

## SECTION 1557: FEDERAL COURT ISSUES NATIONWIDE INJUNCTION AGAINST HHS SEX DISCRIMINATION RULES

On December 31, 2016, a federal district court in Texas issued a preliminary injunction to prevent HHS from enforcing those few portions of the regulations implementing Section 1557 of the Affordable Care Act ("ACA") that interpret the prohibition against "sex" discrimination to include discrimination on the basis of "gender identity" and "termination of pregnancy."

### BACKGROUND

On May 13, 2016, OCR issued a final rule ("Final Rule") implementing Section 1557 of the ACA. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age or disability by any health program or activity receiving federal financial assistance ("Covered Entities"). The Final Rule specified that sex discrimination prohibited under Section 1557 included discrimination based on: (i) an individual's sex; (ii) pregnancy, including termination of a pregnancy, childbirth and related medical conditions; (iii) gender identity; and (iv) sex stereotyping.

In August, five states and three religiously affiliated health care entities filed suit in the U.S. District Court for the Northern District of Texas, challenging the Final Rule and the interpretation by HHS of the anti-discrimination provisions built into Section 1557. The Plaintiffs argued that the broad interpretation of sex discrimination under the Final Rule would violate their religious freedom, impact their medical judgment and require burdensome changes to their health insurance plans beginning January 1, 2017. HHS argued that the Final Rule does not mandate that providers cover or perform specific procedures but that they provide health services and insurance in a non-discriminatory manner.

### INJUNCTION

The court sided with the Plaintiffs, stating it believes HHS exceeded its authority in utilizing such a broad definition of sex discrimination in the Final Rule. The court concluded that "sex," as defined when Congress passed Title IX (on which the Section 1557 sex discrimination prohibition rests), meant one's "biological gender" at birth and that if Congress intended to broaden that when it enacted Section 1557 later, it would have done so. The court also concluded that the Final Rule placed substantial pressure on the religious plaintiffs to abstain from their religious exercise. On December 31, 2016, the court issued a nationwide injunction that prevents HHS from enforcement of the Final Rule that the prohibition against sex discrimination in Section 1557 includes "gender identity" and "termination of pregnancy."

### IMPACT OF THE INJUNCTION

The scope of the injunction is limited to preventing HHS from taking actions to enforce the prohibitions on discrimination based on gender identity or termination of pregnancy and does not impact any of the other Section 1557 requirements. On January 3, 2017, HHS issued a statement that it will continue to enforce the law "including its important protections against discrimination on the basis of race, color, national origin, age, or disability and its provisions aimed at enhancing language assistance for people with limited English proficiency, as well as other sex discrimination provisions."

While the injunction prevents HHS from taking actions associated with claims of discrimination on the basis of gender identity or termination of pregnancy, it does not prevent individuals from continuing to bring private rights of action based on discrimination. After the injunction, on January 5, 2017, another lawsuit was filed by a transgender patient who claimed that a religiously affiliated hospital discriminated against him.

In addition to private claims by individuals, the American Civil Liberties Union has become involved in the case and is attempting to appeal the injunction. Additional litigation on this issue is expected.

### PRACTICAL TAKEAWAYS

The injunction does not impact many of the existing Section 1557 requirements including the requirement to have a Section 1557 coordinator and grievance procedure and to post the non-discrimination notice and non-English taglines. Covered Entities should continue to comply with those requirements.

Hall Render has developed a toolkit to assist Covered Entities in achieving compliance with Section 1557 and the Final Rule. For more information about the toolkit, please contact **Anne Ruff** at (317) 977-1450 or [aruff@hallrender.com](mailto:aruff@hallrender.com).

If you have questions about this topic or would like assistance in compliance with the new requirements under Section 1557, please contact:

- **Anne Ruff** at (317) 977-1450 or [aruff@hallrender.com](mailto:aruff@hallrender.com);
- **Maryn Johnson** at (317) 429-3651 or [mjohnson@hallrender.com](mailto:mjohnson@hallrender.com);
- **Jonathon Rabin** at (248) 457-7835 or [jrabin@hallrender.com](mailto:jrabin@hallrender.com);
- **Sevilla Rhoads** at (206) 795-6876 or [srroads@hallrender.com](mailto:srroads@hallrender.com); or
- Your regular Hall Render attorney.

Please visit the Hall Render Blog at <http://blogs.hallrender.com/> or click [here](#) to sign up to receive Hall Render alerts on topics related to health care law.