

Publications

Labor and Employment Alert: HHS's Final Rule under ACA Section 1557 and Its Challenges

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Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age, or disability by health programs and activities funded or administered by HHS. On June 12, 2020, the U.S. Department of Health and Human Services (HHS) announced a [2020 Rule](#) (2020 Rule) on Section 1557 of the Affordable Care Act (ACA).

This is the second set of final regulations interpreting Section 1557. In 2016, HHS finalized regulations interpreting Section 1557 (2016 Rule) to prohibit discrimination based on gender identity, gender expression, and transgender status. The 2016 Rule provided, among other things, that sex discrimination includes discrimination on the basis of gender identity and termination of pregnancy. Gender identity was defined as “one’s internal sense of gender, which may be male, female, neither, or a combination of male or female.” In December 2016, the US District Court for the Northern District of Texas ruled in favor of a religious organization that had sued the federal government over the 2016 Rule. HHS took the position in the 2020 Rule that, consistent with the decision, gender only meant the biological sex assigned at birth, either male or female.

The 2020 Rule repeals portions of the 2016 Rule that defined discrimination “on the basis of sex” to include discrimination based on gender identity, gender expression or termination of pregnancy and to also limit the entities subject to Section 1557. In publishing the Final Rule, HHS said it was abiding by the court decision. Therefore, the 2020 Rule does not apply the protections of Section 1557 to LGBTQ people and women who have had abortions.

HHS published the 2020 Rule a few days after the Supreme Court ruled 6-3 that transgender workers are protected under Title VII of the Civil Rights Act of 1964 in [Bostock v. Clayton County, Georgia](#). For a discussion of Bostock, review [this Vorys Client Alert](#).

The day after the Bostock decision, [Whitman-Walker Clinic v HHS](#) was filed in the US District Court for the District of Columbia challenging the Final Rule as being in violation of Bostock. In addition, on Monday,

July 20, a coalition of 23 states sued in the Southern District of New York in the case of *New York v. Azar*. The suit requests that the Final Rule be set aside because it is “is arbitrary, capricious, an abuse of discretion, or not in accordance with law.”

While the *Bostock* decision is limited to employment actions under Title VII and has no impact on the 2020 Rule, the plaintiffs in these suits believe that its rationale may apply to other federal nondiscrimination statutes, such as Title VI and Title IX.

The 2020 Rule also eliminates the requirement that covered entities send nondiscrimination notices and “tagline” translation notices in at least 15 languages with all “significant communications.”. In the preamble to the 2020 Final Rule, HHS said eliminating that requirement of providing notices and taglines with all significant communications would eliminate a five-year burden of \$2.9 billion. Covered entities are still required to take reasonable steps to ensure meaningful access LEP individuals.

2016 Rule

2020 Rule

Covered entities

A health program or activity, any part of which is receiving Federal financial assistance. This includes all of the operations of a health insurance company that runs an HHS-funded program (like Medicare or Medicaid) and affiliated entities (such as a claims administrator for self-insured group health plans).

A health program or activity, any part of which is receiving Federal financial assistance. This includes a health insurance company but only to the extent it runs an HHS-funded program (like Medicare or Medicaid). It does not apply to affiliated entities (such as a claims administrator for self-insured group health plans) that do not run an HHS-funded program.

Note that few employers were or are covered entities under either the 2016 or 2020 rules.

Nondiscrimination

Prohibits discrimination on the basis of sex specifically including gender identity or termination of pregnancy.

Still prohibits discrimination on the basis of sex but references to gender identity and termination of pregnancy are eliminated. However, see *Bostock v. Clayton County*, 590 U.S. ____ (2020) interpreting the prohibition of discrimination on the basis of sex for purposes of Title VII.

Notice requirement

Required covered entities to include nondiscrimination notices and foreign language taglines with all significant communications.

Eliminates the notice and tagline requirement.

