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AFFORDABLE CARE
ACT NONDISCRIMINATION
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By: Timothy Wang, Elizabeth Kelman, and Sean Cahill

INTRODUCTION

On May 13, 2016, the U.S. Department of Health and Human Services Office of Civil Rights (OCR) published a final rule implementing Section 1557, the Affordable Care Act's primary nondiscrimination provision. The rule states that discrimination based on gender identity is prohibited in health facilities, programs, and activities receiving federal funding, as it constitutes a form of sex discrimination banned by Title IX of the Education Amendments of 1972. It also explicitly protects non-binary people¹ and intersex people.² In addition, the 1557 rule explicitly prohibits discrimination in health care on the basis of race, color, national origin, sex, age, or disability. While the rule does not explicitly include sexual orientation, it does state that discrimination based on sex stereotyping is prohibited, and that some forms of anti-gay/lesbian/bisexual discrimination may be classified as a form of sex stereotyping.³

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The Section 1557 final rule is essential for addressing the widespread discrimination against transgender people in health care. While the rule's coverage of sexual orientation discrimination is less explicit and robust, it could also offer protections for gay, lesbian, and bisexual people who experience discrimination in health care. This type of discrimination acts as a barrier to accessing necessary preventative and emergency health care, and it contributes to the health disparities that disproportionately burden the LGBT community. The new rule is especially important as more and more states are proposing and passing anti-LGBT legislation that condones discrimination against LGBT people in health care.

ANALYSIS

The Section 1557 rule explicitly prohibits discrimination on the basis of gender identity in health care facilities and programs receiving federal funding, including hospitals that receive Medicaid or Medicare funding, federal health centers, and marketplace plans. Transgender people experience widespread discrimination in health care, such as being subjected to harsh or abusive language from a health care professional, experiencing physically rough or abusive treatment, being blamed for their own health conditions, and being denied health care based on their gender identity.⁴ Studies have shown that experiences of discrimination in health care are a key barrier to accessing necessary preventive and routine health care services, as well as emergency care for transgender people.⁵ The new Section 1557 rule now offers critically needed protections for transgender people who experience this type of discrimination in health care facilities nationwide.

The rule also addresses important issues regarding insurance discrimination against transgender people. Transgender people frequently face discriminatory transgender-specific exclusions in insurance plans that allow insurance companies to deny coverage for medically necessary care related to gender transition. As of August 2016, only 17 states and the District of Columbia have promulgated guidance that prohibits insurance plans from discriminating against transgender individuals.⁶ Now, according to the new Section 1557 rule, insurance plans across the country may not deny access to medically necessary medications, surgeries, and other transition-related treatments for transgender people if similar services—a hysterectomy, for example—would be covered for non-transgender people. This is essential for increasing access to life-saving medical treatments for transgender people who may have previously been unable to access

these services due to financial burden. Finally, the rule also requires health care facilities to treat individuals according to their gender identity, which includes access to public restrooms consistent with their gender identity.

The rule also specifically protects gender nonconforming and non-binary people from discrimination in health care. The rule states, “Sex stereotypes can also include a belief that gender can only be binary and thus that individuals cannot have a gender identity other than male or female.”⁷ The rule goes on to say that the Office of Civil Rights recognizes that there is a wide spectrum of gender identities beyond just male and female. Furthermore, the rule also explicitly protects intersex people. The rule prohibits discrimination against intersex people, defined in the rule as “people born with variations in sex characteristics, including chromosomal, reproductive, or anatomical sex characteristics that do not fit the typical characteristics of binary females or males.”⁸

The rule’s coverage of sexual orientation is somewhat less explicit, but it does state that discrimination on the basis of sexual orientation is prohibited when the discrimination is based on sex stereotypes. The rule notes that OCR has not resolved whether sexual orientation status alone is protected under 1557. The rule goes on to cite numerous recent Equal Employment Opportunity Commission (EEOC) rulings that determined that “discrimination on the basis of sexual orientation necessarily involves sex-based considerations,” meaning that protections on the basis of sex or sex stereotyping may extend to cover some types of discrimination based on a person’s sexual orientation as well.⁹ In addition to EEOC rulings, a number of federal court rulings have also found that discrimination based on sex stereotypes can include discrimination based on sexual orientation. This is based on the understanding that discrimination based on sex stereotyping includes stereotypical gender roles that often

include sexual orientation, such as the belief that women should only date or marry men, while men should only date or marry women. For instance, in *Terveer v. Billington (2014)*, a federal court ruled that a gay man experienced sex discrimination because his “sexual orientation is not consistent with [his supervisor’s] perception of acceptable gender roles” and because his “orientation as homosexual had removed him from [his supervisor’s] preconceived definition of male.”^{10,11}

