

a guide

An Overview of Section 1557, Nondiscrimination Standards, and the Affordable Care Act: A Tool for Stakeholders

This Guide provides an introduction to the Patient Protection and Affordable Care Act's (ACA) nondiscrimination requirements, with a focus on Section 1557, and how the nondiscrimination standards intersect with ACA implementation efforts. It is designed to assist a range of stakeholders including advocates and state regulators learn more about the scope and application of this provision, and incorporate these standards into state ACA implementation activities.

As states work to implement the ACA, it is critical that they incorporate the law's nondiscrimination provisions. These new protections will help ensure an end to many of the historic and systemic barriers to health care based on race, color, national origin, sex, age, disability, sex stereotypes, sexual orientation, and gender identity.

ABOUT THE CENTER

The National Women's Law Center is a non-profit organization whose mission is to expand the possibilities for women and girls by working to remove barriers based on gender, open opportunities, and help women and their families lead economically secure, healthy, and fulfilled lives—especially low-income women and their families.

Table of Contents

Introduction	1
Overview of ACA Section 1557	2
Nondiscrimination in Marketing, Public Education, and Consumer Assistance	4
<i>Marketing Practices</i>	4
<i>Consumer Assistance</i>	5
Nondiscriminatory Benefit Design and the Essential Health Benefits (EHB)	6
<i>The EHB Nondiscrimination Standards</i>	6
<i>Federal and State Enforcement of EHB Nondiscrimination Standards</i>	7
Nondiscrimination Standards: Grants, Contracts, Training, and Certifications	9
<i>Nondiscrimination Requirements and Form Review</i>	10
<i>Nondiscrimination Requirements and Qualified Health Plan (QHP) Certification</i>	10
Nondiscrimination and Data Collection	11
Enforcing Section 1557 and Other Nondiscrimination Laws	12
<i>Federal Enforcement of Section 1557</i>	12
<i>State Oversight and Enforcement</i>	12
Appendix	14

Introduction

THIS GUIDE is designed to educate stakeholders about key provisions of the Patient Protection and Affordable Care Act (ACA)—particularly the law's nondiscrimination protections. Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, disability, age, gender identity, and sex stereotypes in virtually all aspects of the health care system. ACA regulations also incorporate nondiscrimination standards. The Guide describes the statutory and regulatory requirements related to nondiscrimination and ACA implementation.

State advocates, insurance regulators, and Exchange boards/entities can use this Guide to understand how the ACA's nondiscrimination provisions apply to ongoing implementation of the ACA. This Guide provides a useful overview of key nondiscrimination requirements and federal standards and also includes recommendations for states to implement additional protections or state requirements.

More specifically, stakeholders can:

- Understand nondiscrimination requirements in federal law and regulations for Exchanges, Navigators, and benefit design, together with other aspects of ACA implementation.
- Ensure that public education materials (such as consumer notices, bulletins, and other publicly available information) comply with, and explain, the ACA's nondiscrimination standards.
- Establish policies regarding data collection that incorporates the importance of nondiscrimination.
- Participate in the oversight and enforcement of the ACA's nondiscrimination standards, including under Section 1557.

The National Women's Law Center (NWLC) is interested in hearing about and resolving issues of discrimination in health care. If benefit packages, plans, Exchanges, Navigators, or other activities related to ACA implementation or health care raise questions of sex discrimination, please contact NWLC at **(202) 588-5180** or **info@nwlc.org**.

Overview of ACA Section 1557

PREGNANCY DISCRIMINATION IS AN EXAMPLE OF SEX DISCRIMINATION PROHIBITED BY § 1557 AND OTHER CIVIL RIGHTS LAWS.^a

In June 2013, the National Women's Law Center filed complaints against 5 institutions that exclude pregnancy coverage for some of their plan beneficiaries.^b

THE ACA AND ITS REGULATIONS PROHIBIT DISCRIMINATION IN NEARLY ALL PARTS OF THE HEALTH CARE SYSTEM. Section 1557 of the ACA is a federal law that protects individuals from discrimination based on race, color, national origin, sex, age, disability, sex stereotypes, or gender identity in health programs or activities operated by recipients of federal financial assistance; federally-administered programs or activities; or entities created under Title I of the ACA.¹ ***Section 1557 is the first federal law that broadly prohibits sex discrimination in health care.***

Section 1557 applies to virtually all aspects of the health care system. It protects individuals from discrimination in:

- Any “health program or activity” of a recipient of federal financial assistance, including both public and private entities such as state health departments, hospitals and hospital systems, clinics, or insurance companies that receive federal funds. Section 1557 specifically extends its discrimination prohibition to entities that receive federal financial assistance in the form of contracts of insurance, credits, or subsidies.
- Any “program or activity administered by an executive agency,” including health programs like Medicare and Medicaid.
- Any “entity established under [Title I of the ACA],” including the health insurance Exchanges (Marketplaces). Several states will have federally-facilitated Exchanges (FfEs) and Partnership Exchanges. Section 1557 applies to these Exchanges for multiple reasons: they are entities created under Title I of the ACA; they are federally-administered; and they may receive federal financial assistance. Regardless of “type” of Exchange, all activities conducted by the Exchanges must be nondiscriminatory. This includes the activities of entities that contract with or receive grants to carry out Exchange functions or provide consumer assistance to individuals enrolling in health coverage through the Exchange. For example, issuers, Navigators and other consumer assisters, brokers and agents, among others— to the extent they interact with the Exchange— must conduct activities in a nondiscriminatory way.

