

HHS POSTS SECTION 1557 FINAL RULE AND WALKS BACK SEX-BASED DISCRIMINATION PROTECTIONS: ENTER *BOSTOCK V CLAYTON COUNTY BD. OF COMMISSIONERS*

On June 12, 2020, CMS and the Office for Civil Rights of Health and Human Services (“HHS”) posted a display copy of a [new final rule](#) that implements Section 1557 of the Affordable Care Act (“ACA”)(“Final Rule”). This Final Rule supersedes significant portions of the current 2016 rule (“2016 Rule”) that interpreted and implemented Section 1557, the civil rights provision of the ACA that prohibits discrimination on the basis of race, color, national origin, sex, age or disability by any health program or activity that receives federal financial assistance (“Covered Entity”). The Final Rule does not deviate significantly from the proposed rule published on June 14, 2019. See information on the proposed rule [here](#).

This update focuses on the Final Rule’s retraction of certain sex-based protections established in the 2016 Rule. We also include for quick reference a brief summary of other significant aspects of the Final Rule. With respect to the Final Rule’s elimination of the requirement for Covered Entities to distribute non-discrimination notices and “taglines” translation notices in at least 15 languages, and other key provisions, we will provide additional information and guidance in upcoming Health Law News updates.

FINAL RULE OVERRIDES 2016 RULE’S EXPANDED VIEW OF SEX DISCRIMINATION

One of the most notable aspects of the Final Rule is that it [eliminates](#) the 2016 Rule’s interpretation of what it means to discriminate “on the basis of sex.” The 2016 Rule specifically defined sex discrimination in health programs and activities to encompass discrimination on the basis of: (i) gender identity (i.e., an individual’s internal sense of gender, which may be male, female, neither or a combination of male and female); (ii) sex stereotyping; and (iii) pregnancy including termination of pregnancy, childbirth and related medical conditions. The 2016 Rule required health care providers to provide, and health insurers to pay for, medically necessary treatment for transgender patients.[\[1\]](#)

According to Final Rule commentary, HHS concluded that the 2016 Rule’s expansive view of what it means to discriminate “on the basis of sex” exceeded HHS’s statutory authority and is inconsistent with the underlying framework of civil rights laws incorporated by the ACA[\[2\]](#), including Title IX of the Education Amendments of 1972 (“Title IX”), which is the statutory basis for Section 1557’s provision against discrimination “on the basis of sex.”

In the new [Final Rule](#), HHS adopted “the government’s longstanding interpretation and ordinary meaning of the term ‘sex’” as the state of being biologically male or female as determined at birth. HHS further took the position that neither Section 1557 of the ACA nor Title IX includes prohibitions on discrimination on the basis of gender identity or sexual orientation or defined “discrimination on the basis of sex” to include such categories.

The Final Rule was published in the Federal Register on June 19, 2020 and therefore is currently scheduled to take effect August 18, 2020. However, given the Supreme Court’s opinion in *Bostock v. Clayton County Board of Commissioners* (discussed below), it is likely that the Final Rule’s effective day could be delayed.

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On June 15, 2020, a mere three days after the Final Rule was released for public inspection, the U.S. Supreme Court decided three consolidated cases addressing whether discrimination based on sexual orientation and gender identity is illegal under Title VII of the Civil Rights Act of 1964 (“Title VII”). Title VII prohibits employment discrimination on the basis of race, color, religion, sex or national origin. In [Bostock v Clayton County Bd. of Commissioners](#), the Supreme Court held this type of discrimination is indeed prohibited under Title VII. See our [recent article](#) for a summary and discussion on *Bostock*.

Bostock, a long-awaited Supreme Court decision, raises significant questions about the Final Rule, given that discrimination “based on sex” has now been determined by the nation’s highest court to encompass discrimination based on sexual orientation and gender identity in a major federal civil rights law, Title VII. *Bostock* thus undercuts HHS’s principal argument that the framework of civil rights laws does not define sex-based discrimination as anything more expansive than discrimination based on a person’s binary classification as male or female.

Even before the *Bostock* decision was announced, advocacy organizations, such as the Human Rights Campaign, the American Civil Liberties Union and Lambda Legal's Transgender Rights Project all indicated their intent to file suit against the Trump administration over the Final Rule.^[3]

Further, key health care stakeholders including the American Medical Association, the American Hospital Association and America's Health Insurance Plans have expressed their opposition to the Final Rule.^[4]

OTHER KEY PROVISIONS OF THE FINAL RULE

The Final Rule also:

- Eliminates the requirement that Covered Entities distribute non-discrimination notices and "taglines" translation notices in at least 15 languages in all significant communications to patients and customers, a move anticipated to save Covered Entities an estimated \$2.9 billion over the next five years;
- Eliminates the requirement for a Section 1557 Compliance Coordinator and written grievance procedure;
- Interprets Section 1557 as applying to all of the operations of entities principally engaged in the business of providing health care that receive federal financial assistance, and for entities not principally engaged in the business of providing health care, Section 1557 applies to such entities' operations only to the extent any such operations receive federal financial assistance;
- Removes a single enforcement structure across different types of discrimination claims and returns to the enforcement structure for each civil rights statute identified in Section 1557 of the ACA;
- Adds a provision providing that Section 1557 must be enforced in a manner consistent with other statutes including the Religious Freedom Restoration Act and federal conscience protection laws;
- Retains protections from the 2016 Rule that ensure physical access for disabled individuals to health care facilities and appropriate communication technology to assist visually or hearing impaired individuals;
- Retains the 2016 Rule's qualifications for translators and interpreters for non-English speakers and adds a "4-factor analysis" to ensure that health care companies and providers subject to the Final Rule provide meaningful access for limited English proficiency individuals; and
- Retains the requirement that Covered Entities submit to HHS a binding assurance of compliance with Section 1557.

