

# ACA Section 1557: Will You Meet the October 16 Deadline?

Presented by Frank C. Morris, Jr. and  
Nathaniel M. Glasser

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# Agenda

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1. General Background on Section 1557
2. Deadline – October 16, 2016
3. Section 1557 Requirements in Practice
4. Best Practices
5. Questions / Feedback

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# Section 1557 Overview

# Section 1557 of the Affordable Care Act

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- Section 1557 of the ACA – Titled “Nondiscrimination”
- Incorporates the following statutes:
  - Title VI of the Civil Rights Act of 1964 (“Title VI”)
  - Title IX of the Education Law Amendments of 1972 (“Title IX”)
  - Age Discrimination Act of 1975 (“Age Act”)
  - Section 504 of the Rehabilitation Act of 1973 (“Section 504”)
- Prohibits discrimination on the basis of race, color, national origin, sex, age, and disability
- On those grounds, individuals cannot be excluded from participation in, be denied benefits of, or be subjected to discrimination under, any health program or activity

# What is a Covered Entity?

## Definition

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- Entities that operate a **health program or activity**, any part of which receives **federal financial assistance** directly from HHS or through another recipient
  - Funds under Medicare Parts A, C, and D = federal financial assistance
  - Funds under Medicare Part B ≠ federal financial assistance
- Entities established under **Title I of the ACA** that administer a **health program or activity**
  - Including state-based marketplaces
- Programs and activities **administered by HHS**
  - Including federally-facilitated marketplaces



If an entity is subject to Section 1557, ALL of the covered entity's programs and activities are subject to the non-discrimination requirements



# What is a Covered Entity?

## Examples

- Hospitals
- Nursing homes
- Skilled nursing facilities
- Home health agencies
- Retail pharmacies
- Laboratories
- Qualified Health Plan Insurers
- Private physicians receiving non-Medicare Part B federal assistance\*
- Community health centers participating in Medicare, Medicaid, or receiving other federal assistance
- Rehabilitation facilities



# Prohibited Discriminatory Conduct

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- **Sex**, including pregnancy, gender identity, and sex stereotypes
  - Gender identity defined to include gender expression and transgender status
  - Sexual orientation not expressly identified, but OCR will evaluate complaints related to sexual orientation to determine whether they can be addressed under Section 1557
- **Race, Color, and National Origin**, including denying or delaying effective language assistance services to individuals with limited English proficiency (“LEP”)
- **Disability**, including failing to make reasonable changes to facilities, policies, procedures, or practices to provide equal access for individuals with disabilities
- **Age**



# Section 1557 Enforcement

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- OCR charged with enforcing Section 1557
- Existing enforcement mechanisms for Title VI, Title IX, Age Act and Section 504 apply
- Enforcement may include:
  - Settlement or conciliation agreements
  - Suspension or termination from federal financial assistance
  - Private civil suits



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# October 16, 2016 Deadline Requirements

# Notice of Nondiscrimination

## Content

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- **By October 16, 2016**, Covered Entities must post a notice that includes:
  1. Statement of nondiscrimination on basis of race, color, national origin, sex, age, or disability;
  2. Statement that entity provides appropriate auxiliary aids and services, free of charge and in a timely manner, to individuals with disabilities;
  3. Statement that the entity provides language assistance services, free of charge and in a timely manner, to individuals with LEP;
  4. How to obtain the aforementioned aids and services;
  5. Contact information for Section 1557 compliance officer;
    - Required for Covered Entities with 15 or more employees
  6. Availability of compliant grievance procedure, and how to file a grievance;
    - Required for Covered Entities with 15 or more employees
  7. How to file a discrimination complaint with OCR.

## Appendix A to Part 92—Sample Notice Informing Individuals About Nondiscrimination and Accessibility Requirements and Sample Nondiscrimination Statement: Discrimination is Against the Law

[Name of covered entity] complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability, or sex. [Name of covered entity] does not exclude people or treat them differently because of race, color, national origin, age, disability, or sex.

[Name of covered entity]:

- Provides free aids and services to people with disabilities to communicate effectively with us, such as
  - Qualified sign language interpreters
  - Written information in other formats (large print, audio, accessible electronic formats, other formats)
- Provides free language services to people whose primary language is not English, such as:
  - Qualified interpreters
  - Information written in other languages

If you need these services, contact [Name of Civil Rights Coordinator]

If you believe that [Name of covered entity] has failed to provide these services or discriminated in another way on the basis of race, color, national origin, age, disability, or sex, you can file a grievance with: [Name and Title of Civil Rights Coordinator], [Mailing Address], [Telephone number ], [TTY number—if covered entity has one], [Fax], [Email]. You can file a grievance in person or by mail, fax, or email. If you need help filing a grievance, [Name and Title of Civil Rights Coordinator] is available to help you. You can also file a civil rights complaint with the U.S. Department of Health and Human Services, Office for Civil Rights electronically through the Office for Civil Rights Complaint Portal, available at <https://ocrportal.hhs.gov/ocr/portal/lobby.jsf>, or by mail or phone at: U.S. Department of Health and Human Services, 200 Independence Avenue SW., Room 509F, HHH Building, Washington, DC 20201, 1-800-868-1019, 800-537-7697 (TDD).