The Office for Civil Rights (OCR) at the Department of Health and Human Services (HHS) has primary jurisdiction to oversee and enforce Section 1557 and is currently receiving and investigating complaints alleging violations of Section 1557. The Department of Justice (DOJ) also coordinates enforcement of federal civil rights laws, including Section 1557. In addition, people may go directly to court to secure an order that the discrimination stop and any damages to compensate them from the injuries they suffered due to the discrimination.

States, too, have an important role to play in ensuring that the guarantees of Section 1557 and other nondiscrimination standards are fully realized. As recipients of federal financial assistance, for example, state agencies must comply with Section 1557 and other civil rights laws. Without explicit notice and robust enforcement of Section 1557 and other nondiscrimination standards, individuals remain vulnerable to discrimination in health care settings, and entities bound by these nondiscrimination mandates may well continue discriminatory practices. Monitoring the actions of entities such as Exchanges and health insurance issuers is thus vital to ensuring compliance with the law.

Nondiscrimination in Marketing, Public Education, and Consumer Assistance

A VARIETY OF ENTITIES WILL BE MARKETING NEW HEALTH PLANS and states will be conducting outreach and assistance to educate and enroll individuals in health coverage. The ACA and its regulations set out specific nondiscrimination requirements that apply to entities engaged in marketing or consumer assistance.

MARKETING PRACTICES

A number of ACA regulations set rules for marketing, including rules that prohibit practices that result in discrimination. These rules prohibit discriminatory practices such as issuers attempting to steer older, sicker individuals away from certain plans while trying to attract younger, healthier individuals. These rules are designed to mitigate the risk of adverse selection and prohibit discriminatory marketing by issuers, by the Exchange itself, and by Qualified Health Plans (QHPs).

ACA regulations prohibit Exchanges from discriminating on the basis of race, color, national origin, disability, age, sex, gender identity, or sexual orientation.² The Exchanges are also among the entities established under Title I of the ACA to which Section 1557 applies.³ To the extent that Exchanges engage in marketing, Section 1557 also applies to prohibit discriminatory practices. In addition, these nondiscrimination requirements apply to all activities of the Exchange, including activities by Navigators (which are third parties under an agreement with the Exchange) and contracting entities eligible to carry out Exchange functions.⁴

Not only are Exchanges prohibited from discriminating, Section 1557 and other federal laws prohibit an Exchange from providing assistance, monetary or otherwise, to others that discriminate.⁵ For example, Exchanges cannot host enrollment events with organizations that engage in discriminatory practices.

Section 1557 and ACA regulations set strong protections against discriminatory steering by issuers. The market rule states:

A health insurance issuer and its officials, employees, agents and representatives must comply with any applicable state laws and regulations regarding marketing by health insurance issuers and cannot employ marketing practices or benefit designs that will have the effect of discouraging the enrollment of individuals with significant health needs in health insurance coverage or discriminate based on an individual's race, color, national origin, present or predicted disability, age, sex, gender identity, sexual orientation, expected length of life, degree of medical dependency, quality of life, or other health conditions.⁶

This uniform standard applies to all issuers, regardless of whether they offer plans inside or outside the Exchange. Given the relationship between the availability of coverage and nondiscriminatory marketing practices, the rule underscores the point that “discriminatory marketing practices or benefit designs represent a failure by issuers to comply with the guaranteed availability requirements.”⁷ Guaranteed availability means that every health insurance issuer that offers health insurance coverage must accept every individual and employer in the state that applies for coverage.

Further, as the rule states, all issuers, as well as their officials, employees, agents, and representatives must comply with all applicable state laws regarding marketing of insurance. In other words, the market rule provides a robust floor below which issuers cannot fall; however, in states that have stronger marketing standards, issuers must comply with those as well.

CONSUMER ASSISTANCE

States will use a variety of entities to educate and enroll individuals and their families into health coverage. All entities or individuals that provide consumer assistance and interact with the Exchange must comply with Section 1557 and other nondiscrimination standards set out in the ACA and its regulations. To the extent that these entities provide consumers with information about QHPs and enroll people in plans through the Exchange, they must abide by the Exchange’s nondiscrimination requirements as well.

Entities that provide consumer assistance include, but are not limited to:

- Navigators⁸
- Non-Navigator assistance personnel, such as In-Person Assistors (IPAs)⁹
- Certified Application Counselors (CACs) and Certified Application Assistors (CAAs)¹⁰
- Community-based organizations
- Brokers and agents¹¹

These entities will serve as critical points of information and education not only about health coverage options, but also about an individual’s rights under the law. Thus, as part of their obligation to assist consumers, these entities should inform consumers of their rights to be treated in a nondiscriminatory manner throughout the enrollment process, by the Exchange, and by QHPs once people are enrolled in coverage. Further, all entities providing consumer assistance should advise consumers about how they can file a complaint—either with the state or federal government—if they believe they have been discriminated against.

