity, including in access to health care facilities. This means that, when it comes to using restrooms or changing rooms, making room assignments, labeling hospital bracelets, and other situations where people are separated or labeled by gender, people should be treated according to their self-identified gender. For example, a residential substance abuse treatment center must give transgender women the same housing options it gives to other women.

At the same time, the regulation makes clear that no one may be denied a gender-specific health service simply because doesn't match the gender listed in their medical records or their assigned sex at birth. For example, a clinic that accepts federal funds cannot refuse to provide medically appropriate reproductive care to a transgender man simply because those services are ordinarily provided to women.

## **C. WHO IS COVERED**

### **Who has to comply with the HHS regulation?**

ACA Section 1557 applies to health programs and activities funded or administered by any federal agency, not just by HHS. However, this HHS regulation directly applies only to a smaller set of programs *funded by HHS or administered by HHS*. Specifically, the regulation applies to:

- (1) Programs and activities that receive funding from HHS, including HHS grants and contracts
- (2) Programs and activities administered by HHS, including Medicare, Medicaid (in all 50 states), the Children's Health Insurance Program, and the Indian Health Service, and all insurance carriers that sell plans through Medicare or Medicaid, and all hospitals and other health care providers that take Medicare, Medicaid, or CHIP payments



(3) The federal Health Insurance Marketplace (healthcare.gov), the state Marketplaces, and all insurance carriers that sell plans through the Marketplaces

The vast majority of health providers and insurance companies fall into one of those categories.

The regulation doesn't directly apply to a small number of programs and activities funded or administered by other federal agencies, like the Office of Personnel Management, and the Departments of Defense, Labor, and Veterans Affairs. All of these agencies are still subject to Section 1557, though, and will have to make sure that their health programs comply with Section 1557 and don't discriminate based on sex. They might propose regulations of their own to interpret Section 1557 or adopt HHS's regulations. If trans people face discrimination in one of these health programs, like VA health centers or the Federal Employee Health Benefits program, they can bring a complaint to the agency that runs those programs or sue in federal court. HHS might be able to investigate some of those complaints, too.

### **What types of health care providers are covered by HHS' regulation?**

Section 1557 applies to any health care provider or program that accepts federal funding, including Medicaid or Medicare payments or federal grants or contracts. This means that the regulation applies to most health care providers across the country, including hospitals, specialty medical centers, mental health and substance abuse treatment centers, pharmacies, nursing homes, community health centers, hospices, health clinics, state, city, and county health departments, and doctors' offices. Some health care providers who accept no insurance or only private insurance may not be covered.

### **Does Section 1557 cover...**

- **Employer-sponsored health plans?**

In most cases, yes. If the coverage available through an employer is purchased from or administered by a health insurance company that also participates in the Marketplace, Medicare, or Medicaid, all of the company's plans are covered by Section 1557—including employer-sponsored plans. But if a plan isn't covered under Section 1557, federal law prohibits employment discrimination against trans people, and it is likely that this law, Title VII of the Civil Rights Act, also makes it illegal for employers to have discriminatory health plans.

- **Student health plans?**

Yes. The final regulation says that student health plans are covered by the final rule, as well as by Title IX, the federal education nondiscrimination law, as well as many state laws.

- **Individual health plans that are not purchased through the Marketplace?**

In almost all cases, yes. Section 1557 would apply to non-Marketplace/individual insurance plans if the insurance carrier participates in state or federal Marketplaces, Medicare, or Medicaid. For example, if you have an individual insurance plan through a major carrier like Aetna or Blue Cross Blue Shield, your plan is protected under Section 1557 those and all of the other major carriers also have Marketplace plans. In addition, many states also have protections against



discrimination in health insurance that would apply to these plans. Seventeen of these states (CA, CO, CT, DE, IL, MA, MD, MI, MN, MT, NY, NV, OR, PA, RI, VT, WA) and the District of Columbia have released policies making clear that their nondiscrimination laws prohibit discrimination on the basis of gender identity, including exclusions of transition-related care, in all health insurance sold in those states.

- **TRICARE?**

Yes. The Department of Defense TRICARE program relies on private carriers (Humana, United and Health Net) to offer coverage. All three of these private carriers also participate in the Marketplaces and so are subject to Section 1557. However, the HHS regulation—that is, HHS’ explanation of what Section 1557 means—doesn’t technically apply to TRICARE. It also doesn’t automatically override a TRICARE regulation that excludes some transition-related care from coverage—but we’re working hard to get rid of that exclusion and have the Department of Defense adopt regulations like HHS’.

