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Health Plans Post-Bostock: Mixed Signals on Sex Discrimination?

Article By:

Timothy J. Stanton

Hillary M. Sizer

Most employer-sponsored health plans will be exempt from the primary Affordable Care Act (ACA) provision governing race, color, age, sex, disability, and national origin discrimination under new final rules issued by the U.S. Department of Health and Human Services (HHS). Only plans (or other covered programs and activities) that receive financial assistance from HHS or that are sponsored by entities principally engaged in providing healthcare will have to comply with ACA Section 1557.

That exemption, though, may provide little relief to employers, at least as it relates to sex discrimination. That is because before the new HHS rules were even printed in the *Federal Register*, the Supreme Court of the United States held in *Bostock v. Clayton County, Georgia*, an opinion authored by Justice Neil Gorsuch, that Title VII of the Civil Rights Act of 1964's prohibition on sex discrimination encompasses discrimination on the basis of sexual orientation and gender identity. This decision could prompt new scrutiny of certain health plan terms regarding sexual orientation and gender identity, regardless of Section 1557.

The new Section 1557 regulations—which take effect on August 18, 2020, and is already subject to a lawsuit by LGBTQ advocacy groups and health care providers in federal district court in Washington, D.C.—are very similar to the 2019 proposed rules and reflect a drastic scaling back of rules that were initially effective in 2016. The initial rules applied to a broader range of health programs and activities (including potentially third-party administrators of health plans) that received federal support, incorporated notices and "taglines" highlighting the language support services offered by covered entities, and defined discrimination on the basis of sex broadly enough to include discrimination based on gender identity, sex stereotyping, and sexual orientation.

Section 1557 of the ACA does not define prohibited discrimination but instead incorporates provisions of four other statutes: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973. Note that the relevant provision on sex discrimination comes not from the Civil Rights Act, which the Court considered in *Bostock*, but from Title IX.

HHS's enforcement of Section 1557 has had a complicated history. While Section 1557 took effect

upon the ACA's enactment date in 2010, HHS initially published final regulations implementing the section in May 2016, effective that July. In December 2016, a federal district judge in Texas granted a nationwide preliminary injunction prohibiting HHS from enforcing the language in the rules relating to gender identity discrimination. In July 2017, the judge remanded the rules to the HHS for reconsideration, holding that the regulations exceeded the agency's rulemaking authority and violated the Religious Freedom Restoration Act. Finally, in 2019, the judge vacated the portions of the 2016 rules related to gender identity discrimination. The case is still on appeal before the U.S. Court of Appeals for the Fifth Circuit.

HHS received nearly 200,000 comments on the 2019 proposed rules. In the preamble to the final rules, HHS indicated that it had determined that the 2016 final rules were unduly burdensome and inconsistent with the language of the four federal antidiscrimination statutes. HHS states that the agency will interpret discrimination "on the basis of sex" under Title IX as solely on the basis of biological sex (i.e., an individual's genetic sex at birth) in its enforcement of Section 1557.

In a nod to the Supreme Court, the HHS acknowledges in the preamble to the final rules that "Title VII case law has often informed Title IX case law with respect to the meaning of discrimination 'on the basis of sex'." However, the HHS also states that, in finalizing the new Section 1557 regulations, it will rely on the "plain meaning of [sex] under Title IX, and does so in the health context within which the [agency] applies Title IX under Section 1557."

All definitions of protected classes (i.e., sex, national origin, etc.) are removed in the new final rules, along with all provisions detailing specific forms of discrimination such as gender dysphoria treatment, health insurance participation, and benefit plan design. The final rules also drastically reduce the number of entities covered by the rules, saving an estimated "$2.9 billion over five years" in what HHS calls "undue regulatory burdens." As a result, most sponsors and third-party administrators of self-funded plans will no longer be subject to Section 1557.

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