THE ACA SETS OUT SPECIFIC OBLIGATIONS FOR NAVIGATORS.

For example, Navigators must provide referrals to appropriate state agencies for individuals with grievances, questions, or complaints.

Nondiscriminatory Benefit Design and Essential Health Benefits

THE ACA REQUIRES THAT HEALTH PLANS in the individual and small group markets provide coverage for at least 10 categories of benefits called “essential health benefits” (EHB). Among other ACA provisions, the EHB aims to correct longstanding discriminatory practices in the health insurance market. Many of these practices have a disproportionate impact on women. For example, unless required by state law, only 6% of plans sold in the individual insurance market included maternity coverage.¹² In January 2012, the Secretary of the Department of Health and Human Services (HHS) used her authority to set up a process by which states were given the option to choose a “benchmark” plan to serve as the basis for establishing the EHB in their state.¹³ The 10 benefit categories in the EHB are:¹⁴

- Ambulatory patient services;
- Emergency services;
- Hospitalization;
- Maternity and newborn care;
- Mental health and substance use disorder services, including behavioral health treatment;
- Prescription drugs;
- Rehabilitative and habilitative services and devices;
- Laboratory services;
- Preventive and wellness services and chronic disease management; and
- Pediatric services, including oral and vision care.

All individual and small group plans offered in a state, either inside or outside the Exchange, must provide the EHB and *all plans* providing the EHB must not discriminate.¹⁵ There are four provisions of the ACA that apply to nondiscrimination in the EHB and plans offering the EHB:

- § 1557 prohibits discrimination on the basis of race, color, national origin, sex, age and disability in health programs or activities that receive federal financial assistance, are administered by an Executive agency, or were established by Title I of the ACA.¹⁶
- § 1302(b)(4)(B) requires that the Secretary “not make coverage decisions, determine reimbursement rates, establish incentive programs, or design benefits in ways that discriminate against individuals because of their age, disability, or expected length of life.”¹⁷

- § 1302(b)(4)(C) requires the Secretary to “take into account the health care needs of diverse segments of the population, including women, children, persons with disabilities, and other groups.”¹⁸
- § 1302(b)(4)(D) requires the Secretary to ensure “that health benefits established as essential not be subject to denial to individuals against their wishes on the basis of the individuals’ age or expected length of life or the individuals’ present or predicted disability, degree of medical dependency, or quality of life.”¹⁹

The EHB and nondiscrimination thus go hand-in-hand. For example, § 1302(b)(4)(C) instructs the Secretary to “take into account the needs of diverse segments of the population, including women, children, persons with disabilities, and other groups.”²⁰ Reading this requirement in concert with Section 1557’s prohibition on discrimination based on sex (among other characteristics) reinforces the obligation to address the needs of women and other groups against whom the insurance market historically discriminated. Because the EHB cannot discriminate,²¹ neither a state’s EHB package, nor any plan providing the EHB can discriminate. Any discrimination in benefit design must be addressed and corrected before the benefits package is finalized as the state’s EHB. Further, regulators have an ongoing obligation to ensure that the EHB and plans offering the EHB do not discriminate.

To comply with nondiscrimination standards, regulators must evaluate benefit design to ensure that groups protected under Section 1557 and ACA regulations are not subject to arbitrary limits, exclusions, or lower standards of service. These approaches to benefit design have the potential to be discriminatory. And, while the EHB rule states these requirements do not prevent issuers from “appropriately utilizing reasonable medical management techniques,”²² these techniques cannot be used in ways that discriminate.

Some key standards of nondiscrimination on the basis of sex are set forth in current civil rights law. Regulations, guidance, and case law under Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act (PDA), and Title IX of the Education Amendments of 1972 inform the interpretation of what constitutes sex discrimination in benefit design, particularly to the extent that these laws address issues specifically relevant to health programs and activities.

Simply put, if the benefit design is discriminatory, the EHB is not being offered. States have finalized their EHB packages for plan year 2014-2015; however, HHS will be reviewing the benchmark approach and EHB process in 2016.

FEDERAL AND STATE ENFORCEMENT OF THE EHB NONDISCRIMINATION STANDARDS

The EHB is one area in which federal and state authority overlap. Section 1557 is a federal nondiscrimination mandate that applies to the EHB and HHS is required to enforce it. However, the Secretary of the Department of Health and Human Services (HHS) used her authority to set up the “benchmark” process, which involved states in developing the EHB for their state.²³ Thus, the federal regulations that set out rules for the EHB give both federal and state officials a role in enforcing those requirements, including the nondiscrimination standards that apply to the EHB.

While federal regulators have the obligation to ensure plans offering the EHB comply specifically with Sections 1557 and 1302, as well as other applicable federal nondiscrimination laws and the EHB regulations, states must ensure that the state’s EHB and plans offering the EHB do not discriminate. The EHB rule requires that, with respect to enforcement, HHS “first looks to the states and then to the Secretary where a state does not substantially enforce.”²⁴ State advocates and regulators can play a crucial role in monitoring and enforcement.

