

1 Overview and Purpose of This Document

On May 18, 2016, the U.S. Department of Health and Human Services (DHHS) issued a final rule—which took effect on July 18, 2016—implementing section 1557 of the Affordable Care Act (ACA). The rule is complex in the scope of its requirements. To help navigate this rule in part, this document provides an overview of (1) protections for persons with limited English proficiency, (2) entities subject to section 1557, and (3) notice and tagline requirements for covered entities in meeting their obligations under the rule.

This document **does not** provide a full summary of the rule’s requirements and recommendations. In addition, other laws—including Title VI of the Civil Rights Act of 1964, Title III of the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973—may impose additional requirements not covered here.

2 Protections for Persons with Limited English Proficiency

Section 1557 of the ACA makes it unlawful for covered entities—including health insurance issuers—that receive federal financial assistance to refuse to treat, or otherwise discriminate against, an individual on the basis of race, color, national origin, sex, age, or disability.

Consistent with these civil rights principles, the final rule requires covered entities to take **reasonable steps** to provide **meaningful access** to those persons with limited English proficiency (LEP) likely to be eligible for, or served by, health programs and activities offered by these entities. Reasonable steps include the provision of language assistance services, including oral language interpretation or written translation.¹

3 Entities Subject to § 1557

Section 1557 applies to the following entities:

- ◆ All health programs and activities receiving federal financial assistance through DHHS, including Medicaid, Medicare (except for Part B), and CHIP;

¹ Similarly, the rule requires covered entities to take appropriate steps in ensuring effective communications with Deaf persons and other individuals with certain disabilities. Appropriate steps include the provision of auxiliary aids and services, such as alternative formats and sign language interpreters, where necessary.

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- ◆ Health programs and activities administered by DHHS, including the federally-facilitated Marketplace; and
- ◆ State-based Marketplaces and other health programs and activities administered by entities established under Title I of the ACA.

If an organization is “principally engaged” in providing or administering health services or health insurance, the rule applies to the **entire organization**, not just the health program or activity receiving DHHS funding. This includes hospitals, health clinics, group health plans, health insurance issuers, physicians’ practices, community health centers, nursing facilities, residential or community-based treatment facilities, and other similar entities.²

4 Notice Requirements

The final rule requires that covered entities post (1) nondiscrimination notices and (2) taglines alerting LEP individuals to the availability of language assistance services.

These notice and tagline requirements are **effective October 16, 2016** (90 days following issuance of the final rule). However, covered entities may exhaust their current stock of hard copy publications rather than printing entirely new publications.

The DHHS provides **sample translations** of these nondiscrimination notices and taglines at the website: <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources>.³

4.1 Nondiscrimination Notice

The final rule requires a covered entity to post an English-only nondiscrimination notice with the following information:

- ◆ The entity’s nondiscrimination policy;
- ◆ The entity’s provision of appropriate auxiliary aids and services, free of charge, where necessary for persons of with disabilities

² 81 Fed. Reg. 31399. In comments to the final rule, the DHHS estimates that “the regulation would likely cover all licensed physicians because they accept Federal financial assistance from sources other than Medicare Part B.” *Id.* at 31445.

³ While the DHHS provides translations of the sample nondiscrimination notice and sample nondiscrimination statement at its website, these “are for covered entities’ discretionary use only—the final rule does not require the posting of [these documents] in non-English languages.” 81 Fed. Reg. 31399. **NOTE**, however, that the rule *does require* translations for taglines (discussed below).

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- ◆ The entity’s provision of language assistance services;
- ◆ How to obtain these auxiliary aids and language assistance services;
- ◆ For entities employing 15 or more persons, the availability of a grievance procedure and contact information for the person responsible for compliance; and
- ◆ How to file a discrimination complaint with Office of Civil Rights.⁴

A covered entity may combine the content of this notice with the content of other notices if the combined notice *clearly informs* individuals of their civil rights under Section 1557 and the nondiscrimination notice.⁵

4.2 Taglines in Top 15 Languages

In addition to the nondiscrimination notice, which the final rule only requires to be published in English, the covered entity must post taglines in at least the top 15 languages spoken by LEP individuals **statewide**.⁶ Taglines are defined in the final rule as “short statements written in non-English languages that indicate the availability of language assistance services free of charge.”⁷

⁴ 45 C.F.R. §§ 92.8(a)(1)-(7).

