

LEGAL UPDATE



HHS Final Rule on Nondiscrimination in Health Programs and Activities

On April 26, 2024, the U.S. Department of Health and Human Services' (HHS) Office of Civil Rights (OCR) issued a [final rule](#) under Section 1557 of the Affordable Care Act, which prohibits discrimination based on race, color, national origin, sex, age or disability in certain health programs and activities. The final rule is scheduled to be published on May 6, 2024, and will take effect 60 days later. However, [effective dates vary](#) for certain provisions of the rule.

Background

Prior rules and guidance that the OCR 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.

Under final regulations from 2020, gender identity and pregnancy termination were not included in the definition of sex discrimination, and the scope of Section 1557 was narrower than the 2016 regulations (namely, health insurance issuers were generally not included).

Highlights of the 2024 Final Rule

The final rule expands the scope of prior 2020 regulations by providing that:

- Health insurance issuers **are** covered under Section 1557, and Section 1557 applies to **all** HHS-administered health programs and activities;
- Protections against sex discrimination **include** discrimination on the basis of sexual orientation and gender identity, as well as sex stereotypes, sex characteristics, and pregnancy or related conditions; and
- Nondiscrimination requirements apply to health programs and activities provided through **telehealth services**.

In addition, entities covered by the final rule are required to:

- **Notify individuals** that language assistance services and auxiliary aids are available if needed;
- Take steps to identify and mitigate discrimination when they use **patient care decision support tools**; and
- Implement and train their staff on **policies and procedures** to ensure compliance with the final rule.

Action Steps

The final rule is likely to become the subject of more lawsuits. 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. The latest updates can be found on the [OCR Section 1557 webpage](#).

REGULATORY HIGHLIGHTS

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.

Final rules issued in 2020 further limited the scope of the 2016 regulations. However, the Supreme Court subsequently ruled that employment discrimination based on gender identity or sexual orientation violates Title VII.

In 2021 and 2022, HHS issued guidance and proposed rules to revise and expand the final regulations from 2020. The guidance and proposal have become the subject of litigation, with numerous federal courts ruling differently on the issue. **The current final rule is likely to trigger additional lawsuits.**