One of the ways in which state regulators will enforce applicable nondiscrimination standards is through their review of plans. Some state regulators will continue to perform form review and must evaluate plans offering the EHB for discriminatory benefit design during that process. In some cases the federal government will perform form review. Either way, benefit design cannot discriminate against or disfavor a protected group, such as women. Some features of benefit design could raise questions of discrimination. These include:²⁵

- Exclusions
- Restrictions or limitations on covered benefits
- Benefit substitution
- Drug formularies
- Medical management techniques
- Definitions of “medical necessity”
- Cost-sharing
- Provider networks
- Service areas

Nondiscrimination Standards: Grants, Contracts, Training, and Certifications

SEVERAL DIFFERENT ENTITIES AND INDIVIDUALS are involved in ACA implementation activities. Many will receive grants or contracts to carry out Exchange functions, public education and outreach activities. Organizations and individuals will be trained to provide assistance to consumers enrolling in plans and to coordinate enrollment activities with Exchanges. At each step of this process—including training, applications, grants, and certifications—there is a need and opportunity to make clear that these individuals and entities have an obligation to function in a way that is nondiscriminatory as well as culturally and linguistically competent. This is a critical part of achieving one of the ACA's goals—through Section 1557 specifically, but through a number of other provisions as well—to end discriminatory practices in the health care system.

Nondiscrimination and cultural and linguistic competency are mutually reinforcing requirements. Cultural and linguistic competence means the ability to work or communicate within the context of the needs of the cultural, linguistic, racial, and ethnic (among other) groups of the consumers and communities.²⁶ For example, Navigators providing consumer assistance to an individual with limited English proficiency must ensure the individual is provided with adequate language access services. Indeed, one of the conditions for receiving funding to serve as a Navigator is the ability to provide assistance in a culturally and linguistically appropriate way to diverse communities.²⁷

In addition, training for individuals who provide direct assistance to consumers, either through public education or by enrolling them into health coverage, should include information about applicable nondiscrimination standards. This training should enable consumer assisters to inform individuals about their right to be treated without discrimination, and where they can seek redress if they believe they have been subject to discrimination.

**THE ACA
AND ITS REGULATIONS
REQUIRE** that Navigators
and non-Navigator assisters provide
consumer assistance that is “fair,
accurate, and impartial.” This important
requirement is intended to ensure
women have access to unbiased
information when deciding what
health coverage to purchase.

Nondiscrimination and cultural and linguistic competency requirements can be incorporated in applications, training curriculum, certifications, grants, or contracts for individuals or entities carrying out ACA functions. By explicitly identifying these requirements, states can educate grantees and other participants, and clarify that they will ensure these standards are being met. Sample language for these materials is included in the Appendix; the language can be adapted for areas not covered below.

NONDISCRIMINATION REQUIREMENTS AND FORM REVIEW

Since Section 1557 and existing civil rights laws apply broadly, regulators must be vigilant in reviewing plans to ensure that benefits are not designed in a discriminatory manner. This review should include identification of discriminatory cost-sharing; discriminatory practices or wording in plans' explanations and exclusions sections; limitations or restrictions on benefits or services; use of utilization management techniques; and exclusions of benefits used disproportionately by certain groups, including women. The National Association of Insurance Commissioners (NAIC) identifies additional items regulators should focus on when reviewing plans for discriminatory elements.²⁸ The NAIC advises regulators to review all forms to see if they include certain questions—the responses to which may lead to discriminatory underwriting or eligibility determinations.

Further, issuers are prohibited from using certain marketing practices that could discourage enrollment or discriminate on the basis of sex. Whoever carries out form review—regulators or the Exchange—must therefore assess issuers' marketing practices to ensure that they comply with this nondiscrimination requirement.

Nondiscrimination is one of the core requirements for certification as a QHP.²⁹ QHPs cannot discriminate in marketing or in benefit design.³⁰ In some states, regulators and the Exchange will work together to review and certify QHPs. In other states, this work will largely be the responsibility of federal officials. Regardless of who certifies the QHP, Section 1557 and other federal nondiscrimination laws obligates federal oversight and enforcement. States should, for example, require that QHPs affirmatively confirm that they do not discriminate and are in compliance with Section 1557 and ACA regulations. Sample language can be found in the Appendix.

Nondiscrimination and Data Collection

DATA COLLECTION IS AN IMPORTANT TOOL to identify discrimination and to ensure covered entities comply with civil rights laws. For example, the Department of Education (DOE) collects a range of data to ensure that public schools and other federally-assisted education programs comply with civil rights laws including laws that prohibit discrimination based on race, color, national origin, sex, age, and disability. The DOE collects data about student enrollment and education programs and services, disaggregated by race/ethnicity, sex, disability, and limited English proficiency.³¹ Analyzing this data, including the ability to evaluate sub-groups of populations, can help identify unequal educational opportunities or discriminatory policies or practices.

Likewise, data collection by entities involved in health care is essential to ensuring compliance with Section 1557 and other civil rights laws. Collecting data that can be analyzed by race, ethnicity, limited English proficiency, sex, age, disability, gender identity, and sexual orientation can reflect patterns of enrollment in certain health programs and health plans. For example, data demonstrating that a particular QHP issuer disproportionately enrolls men could be an indication of steering. These data may not necessarily confirm discriminatory steering, but could be used to inform further research. Several entities should collect data to measure compliance with civil rights laws including Section 1557. These include hospitals, clinics, or insurance companies that receive federal money; entities created under Title I of the ACA, such as the Exchanges³²; and QHPs offered through the Exchange.³³

Enforcing Section 1557 and Other Nondiscrimination Laws

CONSISTENT ENFORCEMENT of the nondiscrimination standards, in particular through Section 1557, will help ensure an end to the pre-ACA discriminatory practices of the insurance marketplace. Enforcement of nondiscrimination laws will take place both at the federal level through Section 1557 and other federal nondiscrimination standards, and at the state level through the implementation of the ACA regulations and existing state law.