Complaint forms are available at <http://www.hhs.gov/ocr/office/file/index.html>.

# Notice of Nondiscrimination

## Where Should It Be Posted?

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- The notice must be posted (in conspicuously-visible font) in:
  - Significant publications or communications
  - Conspicuous physical locations where the entity interacts with the public
  - Conspicuous location on the covered entity's website
- What is a “significant publication”?
  - Targeted to beneficiaries, enrollees, applicants, or the public
  - “Significant” refers to importance of publication, not size
  - Examples: Patient handbooks; consent forms; complaint forms; LEP guidance; outreach, education, marketing materials; written notices to an individual pertaining to rights and benefits or services; and applications to participate in a program or activity or to receive benefits or services
- Prioritize high-profile physical areas and high-profile/widespread communications



# Statement of Nondiscrimination

## Where Should It Be Posted?

- Less onerous requirement for small-sized significant publications:
  - Less information to publish in publications with less available space
  - Only need to publish the first element of the Notice (statement of nondiscrimination)
  - Sample notice language from OCR:

[Name of covered entity] complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age, disability, or sex.

- Examples of small-sized significant publications:
  - Postcards
  - Tri-fold brochures
  - Targeted fliers and pamphlets
  - Social media communications





# Taglines

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- **TAGLINES** must be posted in the same locations as the Notice
  - **Taglines are short statements written in non-English languages indicating the availability of language assistance services**

**ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).**

**ATENCIÓN: si habla español, tiene a su disposición servicios gratuitos de asistencia lingüística. Llame al 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).**

# Taglines

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- Large-size publications
  - Taglines must be written in at least the top 15 languages spoken by individuals with LEP in the state
  - OCR created a [table](#) with top 15 languages in each state, but Covered Entities may use other sources if a reasonable basis for doing so.
- Small-size publications
  - Only required to have the top 2 languages spoken by individuals with LEP in the state
- HHS has provided tagline translations on its [website](#).



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# Section 1557 In Practice

# Individuals with Disabilities

## Accessibility

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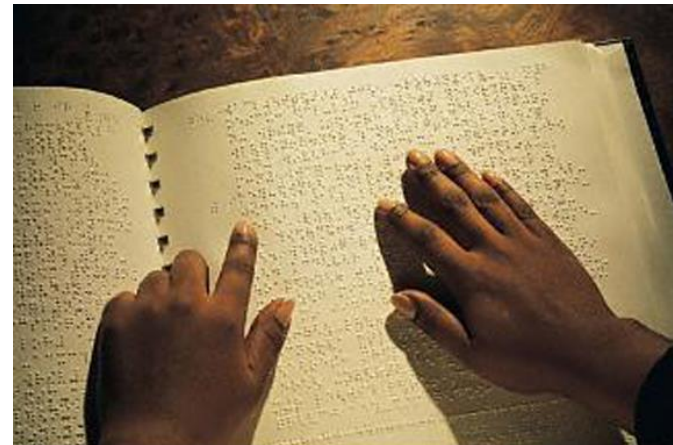
- Physical access requirements:
  - Compliance with 2010 ADA Standards for Accessible Design for new alterations/construction
  - Compliance with requirements applicable to public buildings
  - Older facilities must remove barriers to access, if readily achievable
- Electronic and information technology
  - *E.g.*, websites & on-line scheduling systems have been a target of DOJ & private claimants
  - Must be accessible, unless
    - Undue financial or administrative burden, or
    - Fundamental alteration in the nature of the health program or activity
- Reasonable modifications to policies, practices, or procedures
  - Must be made unless modifications would fundamentally alter the nature of the health program or activity

# Individuals with Disabilities

## Auxiliary Aids and Services

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- Must make available auxiliary aids and services, such as
  - Braille & large print
  - Sign-language interpreters
  - Possible use of talking prescriptions



