

Health care reform update – July 2016

## Nondiscrimination in Health Programs and Activities Rule (ACA Section 1557) – Gender identity, notifications and language assistance

### Summary

The Nondiscrimination in Health Programs and Activities Rule, Affordable Care Act Section 1557 ("Section 1557 Rule"), prohibits covered entities from discriminating on the basis of race, color, national origin, sex, age, or disability. The Rule, released on May 13, 2016, included clarifications and requirements for covered entities:

- Clarification that discrimination on the basis of sex in health care programs includes discrimination on the basis of gender identity, which prohibits a covered entity from broadly excluding coverage for transgender services, including sex transformation surgery and related services.
- Clarification that a covered entity cannot deny coverage or impose additional limitations for any health service that is ordinarily or exclusively available to individuals of one sex if medically appropriate (i.e. hysterectomy performed for transgender male for treatment of uterine cancer).
- Requirement that covered entities include a statement about their non-discrimination obligations, as well as information about language assistance in the top 15 non-English languages spoken by state, on any significant communication that goes to health plan enrollees, conspicuous physical locations and in a conspicuous location on the home page of a covered entity's website.
- Requirements for accessibility for people with disabilities, which are consistent with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973.
- Requirement that covered entities employing 15 or more persons designate a responsible employee to coordinate the entity's compliance with the rule and adopt a written grievance procedure.

A "covered entity" is an entity that operates a health program or activity, any part of which receives federal financial assistance. Anthem receives federal financial assistance through the Exchange subsidies and government programs that it underwrites and thus is a covered entity.

The Rule applies to the entire operations of a health insurance issuer receiving Federal financial assistance, not just the portions receiving federal financial assistance. This includes all fully insured market segments as well as its TPA/ASO operations.

For additional details, please see the HHS Office of Civil Rights information page (<http://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>) as well as FAQs published by HHS: <http://www.hhs.gov/sites/default/files/2016-05-13-section-1557-final-rule-external-faqs-508.pdf>

### Applicability dates

*Effective 7/18/16:*

- Prohibition on denial of coverage or imposition of additional limitations for any health service that is ordinarily or exclusively available to individuals of one sex if medically appropriate (i.e. hysterectomy performed for transgender male for treatment of uterine cancer).
- The requirement for covered entities that employ 15 or more persons to designate a responsible employee to coordinate the entity's compliance with the rule and adopt a written grievance procedure.



*Effective 10/16/16:*

- The requirement to post notices of nondiscrimination in all significant communications that go to health plan enrollees, in conspicuous physical locations, and in a conspicuous location on the home page of a covered entity's website.
- The requirement to post language accessibility taglines in at least the top 15 non-English languages spoken in the state in which the entity is located or does business in all significant communications that go to health plan enrollees and in a conspicuous location on the home page of a covered entity's website.

*Effective for plan years 1/1/17 and after:*

- Prohibition on explicit, categorical (or automatic) exclusions or limitation of coverage for all health services related to gender transition when medical necessity criteria is met.

**Note:** On June 14, 2016, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued a final regulation, effective August 15, 2016, on sex discrimination that applies to employers that hold federal contracts. This regulation also prohibits blanket exclusions for transgender services. Groups should also review this regulation as they consider whether to continue excluding transgender services from their benefit plan. For an overview of the OFCCP Rule's contents, please see the fact sheet "OFCCP's Sex Discrimination Final Rule," located at [https://www.dol.gov/ofccp/SexDiscrimination/SexDiscrimFinalRuleFactSheet\\_JRFOA508c.pdf](https://www.dol.gov/ofccp/SexDiscrimination/SexDiscrimFinalRuleFactSheet_JRFOA508c.pdf)

The FAQs indicate that OFCCP will consider good faith progress to take steps to change benefits policies and practices in analyzing whether enforcement action is appropriate, particularly in the period immediately following the rule's effective date.

## Key points

Related to the gender identity nondiscrimination portion of the Section 1557 rule:

- Anthem will remove all transgender exclusions from the templates of the benefit plans we offer or administer for all groups as well as individual policies, starting 1/1/17 upon plan start or renewal.
- Requests to quote existing benefits for self-funded ASO groups where a transgender exclusion exists will be responded to with an exception for administering that exclusion.

Related to the nondiscrimination notification and language requirements of the Section 1557 rule:

- Anthem will add the required notification and language taglines on impacted communications produced by Anthem. We're currently reviewing which communications will be impacted – we believe it will be most member-facing communications.
- Groups are responsible for determining if they must add this information to communications that they provide to employees covered by their health plan, and if so, which communications require it.

## Questions and Answers

### Gender Identity and Nondiscrimination

**Q. When does the new requirement for gender identity/transgender services go into effect?**

A. Health plan benefit design changes to comply with gender identity nondiscrimination requirements under the Section 1557 rule must be effective on the first day of the first plan year (in the individual market, policy year) beginning on or after January 1, 2017.



**Q. What is Anthem doing to comply with the gender nondiscrimination requirements?**

A. Anthem will remove all transgender exclusions from the templates of the benefit plans we offer or administer for all groups as well as individual policies, starting 1/1/17 upon plan start or renewal.

**Q. Will all transgender transition treatment be automatically covered?**

A. Medical necessity rules will be applied to these services as they are applied to all other medical services, with no discrimination based on gender or gender identity.

**Q. Does Anthem have medical necessity guidelines for transgender services?**

A. Existing medical guidelines for gender reassignment surgery can be found here:

[https://www.anthem.com/medicalpolicies/guidelines/gl\\_pw\\_a051166.htm](https://www.anthem.com/medicalpolicies/guidelines/gl_pw_a051166.htm)

We will continue to review and update the guidelines as needed.

**Q. How will transgender treatment coverage be handled in plan design documents?**

A. Anthem will remove all transgender exclusions from the templates of the benefit plans we offer.

## **Nondiscrimination Notification and Language Requirements**

**Q. What is the definition of "significant communications" in regard to the notices and taglines?**

A. While the regulation did not define "significant communications," HHS Office of Civil Rights intends to interpret this term very broadly. We will be identifying impacted communications, and believe it will include the majority of member-facing communications.

**Q. When a document is used for multiple states, what language assistance taglines will be applied?**

A. The document will need to include all the top 15 non-English taglines for all applicable states, or will need to be made specific to a particular state.

**Q. How is "state" defined for the language assistance taglines?**

A. The language taglines will be applied based on the state in which the policy was sold.

This content is provided solely for informational purposes. It is not intended as and does not constitute legal advice. The information contained herein should not be relied upon or used as a substitute for consultation with legal, accounting, tax and/or other professional advisers.