



The following analysis has been prepared for signatories of the [Business Statement for Transgender Equality](#) with an update regarding the Department of Health and Human Services (HHS) intention to issue revised regulations on the implementation of Section 1557 of the Affordable Care Act (ACA).

As [reported by the Washington Post](#) and others last week, the Trump administration plans to propose revised 1557 implementation regulations this week. This is in response to litigation challenging the absence of religious exemptions for compliance with the rule's nondiscrimination protections on the basis of gender identity.

The proposed changes threaten to undermine access to life-saving care for transgender people. We will continue to keep you posted on this issue as the situation evolves over the next few weeks.

The voice of business remains vital in this debate – which is why we're sharing this up-to-date assessment of the proposal the administration may make.

As a signatory of the Business Statement for Transgender Equality, your company will have the opportunity to participate in a coordinated response to the proposed changes. We will share a set of recommendations businesses can leverage when the regulations reach the public comment period, shortly.

We wish to be a resource to you. If you have any questions, please feel to reach out.

Re: Section 1557 of the Affordable Care Act, Proposed Regulation Reversal

Date: 4.29.2019

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Quick Overview:

We are anticipating the Department of Health and Human Services (HHS) will publish proposed regulations revising implementation of Section 1557 of the Affordable Care Act between now and May

2nd. This is in response to litigation challenging the rule's nondiscrimination protections on the basis of gender identity and including, but not limited to, the absence of broad religious exemptions.

Background -- Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. This landmark provision is the first of its kind to include protections from discrimination on the basis of sex in the context of healthcare. The definition of “on the basis of sex” has been consistently interpreted by numerous federal courts and agencies to include discrimination on the basis of sex stereotyping and gender identity. HHS has accepted complaints of gender identity and sex stereotyping discrimination since 2012 and codified this interpretation in 2016.

Status -- The proposed regulation has been under review within the Executive Branch since spring 2018. HHS informed the court on 04/05/2019 that they would likely be publishing the rule within three weeks.

What it is likely to contain -- We believe that the proposed regulation will remove all recognition of protections on the basis of gender identity and sex stereotyping. It may expressly state that sex discrimination does not include gender identity or sex stereotyping/sexual orientation discrimination. It may also contain new religious and/or conscience exemptions.

Lengthier Discussion:

Overview and Current Status

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. This landmark provision is the first of its kind to include protections from discrimination on the basis of sex in the context of healthcare. The definition of “sex” has been consistently interpreted by numerous federal courts and agencies to include discrimination on the basis of sex stereotyping and gender identity. The Office of Civil Rights in the Department of Health and Human Services (HHS) has recognized this interpretation and began accepting complaints and conducting investigations of gender identity and stereotyping discrimination as early as 2012.¹ In 2016, HHS published a final regulation interpreting the statutory prohibition of discrimination on the basis of sex to include sex characteristics, gender identity and sex stereotyping including some types of discrimination on the basis of sexual orientation.² These critical protections have been a true sea change for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people seeking healthcare, prompting many provider institutions and insurers to update their own policies and staff training.

On December 31, 2016 a federal judge in the Northern District of Texas issued an injunction in response to a lawsuit brought by eight states and three private healthcare providers challenging the Section 1557

¹ Letter from Leon Rodriguez, Dir., Office of Civil Rights, Dep’t of Health and Human Services, to Maya Rupert, Fed. Policy Director, Nat’l Center for Lesbian Rights (July 12, 2012) available at <http://www.washingtonblade.com/content/files/2012/08/101981113-Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services.pdf> (last accessed September 12, 2014).

² *Nondiscrimination in Health Programs and Activities*, 81 FR 31375 (May 18, 2016).

regulations. The court halted enforcement by HHS of key provisions of the regulations impacting the LGBTQ community including the prohibition of discrimination on the basis of gender identity. Private litigation by patients and insured individuals to enforce Section 1557 has continued, with every other court concluding that the statute protect transgender individuals. On April 5, 2019 HHS provided a status report to the Texas court indicating that a proposed rule was forthcoming.