# Limited English Proficiency Language Assistance

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- **“Meaningful access”** to individuals with limited English proficiency
- Requirements of language assistance services:
  - Free of charge
  - Accurate and timely
  - Protect the privacy and independence of the individual with LEP
- Interpreter/translator requirements:
  - Qualified interpreter to be provided when oral interpretation constitutes reasonable step to provide meaningful access; and
    - May be provided by video
  - Qualified translator to be used when translating written content
  - If video remote interpreting is used, various technology & training requirements to assure effective communications



# Limited English Proficiency

## Language Assistance

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- Prohibited conduct:
  - Requiring an individual to provide own interpreter
  - Relying on family member or a minor child to provide translation services
    - Except in an emergency or where individual requests that the accompanying adult interpret/translate
  - Relying on non-qualified staff to communicate/interpret
  - Requiring an individual to accept language assistance services
- To evaluate compliance, OCR will:
  - “evaluate, and give substantial weight to, the **nature and importance of the health program or activity** and the **particular communication** at issue to the individual with limited English proficiency.”
  - “take into account all other relevant factors, including whether the entity has developed and implemented an **effective language access plan**, appropriate to its particular circumstances.”

# Civil Rights Coordinator Duties

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- Section 1557 requires Covered Entities to designate a **Section 1557 Civil Rights Coordinator**
- **Coordinator duties** include:
  - Coordinate efforts to comply with and carry out Section 1557 responsibilities
  - Investigate any grievance communicated to the entity alleging noncompliance
  - (May have other compliance duties as well)
- Disability Coordinator duties under Section 504 or Title IX could be consolidated with Civil Rights Coordinator's duties





# Grievance Procedures

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- **Grievance Procedures** are required for each Covered Entity that employs 15 or more persons and must:
  - Incorporate due process standards
  - Provide prompt and equitable resolution of grievances
- Grievance Procedures that meet the standards under Section 504 regulation can be used to address disability claims under Section 1557
  - Can also be used for all other Section 1557 claims if the procedure is modified to apply to race, color, national origin, sex, and age discrimination



# Grievance Procedures

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- **Sample Grievance Procedure** included in Appendix C of Final Rule
  - Grievances must be filed with Civil Rights Coordinator within 60 days of being made aware of the alleged discriminatory action
  - Coordinator shall conduct thorough investigation
  - Coordinator must issue a written decision on the grievance based on a preponderance of the evidence within 30 days of filing
  - Individual may appeal to higher authority within covered entity within 15 days of decision



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# Best Practices

# Compliance Challenges

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- Compliance with the Section 1557 can be challenging due to the wide scope of Section 1557 and the vague nature of some of the provisions.
  - OCR has reserved significant discretion to determine what constitutes noncompliance.

**The determination of whether a certain practice is discriminatory typically requires a nuanced analysis that is fact-dependent; therefore, it is not possible to identify all issues and circumstances that may raise compliance concerns.**

- Litigation by individuals or advocacy groups against Covered Entities can have negative public relations implications

# Civil Rights Compliance Officer

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- The Civil Rights Compliance Officer must be knowledgeable in Section 1557 requirements and should be empowered to speak up and address compliance concerns.
- Covered Entities and Compliance Officers should work closely with **skilled legal counsel** to develop policies, procedures, and operational workflows that are compliant with Section 1557.
  - While OCR retains significant discretion to decide violations on a case-by-case basis, legal counsel can help quantify the risk of whether activities are likely to be viewed unfavorably by OCR



# Training

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- Training must occur across all levels of a Covered Entity
- **Upper and middle management** need to be aware of the Covered Entities' responsibilities under Section 1557 to create policies and workplace behaviors that are compliant with the nondiscrimination provision
- **Non-managers and other employees** who interact with the public must also be trained in the requirements of Section 1557 so that they can adapt their work actions to comply with the nondiscrimination provision
  - Managers need to pay careful attention to what work actions are actually occurring “at the ground level”
  - Example: Nurses should understand why they need to use a video conferencing device to provide translation services instead of relying upon a family friend or a non-clinical employee (e.g. the hospital electrician)



# Limited English Proficiency (LEP)

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- Consider implementing a Language Access Plan
  - Establishes procedures for providing meaningful access to LEP population
  - HHS has its own [Language Access Plan](#), which may be used as a resource
- Document when language assistance services are refused by patients



# Transgender Patient Population



- Prepare staff to treat patients consistent with their gender identities
- Establish appropriate admission procedures
  - Request preferred name and pronoun of patient
  - Provide opportunity to identify transgender status
    - Suggested options:
      - Male
      - Female
      - FTM
      - MTF
      - Gender-nonconforming
      - Different identity
    - Prepare to update electronic health record and other files
- Assign rooms consistent with gender identity
- Permit transgender patients to join gender-specific programming/services consistent with identified gender (unless patient personally declines)



# Questions? Feedback?

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