FEDERAL ENFORCEMENT OF SECTION 1557

Section 1557 is enforceable through the filing of an administrative complaint or by a lawsuit. Like under other civil rights laws, people may go directly to court to secure an order that the discrimination stop and any damages to compensate them from the injuries they suffered due to the discrimination.

The Office for Civil Rights (OCR) at the Department of Health and Human Services has the primary responsibility for enforcing Section 1557 and administrative complaints may be filed there. Other federal agencies also have responsibilities for enforcing Section 1557. This means that when a federal agency extends federal financial assistance to an entity engaged in health care, they too have a responsibility to enforce Section 1557.³⁴ Further, a federal agency that administers a health program or activity has an obligation to ensure it complies with Section 1557. In addition, the Department of Justice (DOJ) coordinates enforcement of federal civil rights laws, including Section 1557.

Administrative complaints can be filed against covered entities by individuals or organizations alleging specific incidents of discrimination or a discriminatory policy or practice. An administrative complaint to OCR should describe the discrimination that happened; when it happened; how the entity is covered by Section 1557; and what remedy is sought. For recipients of federal financial assistance,³⁵ the ultimate enforcement of Section 1557 is the withdrawal of federal funds to the discriminatory program. The DOJ can also bring a lawsuit to secure an end to the discrimination. In most instances under similar civil rights provisions, OCR reaches a resolution with the entity against which a complaint is filed to stop the discrimination.

STATE OVERSIGHT AND ENFORCEMENT

The federal government is responsible for implementing and enforcing Section 1557 and Section 1557 complaints should be filed with the Office for Civil Rights at the Department of Health and Human Services.³⁶ In addition to enforcing ACA regulations as outlined earlier in this Guide, states have an obligation to enforce existing state laws, which may apply to ACA-related entities.

States can ensure newly-created entities do not discriminate by enforcing existing state antidiscrimination laws. For example, state consumer protection laws and rules regarding deceptive practices can be used to reinforce federal regulations regarding nondiscriminatory marketing practices. Public accommodation laws protect individuals against

discrimination by or in public or private entities that are used by the public. This includes places such as hospitals, or educational institutions as well as the Exchanges created by the ACA. While federal law prohibits discrimination in public accommodations, in some cases, state laws often offer broader protection in this area. State employment protections may also apply to newly-created ACA entities. In addition, although federal law prohibits discrimination in employment on the basis of race, color, national origin, sex, age, or disability, state law may offer more robust employment protections. These workplace protections may apply to employees of the Exchange and/or individuals or entities that contract with the Exchange. Moreover, states may have additional employment discrimination laws that specifically protect state employees and/or laws that require the state to contract only with businesses that promise not to discriminate on certain bases.

Existing state antidiscrimination law, like those indicated above, can be leveraged to support a range of other state policies, such as strong marketing standards, training or certification requirements, or rules about health insurance benefit design, among others.

States advocates can advance parallel nondiscrimination protections or standards that are more robust than the floor set by the federal rules. For example, states could issue regulations or set certification requirements for brokers and agents that specifically prohibit them from engaging in discriminatory practices. Requiring that *all* brokers and agents comply with the same nondiscrimination standards whether or not they interact with the Exchange will ensure uniform and strong consumer protections. States could also prohibit substitution in the EHBs for the individual and small group markets. Federal requirements prohibit substituting essential health benefits among categories, but permit substitutions within the 10 categories of benefits. In Maryland, however, insurance carriers are prohibited from substituting within EHB categories.³⁷ Maryland's Insurance Administration implemented this policy because "standardization of EHBs will facilitate consumers' ability to compare plans and will enhance transparency. It will also reduce the risk of plan designs that are intended to 'cherry pick'" among people with greater health needs.³⁸

Appendix

SAMPLE LANGUAGE FOR APPLICATIONS, GRANTS, OR CERTIFICATIONS:

[Grantee or applicant] does not discriminate in any of its programs or activities against any individual on the basis of race, color, national origin, sex, age, disability, gender identity or sexual orientation. [Grantee] complies with all applicable antidiscrimination laws, including Section 1557 of the Affordable Care Act.

[Grantee or applicant] will provide training to [grantee or applicant's personnel] about the protections available under Section 1557 of the Affordable Care Act. [Grantee or applicant] will inform [individuals to whom grantee or applicant provides services] of these protections and how individuals who believe they have been discriminated against that they may file a complaint with the Office for Civil Rights at the Department of Health and Human Services [and/or other relevant state agency].

SAMPLE LANGUAGE FOR QHP CERTIFICATIONS:

[Issuer] attests that [plan] does not and will not discriminate against individuals on the basis of health status, race, color, national origin, disability, age, sex, gender identity, or sexual orientation, consistent with Section 1557 of the Affordable Care Act; ACA §§ 1302(b)(4)(B)-(D); 45 C.F.R. § 156.200(e); 45 C.F.R. § 156.125; and 45 C.F.R. § 147.104(e).

