

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE FOR CIVIL RIGHTS

**Coordination of Complaints Involving Health Programs or Activities
Memorandum of Understanding**

AGENCIES: Equal Employment Opportunity Commission and Department of Health and Human Services Office for Civil Rights

ACTION: Notice

SUMMARY: The Equal Employment Opportunity Commission and the Department of Health and Human Services Office for Civil Rights have entered into a new Memorandum of Understanding to improve their enforcement efforts.

EFFECTIVE DATE: Upon signature

FOR FURTHER INFORMATION CONTACT: Office of Legal Counsel, Equal Employment Opportunity Commission, (202) 663-4637 (voice), 202-663-7026 (TTY); or U.S. Department of Health and Human Services Office for Civil Rights, (800) 368-1019, (TDD) (800) 537-7697.

SUPPLEMENTARY INFORMATION: The Equal Employment Opportunity Commission is providing a notice of a memorandum of understanding (MOU) between the Commission and the Department of Health and Human Services Office for Civil Rights. This agreement will encourage greater coordination between the agencies through information sharing, complaint referrals, and coordinated investigations.

Memorandum of Understanding Between the Equal Employment Opportunity Commission and the Department of Health and Human Services Office for Civil Rights

I. PURPOSE

The purpose of this Memorandum of Understanding (MOU or Agreement) between the Equal Employment Opportunity Commission (EEOC) and the Department of Health and Human Services (HHS), Office for Civil Rights (OCR), is to clarify procedures for coordinating complaints of employment discrimination filed against recipients of Federal financial assistance, the sharing of information and expertise, and coordinated investigations.

The EEOC enforces Title VII of the Civil Rights Act of 1964, as amended, including the Pregnancy Discrimination Act of 1978 (Title VII); the Equal Pay Act of 1963 (EPA); Title I of the Americans with Disabilities Act of 1990, as amended (ADA); the Age Discrimination in Employment Act of 1967 (ADEA); and Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). The EEO laws broadly prohibit employment discrimination against individuals on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information, or an individual's opposition to discrimination or participation in an EEO proceeding. Unlawful employment practices include discrimination not only in hiring and firing, but also discrimination in compensation and all other terms, conditions, and privileges of employment. Thus, the EEO laws protect workers from discrimination in employee health benefits. Moreover, both employers and their agents (e.g., insurance providers, or third party administrators (TPAs)) are covered and must refrain from discrimination. Coverage does not depend on whether the entity receives Federal financial assistance.

The EEOC's jurisdiction over discrimination in employee benefits partly overlaps with that of HHS OCR. In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA), and Section 1557 is the civil rights provision of the ACA. In May 2016, HHS issued a final rule implementing Section 1557. The Section 1557 final rule prohibits, among other things, discrimination on the basis of race, color, national origin, sex, age, or disability in health programs or activities, any part of which is receiving HHS Federal financial assistance. Except as specifically provided, the Section 1557 final rule does not generally apply to discrimination by a covered entity against its own employees. For example, the rule does not generally extend to hiring, firing, promotions, or terms and conditions of employment. However, the Section 1557 final rule applies to the provision of employee health benefit programs in the limited circumstances set forth in § 92.208 of the rule.

Section 92.208 makes clear that a complaint of discrimination in employee health benefits can be filed with HHS OCR under Section 1557 when: (1) the respondent employer receives Federal financial assistance and is principally engaged in the business of providing health services or health insurance coverage; (2) the respondent employer that is not principally engaged in providing health care or health coverage nonetheless receives Federal financial assistance from HHS for the purpose of funding the entity's employee health benefit program; or (3) the respondent employer is not principally engaged in providing or administering health services or health insurance coverage, but operates a health program or activity (that is not an employee

health benefit program) that receives HHS Federal financial assistance, in which case employees of that health program or activity are covered by Section 1557.

Because such complaints may also be cognizable under an EEOC-enforced law, this MOU clarifies how HHS OCR will coordinate such complaints with EEOC. Moreover, given the EEOC and HHS OCR's ("the agencies") overlapping jurisdictions over discrimination in employee health benefits, the MOU sets out procedures by which they expect to share information and expertise, as well as coordinate investigations.