⁵ 45 C.F.R. §§ 92.8(h).

⁶ 45 C.F.R. § 92.8(d)(1). **Statewide Methodology.** In its comments to the final rule, the DHHS expressly rejected proposals to adopt either a narrower (county-level) or broader (national-level) methodological approach in determining the number of languages in which covered entities would be required to post taglines. In settling on the state-based approach, the DHHS gave three primary reasons: (1) it is more attuned to the diversity of languages spoken by LEP individuals and thus provides notice to more of those individuals; (2) it better harmonizes with the number of languages in which taglines must be provided by Marketplaces and qualified health plan issuers; and (3) “a county-level approach is impractical because detailed language data are not available for counties with populations of less than 100,000.” 81 Fed. Reg. 31399-31400 (May 18, 2016).

Possible Additional Languages. The DHHS does, however, go on to note that “the requirements of § 92.8(d)(1)-(2) establish a floor” and that “covered entities are free to include taglines in additional languages beyond 15 languages.” 81 Fed. Reg. 31400. Moreover, the agency states that compliance with these notice requirements “is not a substitute for complying with the prohibition of national origin discrimination as it affects [LEP] individuals” under Section 1557, “including the general nondiscrimination provisions in § 92.101 and the meaningful access provisions in § 92.201 of this final rule.” *Id.* So, “although this section identifies the languages in which covered entities must post taglines, it does not relieve those entities of the separate obligation to take reasonable steps to provide meaningful access to [LEP] individuals . . . who communicate in other languages.” *Id.*

Covered Entities Serving Persons in More Than One State. Covered entities that serve individuals in more than one state may aggregate the number of individuals with LEP in those states to determine the top non-English languages spoken. 81 Fed. Reg. 31400.

⁷ 45 C.F.R. § 92.4.

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4.3 Posting Requirements

Both the nondiscrimination notice and the taglines must be posted:

- ◆ In all “significant publications and significant communications targeted to beneficiaries, enrollees, applicants, and members of the public;”⁸

⁸ 45 C.F.R. § 92.8(f)(1)(i). **“Significant Publications and Significant Communications.”** The DHHS indicates that these materials “*may* include patient handbooks, outreach publications, or written notices pertaining to rights or benefits or requiring a response from an individual expressly.” 81 Fed. Reg. 31396. Beyond these documents, the agency “decline[d] to enshrine a list of examples of ‘significant publications and significant communications.’” 81 Fed. Reg. 31402. The agency offered two reasons for this: (1) codifying examples would likely not provide meaningful guidance to the full spectrum of covered entities regulated; and (2) each covered entity is in the best position to determine which of its communications and publications are significant.” 81 Fed. Reg. 31402.

Broad Interpretation; Reference to Other Civil Rights Authorities. Rather than codifying examples, the agency indicated that the “OCR intends to interpret [these terms] broadly, which is consistent with the notice provisions of other Federal civil rights authorities, such as Section 504 [of the Rehabilitation Act of 1973] and Title IX [of the Education Amendments of 1972].” 81 Fed. Reg. 31401. Notice provisions under these two authorities are discussed below.

Notice methods under **Section 504 of the Rehabilitation Act of 1973** may include “publication in newspapers and magazines, placement of notices in [Federal financial assistance] recipients’ publication[s], and distribution of memoranda or other written communications” as well as “recruitment materials or publications containing general information that . . . [the recipient] makes available to participants, beneficiaries, [and] applicants.” *Id.* (quoting 45 CFR 84.8(a)-(b)).