PRACTICAL TAKEAWAYS AND RECOMMENDATIONS

Since the Final Rule was published on June 19, 2020, it will become effective on August 18, 2020. However, we believe it is possible that the effective date of the Final Rule could be postponed or stayed as a result of the *Bostock* decision and as a result of lawsuits expected to be filed seeking to overturn parts of the Final Rule.

Another possibility is that HHS Secretary Azar or CMS Administrator Verma will be flooded with demands that they postpone the effective date of the Final Rule or, at a minimum, the sex-discrimination provisions of the Final Rule, until the agencies have considered whether *Bostock* invalidates the Final Rule's sex-based discrimination provisions.

Given these uncertainties, and given that a nationwide injunction enjoining the 2016 Rule's prohibitions against discrimination on the basis of gender identity and termination of pregnancy is still in place^[5], we remain in limbo for the time being with respect to whether and when the Final Rule will be enforceable.

We recommend that health care providers and companies subject to the 2016 Rule hold off for the time being on changing any policies or procedures that comply with the 2016 Rule until a clearer picture of the future of the Final Rule emerges over the next few weeks. The 2016 Rule will be in place until at least August 18, 2020 and, quite possibly, longer.

Health care providers and companies should also keep in mind that they may still be subject to state and local public accommodation or other laws and rules prohibiting discrimination on the basis of gender identity, gender expression and/or sexual orientation, even if the Final Rule, in its current form, does not provide this protection.

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[references]

[1] Implementation of these sex-based provisions in the 2016 Rule was enjoined in federal court. *Franciscan Alliance, Inc. et al. v. Burwell* Civil Action No. 7:16-cv-00108-O (U.S. Dist. Ct. for N.D. Texas) (Dec. 31, 2016)

[2] Civil rights protections are set forth in Title VI of the Civil Rights Act of 1964 (prohibits discrimination on the basis of race, color, or national origin); Title IX of the Education Amendments of 1972 (prohibits discrimination on the basis of sex); Section 504 of the Rehabilitation Act of 1973 (prohibits discrimination on the basis of disability); and Age Discrimination Act of 1975 (prohibits discrimination on the basis of age)

[3] Margot Sanger-Katz and Noah Weiland, *Trump Administration Erases Transgender Civil Rights Protections in Health Care*, N.Y. Times (updated June 15, 2020) found at: <https://www.nytimes.com/2020/06/12/us/politics/trump-transgender-rights.html?action=click&module=RelatedLinks&pgtype=Article>; Sheila Kaplan, *Health Care Advocates Push Back Against Trump's Erasure of Transgender Rights*, N.Y. Times (June 13, 2020) found at: <https://www.nytimes.com/2020/06/13/health/trump-health-care-transgender-rights.html>

[4] Sheila Kaplan, *Health Care Advocates Push Back Against Trump's Erasure of Transgender Rights*, N.Y. Times (June 13, 2020) found at: <https://www.nytimes.com/2020/06/13/health/trump-health-care-transgender-rights.html>; Andis Robeznieks, *AMA opposes HHS rule removing protection against discrimination* (June 16, 2020) found at: <https://www.ama-assn.org/delivering-care/population-care/ama-opposes-hhs-rule-removing-protection-against-discrimination>; Jack O'Brien, *AHA, AMA Oppose HHS Final Rule Reversing Obama-Era Discrimination Protections*, (June 13, 2020) found at: <https://www.healthleadersmedia.com/strategy/aha-ama-oppose-hhs-final-rule-reversing-obama-era-discrimination-protections>; *AHIP Responds to Final Rule Seeking to Eliminate Nondiscrimination Protections in Health Care* (June 12, 2020) found at: <https://www.ahip.org/ahip-responds-to-final-rule-seeking-to-eliminate-nondiscrimination-protections-in-health-care/>

[5] *Franciscan Alliance, Inc. et al. v. Burwell*. HHS Office of Civil Rights posted on its website the following statement at: <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>:

On December 31, 2016, the U.S. District Court for the Northern District of Texas issued an opinion in Franciscan Alliance, Inc. et al v. Burwell, enjoining the Section 1557 regulation's prohibitions against discrimination on the basis of gender identity and termination of pregnancy on a nationwide basis. Accordingly, HHS' Office for Civil Rights (HHS OCR) may not enforce these two provisions of the regulation implementing these same provisions, while the injunction remains in place. Consistent with the court's order, HHS OCR will continue to enforce important protections against discrimination on the basis of race, color, national origin, age, or disability, as well as other sex discrimination provisions that are not impacted by the court's order.

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