The Impact of 1557 on the LGBTQ Community

These protections have served as a critical tool in closing the healthcare gap facing so many in the LGBTQ community, particularly transgender people. Studies have consistently shown that transgender people face startlingly high rates of discrimination when seeking health care. This discrimination takes the form of hostile treatment or harassment, disparate treatment, or in some cases flat out denial of care. In a recent study 33 percent of transgender respondents reported a negative health care experience, including 24 percent who were required to educate their health care provider as to proper standards of care, 8 percent who were refused transition-related care, 6 percent who were verbally harassed, and 1 percent who were sexually assaulted.³ This pervasive discrimination also deters many transgender and gender nonconforming patients from seeking the health care they need – even when faced with a life threatening condition.

Section 1557 prohibits this type of harmful discrimination by health care providers. Discrimination on the basis of gender identity under Section 1557 as previously interpreted by HHS includes: blanket exclusions on any transition– related healthcare services; the denial or limitation of coverage for services used for gender transition when those services would normally be covered when treating an non-transition related health condition; and the refusal to cover treatment that is typically associated with one, particular, gender, because of apparent discrepancies between an individual’s current gender and what is listed in their medical records or on a personal form of identification. If an insurance company provides coverage for a particular treatment of any condition, the carrier cannot refuse to cover the same treatment because it is sought after by a transgender or gender non-conforming individual, or because it is being utilized in the treatment of gender dysphoria. Section 1557 also requires that providers treat individuals in a manner consistent with their gender identity, including in access to health care facilities. Wherever people are separated or labeled by gender, people are to be treated according to their self-identified gender.

The 2016 implementing regulation also provides some protections from discrimination on the basis of sexual orientation to the extent that the discrimination experienced is based on sex stereotyping. Any adverse action based on the belief that women and men dress, act, or behave in a certain way is unlawful sex stereotyping discrimination under this regulation. For example, it would be unlawful for a health care provider to discriminate against a male patient because he is a man in a relationship with another man and they believe men should only date women. The regulation further clarifies that discrimination on the basis of intersex traits or atypical sex characteristics is prohibited sex discrimination, ensuring protection for the approximately 1.7% of the population born with variations in biology that transcend typical notions of male and female (referred to as *Intersex* or as a *Difference of Sex Development*).

³ NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 97 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

Forthcoming Proposed Regulation

In a status report provided by HHS on April 5, the Department indicated that a proposed rule would be published imminently that would resolve the challenges to the 2016 regulation, namely protections on the basis of gender identity and pregnancy. We believe that the regulation will remove the explicit gender identity. It may also directly define sex discrimination narrowly to exclude LGBTQ people. It may also incorporate a religious exemption.

Impact of Proposed Revisions

HHS's actions will not change the underlying law and the protections that the Affordable Care Act provides. However, any regulation that states that LGBTQ people are not covered by the law will undoubtedly cause confusion. Regardless of HHS's regulatory actions, the statute remains unchanged - discrimination on the basis of sex, including sex characteristics, in healthcare is against the law. HHS also cannot change the longstanding legal precedent interpreting gender identity and sex stereotyping discrimination as sex discrimination for purposes of civil rights laws. While the Supreme Court recently said it will rule on related issues in the context of employment laws, such a ruling would not come until mid-2020 and may not fully resolve these legal questions. Presently, transgender, intersex, gender nonconforming, and many, if not all, lesbian, gay, and bisexual people will continue to be covered by the ACA. However, if these regulations are revised to exclude LGBTQ people explicitly they will be forced to take their complaints of discrimination directly to the courts. This will undoubtedly limit individual access to health care to those who have the financial resources to fight back. Replacing this regulation with legally and conceptually flawed policy interpretations also communicates a dangerously inaccurate message to hospitals and other covered entities – that discrimination against LGBTQ people is perfectly legal. This will not only lead to an increase in discrimination, but will also open up hospitals and providers to costly litigation with the case law squarely on the side of the plaintiff. This is a severe disservice to both patients and providers.