

CLIENT BULLETIN

What are “Significant Publications and Significant Communications” Under ACA Section 1557

In [Benefit News Briefs 2016-34](#), we discussed the nondiscrimination requirements of Section 1557 of the *Affordable Care Act (ACA)*. [Section 1557](#) prohibits entities that receive *federal funds* from discriminating on the basis of race, color, national origin, sex, age or disability, including discrimination based on pregnancy, gender identity and sex stereotyping in certain health programs and activities.

In multiemployer group health plans, the plans are most likely to become covered entities under Section 1557 due to federal subsidies in the Medicare Part D drug subsidy program or through participating in an EGWP.

COMPLIANCE DATES

Health plans that need design changes (such as removing *blanket exclusions* of coverage for any health services related to gender transition) have until the first day of the first plan year beginning on or after January 1, 2017 to comply with Section 1557 in that regard. However, covered entities had to post a nondiscrimination Notice with non-English taglines by October 16, 2016. The Notice requirements are quite detailed and found in [Section 92.8](#) of the regulations. Translations of the Notice and taglines are [available at the HHS website](#).

In addition, covered plans must include the nondiscrimination Notice and taglines in the top 15 non-English languages spoken in the coverage area in any “*significant publications* and *significant communications*” targeted to beneficiaries, enrollees, applicants and members of the public, except for significant publications and significant communications that are small-sized, such as postcards and tri-fold brochures. This requirement was also effective October 16, 2016.

For *significant publications and significant communications* that are small-sized, plans must include a statement 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 and taglines in the *top two non-English languages* spoken in the state(s) where the plan's members are located.

Multistate plans can aggregate non-English speakers and base their taglines (for large and small communications) on the top non-English spoken languages in the coverage area. HHS will allow plans to exhaust their current stock of hard copy publications rather than requiring a special printing of the publications to include the new notice.

SIGNIFICANT PUBLICATIONS AND COMMUNICATIONS EXPLAINED

While Fund Counsel should advise the plan what constitutes "significant publications and significant communications" that would require the inclusion of the Notice/statement and taglines, we will take a detailed look at what the *Preamble* to the regulation says about "significant publications and significant communications".

First, the term "significant publications and significant communications" is not defined in the regulations. Given that, reviewing the *Preamble* is the next step to understanding the terms. Such a review reveals that:

1. There is no definitive list or list of examples of documents that would be considered "significant publications and significant communications". *Preamble*, Final Nondiscrimination regulations, 81 FR 31376, 402 (top, left col.)
2. The scope of included documents is broad. *Preamble*, Final Nondiscrimination regulations, 81 FR 31376, 402 (mid, left col.)
3. OCR intends 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*. *Preamble*, Final Nondiscrimination regulations, 81 FR 31376, 402 (mid, left col.)
4. OCR intended that documents that constitute "vital documents" under HHS Limited English Proficiency (LEP) [guidance](#) are a subset of "significant communications and significant publications" for Section 1557. HHS LEP "vital document" guidance states whether or not a document is "vital" may depend upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP person if the information in question is not provided accurately or in a timely manner. Examples given of documents *likely* to be "vital" included: "*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.*" *Preamble*, Final Nondiscrimination regulations, 81 FR 31376, 402 (top, mid. col.)

Based on the above principles, it would appear that the following would be “significant publications and significant communications”:

- Plan Documents, including combination Plan/SPDs
- SPDs,
- SMMs,
- and possibly claims denials, COBRA notices, Creditable Coverage forms, EOBs, Benefit Alerts, SBCs, application forms, etc.

In the final analysis, each plan sponsor with input from their plan professionals must determine what communications they make are “significant publications and significant communications.”

According to the *Preamble*, the regulations declined to enshrine a list of examples of “significant publications and significant communications” for the following two main reasons:

First, the final rule applies to such a diverse range of covered entities that codifying examples likely would not provide meaningful guidance to the full spectrum of covered entities regulated.

Second, HHS intends to maximize covered entities’ *flexibility*, and each covered entity is in the best position to determine which of its communications and publications with respect to its health programs and activities are significant.

Preamble, Final Nondiscrimination regulations, 81 FR 31376, 402 (top, left col.)

ADDITIONAL RESOURCES

As reported previously in [Benefit News Briefs 2016-34](#), numerous resources and Fact Sheets are available at the HHS Section 1557 webpage located at: <http://www.hhs.gov/civil-rights/for-individuals/section-1557>. A specially prepared copy of the regulations and Appendixes with a table of contents is available by “[clicking here](#).” Appendixes A – C are model notices and language.

The final Section 1557 regulations contain a [Sample Notice](#) and [sample tagline](#) in English. Non-English language translations are available at:

<http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html>.

HHS has also posted a document titled [Estimates of at Least the Top 15 Languages Spoken by Individuals with Limited English Proficiency for the 50 States, the District of Columbia, and the U.S. Territories](#) that lists the top 15 foreign languages spoken by individuals with LEP proficiency in each state, DC and each US territory. Covered entities may use this information to implement the tagline requirement of the Section 1557 rule, although nothing in the final rule requires a covered entity to use this particular resource.

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