- **Veterans Health Administration?**

VHA is covered by Section 1557, since it’s a health program run by a federal agency. However, the HHS regulation—that is, HHS’ explanation of what Section 1557 means—doesn’t technically apply to the VHA. It also doesn’t automatically override a VHA regulation that excludes transition-related care from coverage—but we’re working hard to get rid of that exclusion and have the VHA adopt regulations like HHS’.

**Summary of Programs and Activities Subject to the Final Regulation**

	<b>Covered by the final regulation?</b>	<b>Covered by other laws?</b>	<b>Enforcing Agency</b>
Federal employee health plans	Covered by Section 1557 but not by the HHS regulation	Covered under Title VII of the Civil Rights Act. Also covered by OPM’s policy prohibiting exclusions	OPM, or EEOC
Medicaid (some states use alternative names like Medi-Cal or MassHealth)	Yes	May also be covered under state non-discrimination laws	HHS
Medicaid Managed Care	Yes	May also be covered under state non-discrimination laws	HHS

Medicare	Yes		HHS
Medicare Advantage	Yes	May also be covered under state non-discrimination laws	HHS
Medicare Part D	Yes		HHS
Plans sold in a Health Insurance Marketplace (HealthCare.gov and state-run Marketplaces)	Yes	May also be covered under state non-discrimination laws	HHS
Non-Marketplace/ individual plans	Generally yes but it depends. Yes, if the company also has plans that are part of a Marketplace, Medicare, or Medicaid	May also be covered under state non-discrimination laws	HHS and state insurance regulators
Employee plans	Generally yes but it depends. Yes, if:  (1) the carrier also has a Marketplace plan; OR  (2) the employer receives federal funds and is in the health care industry; OR  (3) the employer receives federal funds specifically for its employee health plan	Covered under Title VII of the Civil Rights Act	EEOC or HHS
Student health plan	Yes	Covered under Title IX	HHS, Department of Education



VA	Covered by Section 1557 but not by the HHS regulation		VA (HHS may be able to take complaints)
TRICARE (Department of Defense)	Covered by Section 1557 but not by the HHS regulation		Department of Defense (HHS may be able to take complaints)

**Does the regulation include any religious exemptions?**

No. HHS’ regulation recognizes that if an organization is receiving federal funds, it should not be allowed to use those funds discriminate against anyone. Religious organizations can try to invoke the existing federal Religious Freedom Restoration Act in specific cases. In such cases, HHS says that believes preventing discrimination is a compelling government interest and would assess such claims individually under existing law.

**D. FILING COMPLAINTS**

**What can I do if I have faced discrimination in a health care setting?**

You can file a complaint with the HHS Office for Civil Rights by visiting <http://www.hhs.gov/ocr/filing-with-ocr/index.html>. While NCTE cannot assist individuals in filing complaints, we encourage anyone with a possible complaint to seek help from an LGBTQ-friendly legal organization or attorney. For more information on filing complaints, see our Know Your Rights resource: <http://transequality.org/know-your-rights/healthcare>.

**What can I do if a covered insurance company denies my claim for transition-related care?**

Some insurance companies may not change discriminatory practices, such as exclusions of transition-related care, right away. Other insurers may have changed their policies but haven’t updated their computer systems, which can sometimes result in denials of coverage. If you believe your claim has been denied on discriminatory grounds, you’re strongly encouraged to appeal the decision, using your insurance company’s appeal procedure. If your appeal is rejected, you can file a complaint with the HHS Office for Civil Rights. Note that the effective date for the regulation is different for insurance companies, and they have until 2017 to update plan documents that explain what is covered or not covered by the plan, effective on the first date of the 2017 plan year.

**The only Marketplace or Medicaid plans available in my state exclude transition-related care. Can I file a complaint?**

In order to file a complaint against an insurance plan, you need to be enrolled in the plan. We strongly urge you to enroll in a health plan and then file a claim for transition-related services, even if the insurance policy documents still exclude transition-related care. Marketplace open



enrollment runs from November 1, 2016, to January 31, 2017. Certain life events may allow you to enroll outside that period. You can enroll in Medicaid at any time. Visit <http://Healthcare.gov> for details.