

LGBTQ+ Protections Under the ACA are in Effect ...Again!

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The Department of Health and Human Services (HHS) [announced](#) Monday it now interprets—and will enforce—Section 1557 of the Affordable Care Act (ACA) to prohibit discrimination based on sexual orientation and gender identity, effective immediately. Section 1557 generally prohibits discrimination based on race, color, national origin, sex, age, and disability in any health program or activity receiving federal financial assistance.

Background

Whether Section 1557 protects LGBTQ+ individuals from discrimination has received considerable attention and varying positions from HHS and the courts. The 2016 [final rule](#) interpreted “on the basis of sex” under Section 1557 as including “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.” The 2020 [final rule](#) on Section 1557 reversed the position taken in the 2016 final rule and walked back protections for gender identity, gender expression, sex stereotyping, and termination of pregnancy (addressed [here](#)). But a New York court issued an injunction on enforcing the 2020 final rule’s position, as discussed [here](#), and several other courts have cases pending on whether the rule violates the Religious Freedom Restoration Act as to providers that have sincerely held religious beliefs against providing this care.

“Because of Sex”

In making Monday’s announcement, HHS relied on the United States Supreme Court’s 2020 decision in [Bostock v. Clayton County](#). The Court ruled that Title VII’s ban on “sex”-based discrimination prohibits discrimination based on sexual orientation and that Title VII prohibits discrimination against transgender claimants based on their transgender status. HHS noted that the rationale underlying *Bostock*—that the meaning of “because of sex” in Title VII includes discrimination because of sexual orientation and gender identity—applies to prohibiting sex discrimination applicable to Section 1557 under Title IX.

Employer Action Required

Given this new guidance and HHS's statement that it will enforce this interpretation immediately, employers should review their plans to determine whether they need to take any action. The new guidance might not directly apply to certain employee health plans if neither the sponsoring employer nor the plan receives HHS funding. Still, HHS Secretary Xavier Becerra has stated, "It is the position of the Department of Health and Human Services that everyone, including LGBTQ+ people, should be able to access health care, free from discrimination or interference, period."

Many questions remain unresolved about the scope of this guidance—but one thing is certain: HHS will have more to say on this issue, and so, too, will the courts. Thus, employers should know whether their plans contain provisions that could be discriminatory and could therefore put the employer at risk for enforcement action or discrimination claims.

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