

AUGUST 25, 2016

HHS NONDISCRIMINATION REGULATIONS CHALLENGED IN FEDERAL COURT

On August 23, 2016, eight plaintiffs jointly sued the federal Department of Health and Human Services ("HHS") disputing the definition of the term "sex" in recent HHS regulations implementing the Affordable Care Act's ("ACA") non-discrimination provisions. A link to the Complaint is [here](#). The HHS regulations, which, among other things, protect patients who receive federally funded health care, became effective on July 18, 2016.

The plaintiffs are five states, including Texas, Wisconsin, Nebraska, Kansas and Kentucky, and three religious organizations. The suit was filed in a Texas federal district court.

These Plaintiffs claim that HHS's interpretation of the word "sex," as used in the ACA non-discrimination provision, violates various laws and constitutional protections applicable to states, religious entities and individuals. Plaintiffs primarily challenge HHS's protections against discrimination on the basis of gender identity and expression.

THE COMPLAINT AND RELATED RECENT CASES

The majority of the Complaint focuses on the Plaintiffs' views that they should not have to provide equal services and insurance coverage to transgender patients as required by HHS in its regulations. They also claim that the HHS regulations violate religious and other freedoms to which providers are entitled when deciding whether to terminate a pregnancy.

In their Complaint, Plaintiffs assert a number of legal bases for their claims, including due process, freedom of speech and religious freedom. Plaintiffs also posit that HHS's regulations are inconsistent with other federal laws, including Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on religious beliefs.

In regards to the Plaintiffs' allegation that Title VII conflicts with the HHS regulations, it is interesting to note that, on August 22, 2016, the Equal Employment Opportunity Commission ("EEOC") filed a brief in a California federal district court in a case challenging an employer health plan's exclusion of sex transformation surgery, even when the surgery was considered medically necessary to treat gender dysphoria. In its brief, EEOC stated that Title VII also protects transgender employees from discrimination. That case is the subject of another [blog post](#). In that case, the plaintiff asserted a claim of transgender discrimination under the ACA's non-discrimination provision, which is also at issue in this lawsuit.

The Plaintiffs assert that the HHS regulations should have included an exception for religious entities. In the HHS regulations, the agency declined to provide a blanket exemption for religious entities. Instead, it noted there are existing protections for religious beliefs, such as the Religious Freedom Restoration Act ("RFRA"). In another case we recently discussed ([blog post here](#)), under the RFRA, a court allowed an employer to terminate a transgender individual for wanting to wear women's attire when the employee's sex at birth was male.

In the lawsuit, in addition to damages, the Plaintiffs seek court declarations that the HHS regulations are illegal. They also request that the court issue an order prohibiting HHS from enforcing the non-discrimination regulations against them and other states

PRACTICAL TAKEAWAYS

While this area of law is rapidly evolving, it is particularly important for employers, insurance carriers and entities with federally funded activities and programs to stay informed as to the current state of the laws governing them, including both discrimination based on (i) gender identity and expression and (ii) religious beliefs. When determining your legal obligations on this topic, also consider that, in addition to the laws mentioned in this alert, there are other federal laws and regulations that may apply, as well as possible state and local laws addressing the same types of rights and protections.

Finally, as you begin drafting new policies or conducting training on these topics, remember that obligations may change as these cases (and likely additional ones to follow) are decided and lawmakers respond to those decisions. For example, in policies that are not easy to quickly update, consider discussing with your legal counsel whether to reference "applicable laws and regulations," rather than specifically stating the content or interpretation of the law.

For more information on the underlying HHS regulations, see our prior blog posts: [Part I](#); [Part II](#); and [Part III](#).

If you have any questions or would like additional information about this topic, please contact:

- [Sandy Johnson](#) at (206) 459-3094 or sjohnson@hallrender.com;
- [Sevilla Rhoads](#) at (206) 795-6876 or srroads@hallrender.com; or
- Your regular Hall Render attorney.