Title IX of the Education Amendments of 1972 requires initial notice of individuals’ rights to appear in local newspapers, newspapers and magazines *published by the recipient* of Federal financial assistance, and “memoranda or other written communications distributed to every student . . . of such recipient.” Title IX also requires each recipient of Federal financial assistance to “prominently include a statement of . . . [the recipient’s nondiscrimination policy] in each announcement, bulletin, catalog, or application form which it makes available.” *Id.* (quoting 45 CFR 86.9(a)(2)(i), (b)(i)).

In addition to Title IX and Section 504 requirements, the DHHS, in its comments, refers to its **LEP Guidance**, which uses the term “**vital documents**” (which provides examples such as consent and complaint forms; written notices of eligibility criteria, rights, denial, loss, or decreases in benefits or services; and applications to participate in a recipient’s program or activity or to receive recipient benefits or services). 81 Fed. Reg. 31402 (citing 68 FR 47318-19). However, in the context of ACA § 1557, the agency states that it intends for “vital documents” to represent only a subset of “significant communications and significant publications” in which covered entities must provide notice. *Id.*

Scope. Ultimately, the DHHS “intend[s] the scope of significant publications and significant communications to include not only documents intended for the public, such as outreach, education, and marketing materials, but also written notices requiring a response from an individual and written notices to an individual, such as those pertaining to rights or benefits.” 81 Fed. Reg. 31402.

Placement of Notices/Taglines within Publications. Although the DHHS “encourage[s] covered entities to include notices and taglines at the beginning of significant publications and significant communications to ensure that they are meaningfully accessible to the consumer,” the agency “decline[d] to require this prescriptive approach as part

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- ◆ In a conspicuously visible font size;
- ◆ In “conspicuous physical locations where the entity interacts with the public;”⁹ and
- ◆ In “a conspicuous location on the covered entity’s Web site accessible from [that site’s] home page.”¹⁰

4.4 Small-Sized Publications

For small size publications (such as postcards or tri-fold brochures), covered entities must post, in a conspicuously visible font size, (1) an **abbreviated nondiscrimination statement**¹¹ and (2) taglines in the **top two non-English languages** statewide.

of the final rule.” 81 Fed. Reg. 31401. The DHHS recognized that, whereas “[i]n some circumstances, such as lengthy publications, it may be necessary to include the notice and taglines at the beginning of a document,” in other materials “posting elsewhere, including on a separate insert accompanying the English-language significant publication or significant communication, may be adequate.” *Id.*

⁹ **“Sufficiently Conspicuous” Standard.** “The touchstone by which [the DHHS] will assess whether a covered entity’s provision of notice and taglines is effective is whether the content is sufficiently conspicuous and visible that individuals seeking services from, or participating in, the health program or activity could *reasonably be expected to see and be able to read the information.*” 81 Fed. Reg. 31397.

¹⁰ 45 C.F.R. § 92.8(f)(1)(ii)-(iii). **Web Sites and Links.** “[W]ith regard to the requirement to post taglines,” the DHHS noted in its comments on the final rule, that “covered entities can comply by posting ‘in language’ Web links, which are links written in each of the 15 non-English languages posted conspicuously on the home page that direct the individual to the full text of the tagline indicating how the individual may obtain language assistance services.” 81 Fed. Reg. 31396. “[I]n today’s increasingly electronic and digital age where covered entities may make their first impressions through Web content (often on small mobile devices),” the DHHS expressed sensitivity “to covered entities’ need for autonomy in designing and managing the appearance of their public internet home pages.” 81 Fed. Reg. 31401.

¹¹ 45 C.F.R. § 92.8(g). **Nondiscrimination Statement Distinguished from Nondiscrimination Notice.** This is limited to a brief statement indicating that the “covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities.” 45 C.F.R. §§ 92.8(a)(1), (b)(2). The statement *need not convey* the same detailed information as is required for the full notice of nondiscrimination under paragraphs (2) through (7) of § 92.8(a).