FYI®
For Your Information®

Volume 40 | Issue 08 | January 13, 2017

Court Blocks HHS from Enforcing Prohibition on Transgender Discrimination

Just before they were to take effect, a Texas district court temporarily blocked provisions of new HHS regulation prohibiting certain health programs and activities from discriminating on the basis of gender identity and termination of pregnancy. It is not clear if HHS will appeal the ruling or defend legal challenges involving similar issues going forward, given the imminent change in administration. For now, employers and plans that are covered entities under ACA Section 1557 should work with legal counsel to assess risks associated with coverage gaps for transgender health and abortion services.

Background

Section 1557 of the Affordable Care Act (Section 1557) prohibits "covered entities" from discriminating in certain health programs and activities on grounds prohibited by four federal nondiscrimination statutes – including Title IX of the Education Amendments of 1972 (Title IX). Among the proscriptions Section 1557 expressly incorporates by reference is Title IX's prohibition against discrimination "on the basis of sex."

In May 2016, the Department of Health and Human Services (HHS) issued final regulations defining "covered entity" for purposes of Section 1557's nondiscrimination rules – a health program administered by an executive agency, a public marketplace, or a health program or activity that receives federal funding or assistance. The regulations define "sex" to include biological sex as well as gender identity ("an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth"). They define "sex discrimination" to include, among other categories, discrimination based on gender identity or termination of pregnancy in covered programs, with no carve-out for abortion and abortion-related services. The regulations expressly prohibit a "categorical coverage exclusion or limitation for all healthcare services related to gender transition" and denials of health coverage based on gender identity or sex stereotyping, requiring individuals to be treated consistent with their gender identity. (For more information on the final regulations generally, see our September 7, 2016 *For Your Information* and our *FYI Alert* from May 17, 2016.)

In August 2016, five states and three health care providers that receive federal funds sued HHS, challenging its definition of the term "sex" and interpretation of sex discrimination under Section 1557 as inconsistent with Title IX and its religious exemption. Among other things, the plaintiffs argued that the HHS definition of sex forces doctors to provide health care in a way that violates their religious beliefs and necessitates onerous changes to their health insurance plans. At an early stage in the litigation, they asked the court to block HHS from enforcing the prohibition against discrimination based on gender identity and termination of pregnancy before it took effect on January 1, 2017.

Court Puts HHS Enforcement on Hold

On December 31, 2016, Judge Reed O'Connor in the Northern District of Texas federal court granted a nationwide preliminary injunction in *Franciscan Alliance v. Burwell*, preventing HHS from enforcing its ban on gender identity and termination of pregnancy discrimination. The remaining provisions of the rule – prohibiting discrimination on other bases such as disability, race, age and the uncontested definitions of sex – took effect as scheduled, generally on January 1, 2017.

Specifically, the court held that including gender identity discrimination in the final regulation's interpretation of sex discrimination conflicts with Section 1557. In reaching that conclusion, it looked to the definition of "sex" in Title IX when Congress enacted that law in 1972. The court found that in 1972, sex was "commonly understood to refer to the biological differences between males and females." It further found that Congress passed other laws that used the term "gender identity" in 2010 when the ACA was passed – but it did not include the term in Section 1557.

Judge O'Connor's Other Ruling on Transgender Rights

Two days before the Franciscan Alliance lawsuit was filed, Judge O'Connor **granted** a nationwide preliminary injunction blocking the Obama administration from enforcing Department of Education (DOE) guidelines that require public schools to allow transgender students to use bathrooms and other intimate facilities consistent with their gender identity. Consistent with its later HHS ruling, the court concluded that Title IX's prohibition against sex discrimination does not extend to gender identity, finding that the statute unambiguously defines sex based on biological and anatomical differences between males and females as determined at birth.

While the court did not reach the constitutional arguments that the plaintiffs raised, it did address religious exemptions. The court determined that the gender identity discrimination prohibition likely violates the Religious Freedom and Restoration Act by placing substantial burdens on the plaintiffs' religious exercise.

> **Comment.** The court relied on the 2014 *Hobby Lobby* decision for the proposition that the exercise of religion includes "business practices that are compelled or limited by the tenets of a religious doctrine." In that case, the US Supreme Court struck down the ACA's so-called contraceptive coverage mandate as applied to closely held, for-profit employers with religious objections. (See our June 30, 2014 *FYI Alert*.)

The court also found it likely that the final regulation unlawfully requires access and coverage for abortion procedures, despite the plaintiffs' sincere belief that these procedures would harm patients and force their employees to "engage in material cooperation with evil."

What Happens Next?

On January 3, 2017, HHS released a statement expressing its disappointment in the court's decision and its plans to continue to enforce Section 1557's other provisions – including those against sex discrimination – "to the full extent consistent with the order." It is unclear how HHS will handle continued litigation in the Texas court and any possible appeal under the Trump administration. It is also unclear how HHS will handle the lawsuits brought by religiously affiliated health care providers currently pending in other jurisdictions that similarly challenge HHS's interpretation of sex discrimination in Section 1557 to include discrimination based on gender identity.

Another variable in the future of Section 1557 enforcement are congressional Republicans' efforts to repeal and replace the ACA. These efforts are ongoing, but the nature and timing of a repeal and replacement plan remain to be seen. (See our January 9, 2017 *Legislate*.)

In Closing

In the wake of this ruling and the uncertainty it raises, employers and plans that are covered entities should work with legal counsel to discuss risks associated with any coverage gaps they may have for transgender health or abortion services. Covered entities will also want to consider factors such as cost, corporate culture and employee population in assessing their current plans.

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