



Published: May 26, 2021

HHS Expands Interpretation of Sex Discrimination under 1557

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On May 10, 2021, the Department of Health and Human Services (“HHS”) announced that it will interpret and enforce Section 1557’s prohibition on discrimination on the basis of sex to include discrimination on the basis of (1) sexual orientation and (2) gender identity. HHS also stated its Office of Civil Rights (“OCR”) will comply with the Religious Freedom Restoration Act and all other legal requirements in enforcing Section 1557.

Background

Section 1557 of the Affordable Care Act (“ACA”) prohibits hospitals, doctors’ offices, insurance carriers and other entities that receive financial assistance from the federal government relating to a health program or activity (such as Medicare or Medicaid) from discriminating on the basis of sex and other factors set forth in Title IX of the Civil Rights Act. Final regulations issued in 2020 attempted to narrow the interpretation of discrimination on the basis of sex to exclude sexual orientation and gender identity.

On June 15, 2020, the U.S. Supreme Court decided in the case of *Bostock v. Clayton County* that termination of an employee because of the employee’s sexual orientation or gender identity is a form of sex discrimination under Title VII of the Civil Rights Act.

On August 17, 2020, the U.S. District Court for the Eastern District of New York blocked enforcement of the 2020 regulations, holding they were inconsistent with the Supreme Court’s definition of sex discrimination in the *Bostock* Case.

Interpretation Announcement

Since the Supreme Court's decision in *Bostock*, two federal circuits have concluded that the prohibition of discrimination on the basis of sex in Title IX must be read to include sexual orientation and gender identity. In response to these rulings, HHS announced on May 10, 2021, that consistent with the Supreme Court's decision in *Bostock* and Title IX, OCR will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity.

The OCR enforces federal civil rights laws, conscience and religious freedom laws, the Health Insurance Portability and Accountability Act ("HIPAA") Privacy, Security, and Breach Notification Rules, and the Patient Safety Act and Rule. Individuals who believe they have been victims of prohibited discrimination may request OCR to investigate.

HHS further states that this enforcement interpretation will guide OCR in processing complaints and conducting investigations.

Employer Action

Hospitals, doctors' offices, insurance carriers, and other entities that are subject to the ACA section 1557 nondiscrimination requirements should consider removing exclusions or limitations in health benefit programs (or other employee benefit plans) based on sexual orientation or gender identity. Employers should consult with legal counsel if they have implemented plan designs or eligibility rules based on sexual orientation or gender identity and work with TPAs to determine how to modify their plan design to fit within the HHS interpretation.

It is important to note that employers sponsoring group health plans that are not subject to Sec. 1557 remain subject to other federal employment laws, including Title VII of the Civil Rights Act which prohibits discrimination on the basis of sex (including sexual orientation or gender identity). Employers should consult with legal counsel and proceed with caution if implementing plan designs or eligibility rules based on sexual orientation or gender identity.

Additionally, state insurance and employment laws may also prohibit such discrimination.