SAMPLE LANGUAGE FOR FINAL QHP FILINGS:

Final QHP filings should include a description of all relevant nondiscrimination laws with which plans certified to be QHPs must comply. This includes Section 1557 of the ACA as well as any state nondiscrimination laws that apply to health insurers or plans. It also includes the following federal regulations: 45 C.F.R. § 156.200(e) (QHP issuer participation standards); 45 C.F.R. § 156.125 (standards of the Essential Health Benefits); or 45 C.F.R. § 147.104(e) (market rule).

Final QHP filings should include language to this effect:

Pursuant to Section 1557 of the Affordable Care Act (42 U.S.C. § 18116), Qualified Health Plans are prohibited from discriminating on the basis of age under the Age Discrimination Act of 1975; on the basis of disability under § 504 of the Rehabilitation Act of 1973; on the basis of sex under Title IX of the Education Amendments of 1972; and on the basis of race, color, or national origin under Title VI of the Civil Rights Act of 1964.

Pursuant to federal regulations establishing standards for Qualified Health Plans (45 C.F.R. §156.200(e)), Qualified Health Plan issuers are prohibited from discriminating, with regard to their Qualified Health Plans, on the basis of race, color, national origin, disability, age, sex, sexual orientation, or gender identity.

Pursuant to federal regulations establishing standards for plans offering the Essential Health Benefits (45 C.F.R. 156.125), Qualified Health Plan issuers are prohibited from using benefit designs that discriminate on the basis of age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, health condition, race, color, national origin, disability, sex, sexual orientation, or gender identity. This means that every aspect of the benefit design must be non-discriminatory. QHP issuers cannot subject conditions that disproportionately affect those groups protected under Section 1557 and federal regulations or services primarily used by them to lower standards, arbitrary limitation, or exclusion. And, QHP issuers may not design their benefits to arbitrarily exclude, deny, limit, or subject to lower standards a service for any individual on the basis of age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, health condition, race, color, national origin, disability, sex, sexual orientation, or gender identity.

Pursuant to federal regulations establishing standards for plans offering the Essential Health Benefits 45 CFR 147.104(e), Qualified Health Plan issuers and their officials, employees, agents and representatives must comply with any applicable state laws and regulations regarding marketing by health insurance issuers and cannot employ marketing practices or benefit designs that will have the effect of discouraging the enrollment of individuals with significant health needs in health insurance coverage or discriminate based on an individual's race, color, national origin, present or predicted disability, age, sex, gender identity, sexual orientation, expected length of life, degree of medical dependency, quality of life, or other health conditions.

The Exchange shall enforce these nondiscrimination requirements and monitor all QHPs for noncompliance. If the Exchange determines that a QHP issuer is not complying with these nondiscrimination requirements, and the Exchange further determines that the QHP issuer will not resume compliance with these requirements in a timely manner, then the Exchange will decertify all of the issuer's QHPs that are affected by that noncompliance.

To ensure compliance with Section 1557, QHP issuers shall develop and maintain systems to collect and report information on initiatives to support provision of culturally competent care to their enrollees. Such initiatives shall address cultural competency with regard to race, color, national origin, disability, sex, sexual orientation, and gender identity.

To ensure compliance with Section 1557, QHP issuers shall develop and maintain systems to collect and report voluntary data on QHP enrollees by race, ethnicity, sex, primary language, disability status, sexual orientation, and gender identity, and to stratify their quality, claims, and encounter data by these characteristics whenever possible.

In addition to the sample language above, New York and Washington State have already incorporated the nondiscrimination requirements into solicitation letters for QHPs. The same language can be included in final QHP filings.

New York's Invitation to Participate

Non-Discrimination

The QHP issuer must not, with respect to its QHPs, discriminate on the basis of race, color, national origin, disability, age, sex, gender identity or sexual orientation.³⁹

Washington's Guidance for Participation

Non-discrimination

A QHP issuer must comply with federal and Washington State non-discrimination requirements.

A QHP issuer may not discriminate on the basis of race, color, national origin, disability, age, sex, gender identity, or sexual orientation (45 CFR §156.200(e)). (At the time of publishing this document, proposed rule §156.125 specifies that an issuer may not provide essential health benefits if its benefit design also discriminates based on an individual's degree of medical dependency or quality of life.)

