



LEGAL ADVICE FOR HEALTH PLANS

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## ***HEALTH LAW ALERT***

### ***June 22, 2020***

### **Section 1557 Nondiscrimination Rule Revised**

#### **Tagline Requirement Repealed; Scope of Rule Limited**

On Friday, the Department of Health and Human Services published a final rule that replaces the Section 1557 Nondiscrimination Rule published in 2016. The Final Rule eliminates the 2016 Rule's requirement that health plans include "taglines" in all "significant publications and significant communications" with members and prospective members. The revised Rule also narrows the scope of the Rule's application to health plans by applying the Rule only to lines of business that are receiving Federal financial assistance. In addition, the Final Rule eliminates the 2016 Rule's prohibitions on discrimination based on gender identity and termination of pregnancy, which a Federal Court had already vacated last year.

The Final Rule goes into effect on August 18, 2020 and is published at 85 *Federal Register* 37160 ([click here](#)). For my Health Law Alert on the original 2016 Nondiscrimination Rule, [click here](#).

#### **Elimination of Tagline Requirement**

The 2016 Rule required health plans to include a "nondiscrimination statement" and "taglines" in all "significant publications and significant communications" sent to members and prospective members. Taglines are "short statements written in non-English languages that indicate the availability of language assistance services." "Small-sized" publications and communications, such as post cards and tri-fold brochures, had to include a short nondiscrimination statement and taglines in two foreign languages, but other (longer) publications and communications were required to include a longer nondiscrimination statement and taglines in 15 foreign languages.

In lieu of the tagline (and other) requirements, the Final Rule requires health plans to "take reasonable steps to ensure meaningful access to [applicable health] programs or activities by limited English proficient individuals" (or "LEP individuals"). Under the Final Rule, health plans must conduct an "individualized assessment" to determine what steps are reasonable under the circumstances. The individualized assessment is to be based on four factors:

- i. The number or proportion of LEP individuals eligible to be served or likely to be encountered in the eligible service population;
- ii. The frequency with which LEP individuals come in contact with the entity's health program, activity, or service;
- iii. The nature and importance of the entity's health program, activity, or service; and
- iv. The resources available to the entity and costs.

Thus, the Final Rule permits a health plan to consider how many people will be affected by any measures it considers implementing to ensure meaningful access to its health programs by LEP individuals; health plans may also take into account the costs of any such measures when determining how to proceed under the Final Rule.

## **Scope of Final Rule**

The 2016 Rule applied the Section 1557 nondiscrimination provisions to all of [a health plans'] operations" if any part of the health plan received Federal financial assistance. Health plans were therefore often required to comply with the 2016 Rule for all lines of business. The Final Rule, however, limits application of the requirements to the specific program or activity for which the health plan receives Federal financial assistance. Thus, once the Final Rule goes into effect, the Section 1557 nondiscrimination provision will apply to a health plan's Medicare Advantage line of business, for example, but it will **not** apply to its commercial lines of business.

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For more information, please contact Tom Bixby at (608) 661-4310 or  
[TBixby@tbixbylaw.com](mailto:TBixby@tbixbylaw.com)

**Thomas D. Bixby Law Office LLC**  
(608) 661-4310 | [www.tbixbylaw.com](http://www.tbixbylaw.com)

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