MARKET CONDUCT EXAMINATION STANDARDS

Provision Title	ACA Citation	Page
Nondiscrimination	Section 1557 of the Patient Protection and Affordable Care Act of 2010; and 42 U.S.C. § 18116	1

PROVISION TITLE: Nondiscrimination

CITATION: §1557 of the Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 18116

EFFECTIVE DATE: Plan years, and in the individual market, policy years beginning on or after January 1, 2014

PROVISION: The provisions of the health reform act prohibit discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities.

BACKGROUND: Section 1557 provides that an individual shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d et seq. (race, color, national origin), Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 et seq. (sex), the Age Discrimination Act of 1975 (Age Act), 42 U.S.C. 6101 et seq. (age), or Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794 (disability), under any health program or activity, any part of which is receiving Federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Affordable Care Act or its amendments. Section 1557 states that the "enforcement mechanisms provided for and available under" Title VI, Title IX, Section 504, or the Age Act shall apply for purposes of violations of Section 1557. The antidiscrimination provisions of Section 1557 apply to health carriers, hospitals and any employer or entity that receives federal funds.

Note: Examiners need to be aware that Section 1557(c) of the Affordable Care Act authorizes the Secretary of the Department of Health and Human Services (HHS) to promulgate regulations to implement the nondiscrimination requirements in Section 1557. The HHS Office for Civil Rights (OCR), in coordination with other divisions in HHS, has developed proposed regulations for implementation of Section 1557, however, final regulations have not yet been issued regarding implementation of Section 1557.

42 U.S.C. §18116 sets forth requirements regarding health plans sold on the Marketplace, as well as individual and small group employer plans offered outside of the Marketplace if the health carrier is receiving federal funds. In such cases, the health plans shall not discriminate against individuals, on the basis of:

- Race; color or national origin;
- Disability
- Age; and
- Sex (to include marital or familial status, gender identity, sexual orientation, sex stereotyping and pregnancy).*

*State laws may also be applicable in these situations as well.

Section 1557 of the Patient Protection and Affordable Care Act of 2010, 42 U.S.C. §18116, requires that a health carrier not exclude, deny benefits to, or otherwise discriminate against any person on the ground of race, color, national origin, present or predicted disability, age, sex, sexual orientation, or gender identity in admission to, participation in, or receipt of the services and benefits under any of its health programs and activities.

Under 45 CFR 155.120(c), titled Non-interference with Federal Law and Non-Discrimination Standards, nondiscrimination provisions also apply to exchange contractors, all exchange activities (including but not limited to marketing, outreach and enrollment), navigators, non-navigator assistance personnel, certified application counselors.

Note: The following nondiscrimination standards are based upon Section 1557; these standards intersect with other provisions of the ACA regarding nondiscrimination, such as provisions relating to essential health benefits, nondiscrimination based upon eligibility provisions related to: health factors/status, cultural and linguistic competency, etc. It is important to review other areas of Chapter 20A for further guidance regarding other applicable health reform provisions regarding nondiscrimination, and examination standards will continue to be developed for the health reform-related requirements that became effective on and after January 1, 2014.

This provision applies to all health carriers in the individual market, small group and large group employer plans. This provision applies to grandfathered individual, small group and large group market health plans.

The scope of the civil rights protections of Section 1557 applies to:

- Any health program or activity of a recipient of federal financial assistance, such as hospitals, clinics, employers, or insurance companies that receive federal money. Visiting nurse programs, community health education interventions, and similar programs that receive federal dollars also must comply with Section 1557. 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 federal health programs like Medicare, Medicaid, and CHIP; and
- Any program or activity created under Title I of the ACA, including state health insurance exchanges.

FAQs: See HHS Office for Civil Rights (OCR) website for guidance.

NOTES:

Standard 1
A health carrier offering health benefit plans providing individual, small group and large group market health insurance coverage shall not discriminate, exclude from participation or deny coverage or benefits to any individual on the basis of race, color, national origin, sex, age, or disability.

Apply To: All group health products, (grandfathered and non-grandfathered products) for plan years beginning on or after January 1, 2014

Apply To: All individual health products, (grandfathered and non-grandfathered products) for policy years beginning on or after January 1, 2014

Priority: Essential

Documents to be Reviewed

_____ Health carrier underwriting, complaint handling and claim handling policies and procedures related to nondiscrimination

_____ Underwriting files and supporting documentation regarding nondiscrimination, including letters, notices, telephone scripts, etc.

_____ Applications/pre-enrollment forms and questionnaires

_____ Declinations/disenrollment files

_____ Complaint register/logs/files

_____ Health carrier complaint records concerning nondiscrimination (supporting documentation, including, but not limited to written and phone records of inquiries, complaints, complainant correspondence and health carrier response)

_____ Claim files

_____ Internal appeals/grievance register/logs/files

_____ Applicable external appeals register/logs/files related to nondiscrimination, external appeal resolution and associated documentation

_____ Health carrier form approvals (policy language, enrollment materials, and advertising materials, as required under state statutes, rules and regulations)

_____ Health carrier policy form language and benefit design documents

_____ Health carrier marketing and sales policies and procedures

_____ Health carrier communication and educational materials related to nondiscrimination provided to applicants, enrollees, policyholders and certificateholders

_____ Training materials

_____ Producer records

_____ Applicable state and federal statutes, rules and regulations, and guidances

NAIC References

Individual Market Health Insurance Coverage Model Regulation (#26)
Small Group Market Health Insurance Coverage Model Regulation (#126)

Other References

_____ HHS/OCR/DOL/Treasury final regulations, to include FAQs and other federal resource materials

Review Procedures and Criteria

Verify that the health carrier has established and implemented policies and procedures regarding prohibition of (WA 8/4/15 Comment) ~~non~~discrimination on the basis of race, color, national origin, present or predicted disability, age, or sex, sexual orientation or gender identity in accordance with statute and regulatory guidance established by HHS, OCR, DOL, and the Treasury.