With this understanding, the Section 1557 rule’s sex stereotyping protections may address some of the discrimination that lesbian, gay, and bisexual people experience in health care. OCR is currently accepting complaints of sexual orientation discrimination, which it will evaluate on the basis of sex stereotyping. The rule will continue to evolve in regards to sex discrimination and explicit protection on the basis of sexual orientation, especially as more courts are expected to rule on whether sexual orientation discrimination is a form of sex discrimination. In the final rule, OCR stated:

“For all of these reasons, *OCR concludes that Section 1557’s prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual’s sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes* (italics added). Accordingly, OCR will evaluate complaints alleging sex discrimination related to an individual’s sexual orientation to determine whether they can be addressed under Section 1557. OCR has decided not to resolve in this rule whether discrimination on the basis of an individual’s sexual orientation status alone is a form of sex discrimination under Section 1557. We anticipate that the law will continue to evolve on this issue, and we will continue to monitor legal developments in this area. We will enforce Section 1557 in light of those developments and will consider issuing further guidance on this subject as appropriate.”

The Section 1557 rule is vital to improving the health of LGBT people across the country. Organizations like The Joint Commission,¹² Healthy People 2020,¹³ and the Institute of Medicine¹⁴ have all noted the health disparities that disproportionately affect the LGBT community.

Discrimination in health care is a major barrier to accessing health care services that could help reduce the health disparities that LGBT people face. The new rule is even more important now as states such as North Carolina, Mississippi, and Tennessee have enacted anti-LGBT laws that could allow health care providers to discriminate against LGBT people.

While the Mississippi law was blocked by a federal judge shortly before it was to take effect,¹⁵ other states are considering similar anti-LGBT bills. As federal law, the Section 1557 rule overrides these discriminatory anti-LGBT state laws and offers protections for LGBT people who experience discrimination in health care.

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RELATED NONDISCRIMINATION RULE PROPOSED BY CMS, JUNE 2016

The Centers for Medicare & Medicaid Services (CMS) has proposed a rule modifying the Medicare and Medicaid Conditions of Participation for hospitals and critical access hospitals to require all participating facilities to establish and implement nondiscrimination policies that include all the protections of the Section 1557 rule. Adding to the protections afforded under Section 1557, CMS also explicitly includes sexual orientation in the proposed rule. CMS notes they include sexual orientation alongside gender identity in hospital nondiscrimination policies because “discrimination by a hospital based on a patient’s religion or sexual orientation can potentially lead to a denial of service or inadequate care.”¹⁶ Because the vast majority of hospitals participate in Medicare and/or Medicaid, this rule would make sure that virtually all patients are protected from discrimination in hospitals on the basis of their sexual orientation, in addition to their gender identity.

NEXT STEPS

Given the disparities that persist for LGBT populations and the growing threat posed by state anti-LGBT legislation that targets access to health care, it is essential that the federal government further clarify in the near future that anti-gay, lesbian and bisexual discrimination in health care is also illegal and unacceptable in all health care settings. It is important to educate health care providers and members of the LGBT community as well as about these new federal nondiscrimination requirements. The new Section 1557 rule took effect July 18, 2016. Health plans that currently have blanket exclusions on gender transition-related care have until the first day of the first plan year that begins in 2017 to lift those exclusions.

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Some states ended restrictions on coverage of transition-related care by public and private insurers before the new Section 1557 rule. Regulators in 17 states and the District of Columbia have already issued guidance banning categorical exclusion of transgender-specific care in private health plans.¹⁷ Eleven states affirmatively cover transition-related care in their Medicaid programs.¹⁸ The new Section 1557 rule extends these insurance discrimination protections to transgender people across the country, in all 50 states.

FOR HEALTH CARE PROVIDERS

All health care providers receiving federal funding that previously did not include gender identity and sex stereotypes in their nondiscrimination policies and procedures should revise them accordingly. The Joint Commission has recommended since 2011 that hospitals include sexual orientation,

gender identity, and gender expression in their nondiscrimination policies.¹⁹

Providers must treat individuals in a manner consistent with their gender identity, including in access to health care facilities. This means that individuals must be treated according to their self-identified gender in use of restrooms or changing rooms, room assignments, hospital bracelets, and other situations where people are separated or labeled by gender.. For instance, a transgender woman must be allowed to use the same restrooms as cisgender (non-transgender) women use. Requiring a transgender woman to use the men's restrooms, or restricting her to unisex restrooms, would constitute sex discrimination and violate 1557 protections.

Additionally, providers may not refuse medically appropriate care on the basis of sex or gender identity. For example, providers may not refuse to offer transgender men reproductive health services on the basis that the services are traditionally only provided for women. This could include important preventive services such as mammography and Pap tests.

Section 1557 requires all covered entities, including health care providers, to file an assurance of compliance form. They must also take steps to notify beneficiaries, applicants, and members of the public:

- that they do not discriminate on the basis of race, color, national origin, sex, age, or disability in their health programs and activities;
- that they will appropriately accommodate disability and provide language assistance, including translated documents and oral interpretation services, in a timely manner and for free;
- how to access services and accommodations;
- how to contact the employee point-person for nondiscrimination compliance;
- whether a grievance procedure is available (must be available at entities with 15 or more employees); and

- how to file a discrimination complaint with OCR.