II. PROVISIONS

The parties to this MOU agree as follows:

A. Information Sharing and Coordinating Enforcement:

1. (a) The EEOC and HHS OCR may share, whether upon request or upon an agency's own initiative, any information or data that supports each agency's enforcement mandates under the laws enforced by the EEOC or Section 1557, whether obtained in the course of an investigation or through any other sources, to the extent permitted by law. This may include information in complaint or investigative files relating to alleged violations of the laws enforced by EEOC or Section 1557 of the Affordable Care Act, or policy or other documents that explain the standards under those laws. In addition, EEOC and HHS OCR will encourage and facilitate communication and the sharing of expertise between their respective staffs so as to enhance each agency's ability to identify, analyze, and resolve discrimination in employee health benefits.
- (b) When HHS OCR receives a complaint of discrimination in employee health benefits under Section 1557 and it determines that it has jurisdiction and will investigate the complaint, HHS OCR will promptly contact EEOC to determine whether a charge raising similar allegations against the respondent has been filed with the EEOC. When no charge has been filed, HHS OCR will inform the complainant that EEOC also may have jurisdiction over the complaint and HHS OCR will follow the process in Section II. B. for possible referral or transfer of the complaint to the EEOC. The agencies will ensure that the individual receives appropriate intake counseling to ensure informed decision making.
- (c) When there is an EEOC charge concerning discrimination in employee health benefits that may raise Section 1557 compliance concerns, the EEOC will promptly contact HHS OCR to determine whether a complaint raising similar allegations against the respondent has been filed with HHS OCR and to discuss next steps.
- (d) When there is an EEOC charge and a concurrent HHS OCR complaint against the same respondent involving an employee health insurance or employee health benefits issue, the EEOC and HHS OCR will coordinate with each other to

promote consistency during the investigations and before any final resolutions, including the EEOC making a finding of reasonable cause, or HHS OCR making a violation finding under Section 1557.

(e) In any appropriate case, the agencies may decide to conduct coordinated investigations of a matter arising within both agencies' jurisdictions. If HHS OCR finds a violation and EEOC finds reasonable cause as a result of a coordinated investigation, the agencies may explore with the charging party and the respondent whether the agencies also may attempt to jointly negotiate a coordinated administrative resolution. Coordinated public conciliations/resolutions may be pursued only where both the charging party/complainant and the respondent consent. If one or both decline to consent, the agencies shall negotiate separate administrative settlements with the respondent. In that case, neither agency will disclose publicly that another charge or investigation was pending, including through its settlement documents or press release. The agencies will also not disclose any information from which it may be inferred that there was any other related pending charge or investigation.

2. Requests for the sharing of information, data, or expertise under this section can be made by the following individuals:

(a) For EEOC

- The Chair
- A Commissioner
- The General Counsel
- The Deputy General Counsel
- The Director of Office of Field Programs
- The Director of Field Management Programs
- Any EEOC District Director, the Director Washington Field Office, or their designees
- Any EEOC Regional Attorney or his/her designee
- The EEOC MOU Coordinator

(b) For HHS OCR

- HHS OCR Director or his/her Designees
- HHS OCR Deputy Director or his/her Designees
- HHS OCR Principal Deputy Director or his/her Designees
- HHS Associate General Counsel for the Civil Rights Division or his/her Designees
- HHS Deputy Associate General Counsel or his/her Designees
- HHS OCR Regional Managers or his/her Designees

3. Requests for the sharing of information, data, or expertise under this section should be made to the following individuals:
 - (a) EEOC requests to HHS OCR should be directed to any of the individuals listed in 2(b).
 - (b) HHS OCR requests to EEOC should usually be directed to the EEOC District Director, the Washington Field Office Director, or the Regional Attorney where HHS OCR believes that the information is located. HHS OCR requesting officials may also direct their requests for information to any of the EEOC officials listed in 2(a) with the exception of the Chair, a Commissioner, or the General Counsel.
 - (c) For coordination pursuant to II.A.1.(b)-(c) (determining whether an HHS OCR complaint overlaps with an EEOC charge) and II.A.1.(d) (coordinating findings on employee health insurance or health benefits issues) and complaint referrals pursuant to II.B., the contact points between EEOC and HHS OCR, and associated procedures, shall be established separately from this MOU and updated as necessary. These procedures will include guidance to the field on the types of issues that fall under the jurisdictions of both agencies.
4. EEOC and HHS OCR responses to requests for information under this section shall be made to the official who requested the information. The responding agency will provide copies of the requested documents or make the requested documents available to the requesting agency for inspection and copying and/or loan within ten days of receipt of the request, or as soon as practicable thereafter consistent with the availability of the responding agency's staff and other resources and the responding agency's own priorities.
5. Any transfer of information under this MOU shall only be made where not otherwise prohibited by law and in accordance with Section II.C. of this Agreement. Information transferred between EEOC and HHS OCR under this Agreement shall not be used by the receiving agency for purposes other than the enforcement of the laws enforced by the receiving agency.
6. This Agreement does not prohibit the sharing of information between EEOC and HHS OCR by any means other than those identified in this section to the extent that such means are agreed to by both agencies and not prohibited by law.