The OIC [Washington State Office of the Insurance Commissioner] will enforce non-discrimination requirements and monitor for noncompliance. If the OIC determines that a QHP issuer is not complying with the non-discrimination requirements within Healthplanfinder, and the OIC further determines that the QHP issuer will not resume compliance with the non-discrimination requirements, then the HBE [Health Benefit Exchange] will decertify all of the issuer's QHPs affected by that noncompliance.⁴⁰

endnotes

- 1 Patient Protection and Affordable Care Act § 1557, codified at 42 U.S.C. § 18116 (2012); Letter from Leon Rodriguez, Dir. of Office for Civil Rights, Dep't. of Health & Human Servs. to Maya Rupert, Fed. Pol'y Dir., Nat'l Ctr. for Lesbian Rights (Jul.12, 2012) (OCR Transaction No. 12-000800).
- 2 45 C.F.R. § 155.120(c) states: "In carrying out the requirements of this part, the State and the Exchange must: (1) Comply with applicable non-discrimination statutes; and (2) Not discriminate based on race, color, national origin, disability, age, sex, gender identity or sexual orientation."
- 3 Patient Protection and Affordable Care Act § 1557, codified at 42 U.S.C. § 18116 (2012) (stating that § 1557 protects individuals from discrimination under "any entity established under this title (or its amendments).") Section 1557 may apply to Exchanges for other reasons as well—for example, if the Exchange is federally-administered. *Id.* (stating that § 1557 protects individuals from discrimination under "any program or activity that is administered by an Executive Agency.").
- 4 45 C.F.R. § 155.110(b).
- 5 Section 1557 is similar to Title IX, the federal law that prohibits sex discrimination in education programs, and other civil rights statutes in that it prohibits covered entities from discriminating and prohibits covered entities from providing significant assistance to entities that discriminate. See, e.g., 34 C.F.R. § 106.31(b)(6) (Title IX regulation stating that a recipient "shall not, on the basis of sex," "aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex"); *Iron Arrow Honor Society v. Heckler*, 702 F.2d 549, 561 (5th Cir. 1983) *vacated for mootness* by 464 U.S. 67 (1983)) (upholding these Title IX regulations).
- 6 Health Insurance Market Rules; Rate Review, 78 Fed. Reg. 13,406, 13,438 (Feb. 27, 2013) (to be codified at 45 C.F.R. § 147.104(e)).
- 7 *Id.* at 13,417.
- 8 These are individuals or organizations tasked with helping consumers with their health insurance options. All Exchanges are required to establish a Navigator program.
- 9 HHS uses the terms "non-Navigator assistance personnel" and "in-person assistance personnel" interchangeably. Both Navigators and non-Navigator assistance personnel must "perform public outreach and comply with detailed conflict of interest standards, eligibility requirements, and prerequisites, as well as CLAS [Culturally and Linguistically Appropriate Services] and disability access standards." Standards for Navigators and Non-Navigator Assistance Personnel; Consumer Assistance Tools and Programs of an Exchange and Certified Application Counselors, 78 Fed. Reg. 42,824, 42,829 (July 17, 2013).
- 10 These are also individuals or organizations that will assist consumers with their health insurance options. CACs already exist in some states to help people apply for Medicaid. While State Medicaid agencies will have the option to certify CACs and CAAs, Exchanges are *required* to do so. CACs and CAAs must be qualified to help people fill out applications for Medicaid, CHIP, and plans sold on the Exchange as well as apply for premium tax credits and cost-sharing assistance. Examples of CACs and CAAs may include community health centers or other community-based organizations that, while perhaps not chosen as Navigators, can be certified as CACs and CAAs. See Enroll America, How Can Consumers Get Help Enrolling in Health Coverage?, *available at* http://files.www.enrollamerica.org/best-practices-institute/enroll-america-publications/Enrollment_Assisters_Fact_Sheet.pdf. Proposed rules on Certified Application Counselors were issued in January 2013. See Medicaid, Children's Health Insurance Programs, and Exchanges, 78 Fed. Reg. 4,594 (proposed Jan. 22, 2013).
- 11 Individuals that sell health insurance plans will continue to have a role helping people find health coverage.
- 12 Danielle Garrett, Nat'l Women's Law Ctr., Turning to Fairness: Insurance Discrimination Today and the Affordable Care Act (March 2012), *available at* <http://www.nwlc.org/resource/report-turning-fairness-insurance-discrimination-against-women-today-and-affordable-care-act>.
- 13 Ctr. for Consumer Info. & Ins. Oversight, U.S. Dep't of Health & Human Serv., Essential Health Benefits Bulletin (Dec. 16, 2011) *available at* http://www.cms.gov/CCIIO/Resources/Files/Downloads/essential_health_benefits_bulletin.pdf
- 14 42 U.S.C. § 18022(b)(1)(A)-(J).
- 15 Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation, 78 Fed. Reg. 12,834, 12,867 (to be codified at 45 C.F.R. § 156.125) (prohibiting discrimination in the EHB).
- 16 Patient Protection and Affordable Care Act § 1557, codified at 42 U.S.C. § 18116.
- 17 42 U.S.C. § 18022(b)(4)(B).
- 18 *Id.* at § 18022(b)(4)(C).
- 19 *Id.* at § 18022(b)(4)(D).
- 20 *Id.* at § 18022(b)(4)(C).
- 21 *Id.* at §§ 18022(b)(4)(B)-(D) (2012); see also, Patient Protection and Affordable Care Act § 1557, codified at 42 U.S.C. § 18116 (2012).
- 22 Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation, 78 Fed. Reg. 12,834, 12,867 (Feb. 25, 2013) (to be codified at 45 C.F.R. § 156.125(c)).
- 23 Ctr. for Consumer Info. & Ins. Oversight, U.S. Dep't of Health & Human Serv., Essential Health Benefits Bulletin (Dec. 16, 2011) *available at* http://www.cms.gov/CCIIO/Resources/Files/Downloads/essential_health_benefits_bulletin.pdf.
- 24 Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation, 78 Fed. Reg. 12,834, 12,846 (Feb. 25, 2013).
- 25 Katie Keith, et. al. Ctr. for Health Insur. Reform, Georgetown Univ. Health Pol'y Inst. Nondiscrimination Under the Affordable Care Act 10 (July 2013), *available at* http://chir.georgetown.edu/pdfs/NondiscriminationUndertheACA_GeorgetownCHIR.pdf
- 26 For more information about cultural and linguistic competency, and in particular, the National CLAS Standards, see Office of Minority Health, National Standards on Culturally and Linguistically Appropriate Services (CLAS), <http://minorityhealth.hhs.gov/templates/browse.aspx?lvl=2&lvlID=15> (last updated May 3, 2013).
- 27 42 U.S.C. § 18031(i)(3)(E).
- 28 Nat'l Assoc. of Insur. Comm., NAIC Form Review White Paper, 15 (adopted June 27, 2012), *available at* http://www.naic.org/documents/committees_b_related_wp_form_review.pdf.
- 29 45 C.F.R. § 156.200(e) (2012).
- 30 *Id.*; Health Insurance Market Rules; Rate Review, 78 Fed. Reg. 13,406, 13,438 (Feb. 27, 2013) (to be codified at 45 C.F.R. § 147.104(e)).
- 31 Dep't of Educ., Office of Civil Rights, Civil Rights Data Collection, <http://www2.ed.gov/about/offices/list/ocr/data.html>
- 32 45 C.F.R. § 155.120(c) ("In carrying out the requirements of this part, the State and the Exchange must: (1) Comply with applicable non-discrimination statutes; and (2) Not discriminate based on race, color, national origin, disability, age, sex, gender identity or sexual orientation.").
- 33 *Id.* § 156.200(e) ("A QHP issuer must not, with respect to its QHP, discriminate on the basis of race, color, national origin, disability, age, sex, gender identity or sexual orientation.").
- 34 A comparison to Title IX (the federal law that prohibits sex discrimination in federally funded education programs) is helpful. Under, Title IX, a recipient of federal dollars from the Department of Housing and Urban Development (HUD) must not discriminate on the basis of sex in its education programs. Along with the Department of Education and the Department of Justice, HUD has a responsibility to ensure the entity to which it provides funds complies with Title IX. The same is true of compliance with § 1557.