Review health carrier underwriting, complaint handling and claim handling policies and procedures related to nondiscrimination to verify adequate and appropriate policies/procedures are in place to ensure a health carrier which offers health benefit plans providing individual market health insurance coverage, small group or large group market health insurance coverage does not discriminate based on an individual's race, color, national origin, present or predicted disability, age, sex, sexual orientation, or gender identity, as set forth under final regulations established by HHS, OCR, DOL and the Treasury.

Review the health carrier's underwriting, complaint and claim files to verify that health carrier does not discriminate, exclude from participation or deny benefits to individuals on the basis of race, color, national origin, present or predicted disability, age, sex, sexual orientation, or gender identity.

Review health carrier applications/pre-enrollment forms and questionnaires for questions regarding nondiscrimination, to verify that the health carrier does not deny application or enrollment to prospective insureds on the basis of race, color, national origin, present or predicted disability, age, sex, sexual orientation, or gender identity.

Review health carrier declinations and disenrollment files to verify that the health carrier has not discriminated against applicants/enrollees on the basis of race, color, national origin, present or predicted disability, age, sex, gender identity or sexual orientation.

Review complaint register/logs and complaint files to identify complaints pertaining to coverage denial/restriction of coverage related to nondiscrimination.

Review complaint records, to verify that, when an individual has been the subject of a restriction of coverage or denied coverage, the health carrier has taken appropriate corrective action/adjustments in a timely and accurate manner.

Ascertain if the health carrier error could have been the result of some systemic issue (e.g. programming or processing error). If so, determine if the health carrier implemented appropriate corrective actions/adjustments to its systems in a timely and accurate manner. The examiner should include this information in the examination report.

Verify that the health carrier maintains proper documentation for correspondence, including website notifications, supporting corrective action provided to an individual for whom coverage was inappropriately restricted or denied.

Review health carrier claim files to identify any coverage denials for claimants for whom coverage was improperly restricted or denied, on the basis of nondiscrimination.

Review health carrier internal appeals/grievance register/logs/files to identify any individuals for whom coverage was improperly restricted or denied.

Review procedures should also require review of any external appeal requests and of the conclusions of external appeals addressing improper denial/restriction of coverage.

Note: Examiners need to be aware that other areas of potential discrimination ~~against~~ (WA 8/4/15 Comment) regarding race, color, national origin, present or predicted disability, age, sex, sexual orientation, or gender identity may include:

- Cost sharing;
- Narrow or tiered provider networks;
- Drug formularies;
- Visit limits;
- Restrictive medical necessity definitions;
- Utilization management;
- Waiting periods;
- Service areas;
- Rating; and
- Benefit substitution.

Therefore, examiners should review the health carrier's health benefit plans to verify these benefit design elements are consistent with reasonable medical management techniques and are not discriminatory.

Review policy form files to verify approval(s) from the applicable state and, (if applicable) from the Marketplace.

Review health carrier policy form language and benefit designs to verify that the policy forms/benefit designs do not contain language that has the effect of discrimination (arbitrary limits, exclusions or lower standards of service) based on an individual's race, color, national origin, present or predicted disability, age, sex, sexual orientation, or gender identity.

Verify that any marketing materials provided to insureds and prospective purchasers by the health carrier provide complete and accurate information ~~about~~ pertaining to(WA 8/4/15 Comment) the prohibition of discrimination in health insurance coverage on the basis of the provisions outlined in Section 1557. ~~health carrier prohibition of nondiscrimination~~.

Verify that health carrier communication and educational materials provided to applicants, enrollees, policyholders and certificateholders provide complete and accurate information pertaining to(WA 8/4/15 Comment) the prohibition of discrimination in health insurance coverage on the basis of the provisions outlined in Section 1557. ~~health carrier prohibition of nondiscrimination~~.

Verify that the health carrier has established training programs designed to inform its employees and producers about HHS, OCR, DOL and Treasury provisions and final regulations pertaining to(WA 8/4/15 Comment) the

prohibition of discrimination in health insurance coverage on the basis of the provisions outlined in Section 1557. ~~health carrier prohibition of nondiscrimination~~.

Review health carrier training materials to verify that information provided therein is complete and accurate with regard to(WA 8/4/15 Comment) the prohibition of discrimination in health insurance coverage on the basis of the provisions outlined in Section 1557. ~~health carrier prohibition of nondiscrimination~~.

Determine if the health carrier monitors producer-generated coverage denials/restrictions of coverage. Review any such producer records of coverage denials/restrictions of coverage for compliance with statute and regulatory guidance regarding nondiscrimination established by HHS, the DOL and the Treasury.

Note: With regard to conflict of state and federal law, examiners may need to review and base examinations upon applicable state statutes, rules and regulations, especially where state statutes, rules and regulations add state-specific requirements to the health reform requirements or creates a more generous benefit, and thus not preempted, as set forth in federal law.

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