

Proposed HHS Rule on Health Care Discrimination: Frequently Asked Questions

Send HHS your comments [here](#) by November 9.

A. SECTION 1557 AND THE PROPOSED RULE GENERALLY

What is Section 1557?

Section 1557 is 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, 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 is the proposed rule?

The Department of Health and Human Services (HHS) has released a proposed rule that lays out how HHS interprets Section 1557 and what the statute requires. The proposed rule says that, when Section 1557 prohibits discrimination based on sex, **that includes discrimination based on gender identity**. The proposed rule discusses 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 proposed rule at <http://federalregister.gov/a/2015-22043>.

Why is the proposed rule important?

The proposed rule 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 have a blanket policy of denying coverage for transition-related care**. They are also violating Section 1557 if they won't cover a particular health service when it's used to help people transition, even though they cover the same health service for people with other conditions. The proposed rule 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.

What are the next steps before the rule is final?

HHS wants to hear from the public about what people like and don't like about the rule, how it can be made better, and what kind of impact it can have on people's lives. These comments make an enormous difference and will help shape the final rule. You can submit your comment and personal health care stories through [NCTE's web form](#), where you'll also find a sample comment you can use. You can also submit a through the [federal eRulemaking portal](#). You can submit comments up until **November 9**.

B. SECTION 1557'S NONDISCRIMINATION PROTECTIONS

Does the proposed rule ban discrimination on the basis of gender identity?

Yes. HHS explains that "discrimination based on sex" includes discrimination based on pregnancy, sex stereotyping, and gender identity. "Sex stereotyping" includes assumptions about 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 "man" and "woman."

Does the proposed rule ban discrimination on the basis of sexual orientation?

Not entirely. HHS doesn't explicitly include discrimination based on sexual orientation as a type of sex discrimination. Some federal courts have said that discrimination based on sexual orientation is a form of sex discrimination, but others have said that it is not. HHS says that it would like to create strong protections for lesbian, gay, and bisexual people based on existing law, and the agency is asking for [more comments](#) on this question. While HHS is considering what it will say in the final rule, we encourage individuals facing any form of anti-LGBT discrimination in health care to file complaints with HHS by visiting www.hhs.gov/ocr.

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 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
- Denying or limiting coverage for health services use for gender transition when those services would be covered when needed to treat other health conditions
- Refusing to cover treatment that is typically associated with one gender (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?

The proposed rule doesn't list specific treatments that insurance carriers do or don't need to cover. However, if an insurance company covers a treatment for any condition, 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. Keep in mind that insurance carriers are still permitted to make a case-by-case determination of whether a treatment is medically necessary for a particular individual, 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 rule?

The proposed rule 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 non-transgender women.

At the same time, the rule makes clear that no one may be denied a health service simply because it is typically associated with a gender different from their gender identity, their sex assigned at birth, or the gender listed in their medical records. 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 is covered by the proposed rule?

ACA Section 1557 applies to health programs and activities funded or administered by any federal agency, not just HHS. The proposed rule is HHS's interpretation of what Section 1557 requires and how the statute should be enforced. HHS proposes that the rule it's putting forward apply specifically 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
- (3) The federal Health Insurance Marketplace (healthcare.gov), the state Marketplaces, and insurance carriers that sell plans through the Marketplaces

Other federal agencies, including the Office of Personnel Management, and the Departments of Defense, Labor, and Veterans Affairs, are responsible for making sure that their health programs comply with Section 1557. They might propose rules of their own to interpret Section 1557 or adopt HHS’s rules. HHS may also have the power to investigate such complaints. Complaints for these programs may also be brought using existing complaint processes within the relevant agency, or in federal court.

What types of health care providers are covered by the proposed rule?

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 proposed rule 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 the proposed rule cover...

➤ Employer-sponsored health plans?

In many 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. It is likely that employer-sponsored plans are also covered by Title VII of the Civil Rights Act, which prohibits discrimination based on sex.

➤ Student health plans?

In many cases, yes. Most student health plans will be covered because they are run by insurance companies that participate in the state or federal Marketplaces, Medicare, or Medicaid. The proposed rule doesn’t say whether student health plans that aren’t operated by one of these companies would also be covered by Section 1557. However, it is likely that these health plans are also covered by nondiscrimination protections in the federal Title IX education law and by state laws.

➤ **Non-Marketplace/individual health plans?**

In many 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. In addition, many states also have protections against discrimination in health insurance that would apply to these plans. Ten of these states (CA, CO, CT, IL, MA, NY, NV, OR, VT, WA) and the District of Columbia have released bulletins making clear that their anti-discrimination laws prohibit discrimination on the basis of gender identity, including exclusions of transition-related care, in all health insurance sold in those states.

➤ **Tri-Care?**

Yes. Tri-Care 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.

Summary of Programs and Activities Subject to the Proposed Rule

	Covered by the proposed rule?	Covered by other laws?	Enforcing Agency
Federal employee health plans	Covered by Section 1557 but not by the HHS proposed rule	Covered under Title VII of the Civil Rights Act	HHS 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/	It depends. Yes, if the	May also be	HHS and state

individual plans	carrier also has plans that are part of a Marketplace, Medicare, or Medicaid	covered under state non-discrimination laws.	insurance regulators
Employee plans	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 runs health care programs; 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, if the carrier also has plans that are part of a Marketplace, Medicare, or Medicaid	Covered under Title IX	Department of Education or HHS
VA	Covered by Section 1557 but not by the HHS proposed rule		VA (HHS may be able to take complaints)
Tri-Care (Dept of Defense)	Yes		DOD (HHS may be able to take complaints)

Does the proposed rule include any religious exemptions?

No. HHS has asked for comments about whether Section 1557 should include a specific exemption for religious organizations and, if so, how far that exemption should go and what health implications an exemption may have. NCTE strongly opposes creating any exception to allow health care providers or insurers to discriminate against women, people with disabilities, LGBTQ people, or anyone

else. If an organization is receiving federal funds, it should not be allowed to use those funds discriminate against anyone.

D. FILING COMPLAINTS

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

Although the proposed rule will not be made final for a number of months, Section 1557's prohibition on discrimination is in effect now. Complaints can already be filed with the HHS Office for Civil Rights by visiting www.hhs.gov/ocr. 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?

Since the rule isn't final, some insurance companies may not change discriminatory practices, such as blanket 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.

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 covered by it. 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, 2015, to January 31, 2016, and you can enroll in Medicaid at any time.