- 35 Federal financial assistance includes receipt of federal funds, including federal grants, or Medicare or Medicaid funds. It may also include provisions of the services of federal personnel or other agreements or arrangements the purpose of which is to provide assistance. For a more detailed discussion of “federal financial assistance” under Title IX, see Dep’t of Justice, Title IX Legal Manual, *available at* <http://www.justice.gov/crt/about/cor/coord/ixlegal.php>. Note, however, that “federal financial assistance” under § 1557 is broader than under Title IX—for example, § 1557 includes conduct that flows from “contracts of insurance” while Title IX does not.
- 36 Office for Civil Rights, Dep’t of Health and Human Servs., How to File a Complaint, <http://www.hhs.gov/ocr/civilrights/complaints/index.html>.
- 37 Md. Insur. Admin., Bulletin 13-02: Essential Health Benefits Substitution Rules (Jan. 7, 2013), *available at* www.mdinsurance.state.md.us/sa/docs/documents/insurer/bulletins/bulletin13-02_substitutionrules_010713.pdf.
- 38 *Id.* at 5.
- 39 N.Y.S. Dep’t of Health, Office of the N.Y. Health Benefit Exchange, Invitation to Participate in the New York Health Benefit Exchange, 13 (Jan. 31, 2013), *available at* http://www.healthbenefitexchange.ny.gov/sites/default/files/Invitation%20to%20Participate%20in%20NYHBE_0.pdf.
- 40 Wash. Health Benefit Exchange, Guidance for Participation in the Washington Health Benefit Exchange, 11 (Dec. 21, 2012) (on file with National Women’s Law Center).
- a See, e.g., Dep’t of Health & Human Servs., Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities, 78 Fed. Reg. 46,558 (proposed Aug. 1, 2013).
- b Nat’l Women’s Law Ctr., NWLC Files Complaints Against Five Institutions for Sex Discrimination in Health Care Coverage, Jun. 4, 2013, <http://www.nwlc.org/press-release/nwlc-files-complaints-against-five-institutions-sex-discrimination-health-care-coverag>.
- c 42 U.S.C. § 18031(i)(3)(E).
- d 42 U.S.C. § 18031(i)(5) (requirements for Navigators); 45 C.F.R. § 155.210(e)(2) (same); Standards for Navigators and Non-Navigator Assistance Personnel; Consumer Assistance Tools and Programs of an Exchange and Certified Application Counselors, 78 Fed. Reg. 42,824, 42,860 (July 17, 2013) (to be codified at 45 C.F.R. § 155.215(a)(2)) (requiring non-Navigator assistance personnel carrying out consumer assistance functions comply with standards for Navigators provided for in 45 C.F.R. § 155.210(e)(2)).



11 Dupont Circle, Suite 800
Washington, DC 20036
202.588.5180 | fax 202.588.5185
www.nwlc.org