The above information must be posted in visible locations where the entity serves the public, such as patient waiting rooms, and on its website. It must also be included in printed materials routinely given to or available to patients during admission and registration. OCR provides this notice in English and the top 15 non-English languages of each state.²⁰ OCR also provides downloadable training materials for Section 1557.²¹

FOR PATIENTS

If you believe you have been discriminated against based on your gender identity or sexual orientation in a clinical or insurance context, you may file a complaint with the HHS Office of Civil Rights.²² The complaint should be filed within 180 days of when you knew that the act or omission complained of occurred. OCR may extend the 180-day period if you can show "good cause." Complaints can be filed through mail, fax, e-mail, or the OCR Complaint Portal.²³ You may also call OCR's toll free number at (800) 368-1019 or (800) 537-7697 (TDD) to speak with someone who can answer your questions and guide you through the process. Language assistance services for OCR matters are available and provided free of charge. OCR services are accessible to persons with disabilities.

While you can file a complaint on your own without an attorney's help, if you're not sure how to put together your complaint, the Transgender Law Center's legal helpline can help you find the right information or connect you with a local attorney who can help.²⁴ We encourage LGBT patients who experience discrimination in health care to contact these LGBT legal organizations: Lambda Legal²⁵ and the ACLU LGBT Rights Project.²⁶ LGBT equality advocates and those working to make health care more affirming and equitable for LGBT patients should also encourage LGBT patients to report discrimination in health care and health insurance coverage.

You can also file a lawsuit under Section 1557 to challenge the discriminatory practice and for compensation for any injuries you suffered as a result of the discrimination.

FOR PAYORS

The new rule prohibits insurance plans from denying coverage for medically necessary care related to gender transition if similar services would be covered for non-transgender people. As such, insurance companies will need to revisit the terms and conditions of the plans that they offer in order to ensure that transition-related treatments, such as hormone therapy or surgeries, are covered if those services are covered for non-transgender people. In addition, any discriminatory exclusions that are specific to transgender people must be removed from all insurance plans by first day of the first plan year that begins in 2017.

Q&A

What entities are covered under Section 1557?

- Any health program or activity that receives federal financial assistance through HHS, such as many hospitals, clinics, or insurance companies;
- Any program or activity administered by an executive agency, including federal health programs like Medicare, Medicaid, and the Children's Health Insurance Program; and
- Any program or activity created under Title I of the ACA, including the Health Insurance Marketplaces (both state-based and federally facilitated), navigator programs, and all plans offered by issuers that participate in those Marketplaces.

Together, this includes most of the practicing physicians in the United States, along with more than 100,000 facilities (hospitals, home health agencies, nursing homes, etc), nearly 450,000 clinical laboratories, Medicaid and public health agencies in all states and territories, 1,300 community health centers, and at least 180 insurers.

What are examples of discriminatory practices based on gender identity that are now illegal under Section 1557?

- Denying health care or health coverage to individuals on the basis of gender identity or sex stereotypes
- Categorically excluding coverage for all health care related to gender transition
- Denying or limiting coverage for specific health services related to gender transition if this would result in discrimination against a transgender person
- Treating individuals in a way that is inconsistent with their gender identity, including in access to facilities
- Denying or limiting treatment for sex-specific health services based on the fact that a person seeking such services identifies as belonging to another gender (e.g. refusing mammograms to transgender men on the basis that they are only for women)

Does Section 1557 ban discrimination based on sexual orientation?

The final rule does not resolve whether discrimination on the basis of an individual's sexual orientation status is a form of sex discrimination under Section 1557. However, "sex stereotyping" is banned, and some discrimination based on sexual orientation may be considered sex stereotyping. Discrimination complaints against covered entities filed with OCR on the basis of sexual orientation will be evaluated to determine whether they count as discrimination based on sex stereotyping.

What happens after I file a complaint with OCR?

Once a complaint is received, OCR determines if it has the legal authority to review and investigate the complaint. Once OCR establishes that the complaint falls within its authority (e.g., a facility that receives financial assistance from the U.S. Department of Health and Human Services, an insurer that offers a plan on a Health Insurance Marketplace, a state

Medicaid program, etc.), an investigator there will gather information by:

- Interviewing witnesses (may include you)
- Gathering documentation of the incident
- Visiting relevant sites

If OCR determines that my rights have been violated, what happens next?

The health care provider or government agency that violated your rights will have a set amount of time to correct the violation or provide OCR with a plan of correction. Examples of corrective actions are changing a policy or procedure, offering a particular service, and informing patients and employees of steps taken to comply with a regulation or federal statute. Failure to correct the violation or provide a correction plan may result in the termination of Federal financial assistance to the health care organization or agency.

For more information on this topic, please contact:

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U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201
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