B. Complaint Transfers or Referrals to EEOC and HHS OCR

When HHS OCR receives a complaint of employment discrimination in employee health benefits under Section 1557 and it determines that it lacks jurisdiction under Section 1557, or that it has jurisdiction under Section 1557 but declines to exercise it as a matter of policy, HHS OCR promptly will transfer or refer the complaint to the EEOC district office having jurisdiction over the complaint, as appropriate. Provided that the filing meets the requirements for an EEOC

charge, the date a complaint was filed with HHS OCR will be deemed the date it was filed with the EEOC (although any subsequent denial of a renewed coverage request could be separately challenged by a timely complaint). Under other civil rights laws it enforces, HHS OCR will continue to process claims of employment discrimination other than in employee health benefits, and coordinate them with the EEOC, under separate longstanding procedures (e.g., 28 CFR Part 37/29 CFR Part 1640 and 28 CFR § 42.605/29 CFR Part 1691).

C. Confidentiality and Disclosure:

Information obtained or created pursuant to this MOU, or any process established to implement the MOU, is intended only for use and access by the receiving agencies for the limited purpose of carrying out activities pursuant to the MOU, or as required by applicable laws and regulations. In addition, any information created by or shared between the agencies pursuant to this MOU may be used by either agency for purposes of investigating, determining whether there was a violation, and enforcement efforts related to the charge or complaint about which the information was shared. Except as set forth in this paragraph, such information may not be used or disclosed by either party for other purposes outside of the MOU or any process established to implement the MOU, to other authorities, or to any third parties unless the other party expressly approves such use or disclosure in writing. The information shall not be disclosed externally without a federal court order, a formal request from a federal entity with binding oversight authority over the agencies, or the other agency's written authorization stating that there is no basis for withholding it, including but not limited to, the confidentiality requirements of the Privacy Act, exemptions under the Freedom of Information Act (5 U.S.C. § 552), the Trade Secrets Act, Sections 706(b) and 709(e) of Title VII, Section 107(a) of the ADA, and Section 207(a) of GINA. Before responding to a request for information obtained or created pursuant to this MOU, a party shall notify and confer with the other party regarding an appropriate response prior to duplicating or disclosing information. Disagreements on how to proceed will be resolved in favor of the approach recommended by the agency with the greatest equities in the information, which will generally be the agency from which the information originated.

Any communications between the parties to this Agreement related to a complaint or charge of discrimination, or to an investigation pursuant to the applicable laws each enforce, shall be treated as privileged or protected from disclosure as work product to the same extent the communication would be privileged or protected from disclosure if the communication had been made internally among the officers and employees of the respective parties.

Any communications between HHS OCR employees and a charging party in the course of an EEOC investigation shall be treated as privileged or protected from disclosure to the same extent the communication would be privileged or protected from disclosure if the communication had been made between an EEOC employee and the charging party.

In the event that the agency receiving the information experiences a security incident or disaster that results in the suspected or confirmed inadvertent disclosure of the data exchanged pursuant to this MOU, the agency experiencing the incident or disaster will send formal written electronic notification to the donor agency's designated contact person immediately within 3 days after detection of the incident or disaster. The written electronic notification will describe the security

incident or disaster in detail including what data exchanged pursuant to this MOU may have been inadvertently disclosed.

III. EFFECT OF AGREEMENT AND LIMITATIONS

This agreement is an internal government agreement and is not intended to confer any rights against the United States, its agencies, or its officers upon any private person.

Nothing in this agreement shall be interpreted as limiting, superseding, or otherwise affecting the agencies' normal operations or decisions in carrying out their statutory or regulatory duties, or duties under any Executive Order. This agreement does not limit or restrict the parties from participating in similar activities or arrangements with other entities.

This agreement does not apply to claims of discrimination by federal employees concerning their fringe health benefits nor the rights of any party under the EEOC's administrative process for federal employee discrimination claims in 29 CFR Part 1614. As such, this agreement does not interfere or overlap with any agreement that HHS OCR may separately enter with the Office of Personnel Management for the handling of claims against a federal agency.

This agreement does not itself authorize the expenditure or reimbursement of any funds. Nothing in this agreement obligates the parties to expend appropriations or enter into any contract or other obligations.

IV. EFFECTIVE DATE

This MOU will take effect immediately once signed by both parties and shall continue in force indefinitely. It may be terminated by either party upon 90 days written notice to the other agency. Except as expressly provided in this Agreement, this MOU constitutes the entire agreement between HHS OCR and EEOC with respect to the matters set forth herein.

For the EEOC:

/s/

January 12, 2017

Jenny R. Yang
Chair, Equal Employment
Opportunity Commission

Date

**For the Department of Health
and Human Services:**

/s/

January 13, 2017

Jocelyn Samuels
Director, Office for Civil Rights
Department of Health and Human Services

Date