

Section 1557 MOU between OPM and HHS

WHEREAS, the Department of Health and Human Services (HHS), Office for Civil Rights (OCR) and the U.S. Office of Personnel Management (OPM), recognize and agree as follows:

HHS has statutory authority to prescribe regulations to implement, and otherwise to enforce, the nondiscrimination requirements under Section 1557 of the Affordable Care Act (ACA), 42 U.S.C. § 18116. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability. Section 1557 applies to, among other things, all health programs and activities, any part of which receives Federal financial assistance administered by HHS, including health insurance issuers that participate in the Federally-facilitated and state-based Marketplaces and also offer health plans through the Federal Employees Health Benefits (FEHB) Program.

OPM has statutory authority to administer and carry out 5 U.S.C. Ch. 89, the statute governing the FEHB Program. OPM's authority with respect to health plans under 5 U.S.C. Ch. 89 is subject to oversight by the Equal Employment Opportunity Commission (EEOC), under the Federal sector employment discrimination complaint process set forth at 29 C.F.R. part 1614, through Federal sector Equal Employment Opportunity (EEO) processes applicable to claims of discrimination in a fringe benefit of Federal employment, and to judicial review. Under OPM's authority to effectuate FEHB plans, with respect to contracts under 5 U.S.C. Ch. 89, OPM has authority for ensuring nondiscrimination in FEHB plans on the bases covered by Section 1557 (i.e. race, color, national origin, sex, age and disability), without regard to a carrier's receipt of Federal financial assistance. Additionally, under 5 U.S.C. Ch. 89, OPM approves FEHB premium rates, sets rules generally applicable to FEHB carriers, adjudicates and orders payment of disputed health claims, and adjusts policies as necessary to ensure compliance with nondiscrimination standards.

HHS OCR recognizes that FEHB Program carriers must comply with the FEHB Act, regulations, contracts, and OPM guidance and that their health benefit plans offered under the FEHB Program must be administered consistent with those terms. OPM recognizes that issuers that receive Federal financial assistance must comply with Section 1557 and HHS OCR regulations and guidance implementing Section 1557, including in the plans they offer through the FEHB Program.

Where two Federal entities have regulatory and/or enforcement authorities that overlap, it is appropriate to cooperate and coordinate enforcement efforts in order to avoid potentially conflicting interpretations and requirements affecting regulated entities.

NOW THEREFORE THE PARTIES AGREE:

1. For the purposes of this agreement, "appropriate complaints or inquiries" shall be defined as complaints or inquiries that allege discrimination on the basis of race, color, national origin, age, sex, or disability, and/or allege a violation of Section 1557 in the design of an FEHB plan where OPM is the entity with decision-making authority over the challenged action. *See U.S. Dep't of Health and Human Servs., Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31376, 31432-33 (May 18, 2016).
2. HHS OCR and OPM agree that the term "plan design" or "benefit design" as used in this MOU and the Section 1557 Rule, as applied in context of the FEHB Program, includes but is not limited to the contract between OPM and the carrier, and services pursuant to the plan design.

3. To avoid inconsistency and duplication in enforcement efforts, HHS OCR and OPM will coordinate enforcement and information sharing with respect to appropriate complaints or inquiries and shall share any information that supports enforcement of appropriate complaints or inquiries. Such information shall include, but is not limited to complaints, investigative files, data, reports, and other related information.
4. HHS OCR will make an initial determination on whether a complaint or inquiry it has received is an appropriate complaint or inquiry.
5. If HHS OCR believes that a complaint or inquiry is an appropriate complaint or inquiry, HHS OCR will refer the complaint to OPM, Federal Employee Insurance Operations, close its investigation, and notify the complainant of this determination.
6. The relevant date for timeliness purposes for the complaint will be the date HHS OCR received the complaint. HHS OCR will communicate this date to OPM during the referral process.
7. Once OPM receives this complaint or inquiry from HHS OCR, OPM will review it to ensure that it is an appropriate complaint or inquiry.
8. If OPM determines that the complaint or inquiry from HHS OCR is not appropriate for referral, then OPM will notify HHS OCR and the complainant of this decision and that HHS OCR may re-open the matter and pursue enforcement against the carrier under the Section 1557 Rule.
9. If OPM determines that the referral from HHS OCR is an appropriate complaint or inquiry, OPM will notify the complainant of this determination and investigate the matter. During its investigation, OPM will retain enforcement authority, which is subject to oversight by the EEOC under the Federal sector employment discrimination complaint process set forth at 29 C.F.R. part 1614, through Federal sector EEO processes applicable to claims of discrimination in a fringe benefit of Federal employment, and to judicial review. If OPM finds reason to believe that discrimination has occurred in its investigation, OPM will consider remedies that are comparable to the remedies that could have been sought or awarded had the complaint been processed under Section 1557. Remedies under Section 1557 include, but are not limited to, a change in the FEHB carrier's benefit design and compensation to the complainant from the FEHB carrier.
10. If a timely and appropriate complaint or inquiry first filed with HHS OCR and then referred to OPM is already the subject of an existing EEO complaint filed with OPM, then OPM will consolidate the matters, to the extent appropriate. Untimely appropriate complaints or inquiries will be dismissed in accordance with the standard EEO procedures. In addition, any new claims within the appropriate complaint or inquiry will be included only if like or related to the existing claims. Otherwise, OPM will treat the appropriate complaint or inquiry as a *de novo* EEO complaint, subject to the usual rules for such matters.
11. Once HHS OCR refers its appropriate complaint or inquiry to OPM, HHS OCR will close its investigation of that appropriate complaint or inquiry. After OPM accepts HHS OCR's

referral of an appropriate complaint or inquiry, HHS OCR will defer to OPM's investigation and/or determination with respect to that appropriate complaint or inquiry, subject to the provisions above.

12. OPM and HHS OCR will consult with respect to Section 1557 and 5 U.S.C. Ch. 89 as either party deems necessary or upon either party's request for consultation with the goal of achieving consistency in the enforcement and interpretation of nondiscrimination standards.
13. OPM will provide notice to FEHB Program carriers and enrollees to refer appropriate complaints or inquiries to OPM. However, individuals may file complaints with HHS OCR, OPM, or FEHB Program carriers.
14. All requests for disclosure of information by parties other than parties to this Agreement shall be coordinated with the agency that initially created or compiled the information (the "originating agency"), unless disclosure is otherwise required by law. The decision of the originating agency regarding disclosure shall be honored, to the extent permissible by law.
15. This MOU constitutes the entire agreement between OPM and HHS with respect to matters set forth herein.
16. Amendments, including additions, deletions, or modifications to this MOU, may be proposed in writing by either party for the other party's consideration. If both parties agree to the revision, OPM will amend this MOU, and forward it to HHS OCR for signature. Such agreed-upon conditions will be considered part of this MOU prior to their formal incorporation.
17. This MOU will become effective upon signature of both parties and shall continue in force indefinitely. It may be terminated by either party upon 90 days written notice to the other agency.
18. Nothing in this agreement shall be interpreted as limiting, superseding or otherwise affecting either party's normal operations or decisions in carrying out its duties. This agreement does not itself authorize the expenditure or reimbursement of any funds. Nothing in this agreement obligates the parties to expend appropriations, enter into any contract or incur any obligations.

/s/

SIGNED: _____
Alan P. Spielman
Director, Healthcare & Insurance
U.S. Office of Personnel Management

January 9, 2017

DATE: _____

/s/

SIGNED: _____
Jocelyn Samuels
Director, Office of Civil Rights
U.S. Department of Health and
Human Services

January 11, 2017

DATE: _____