

Employment Practices Liability

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Texas Court Enjoins Enforcement of Regulation that Would Forbid Discrimination in Healthcare on the Basis of Gender Identity and Termination of Pregnancy

By Johanna G. Zelman, Partner; Nancy Van der Veer Holt, Counsel; Timothy F. Kennedy, Counsel; FordHarrison

Executive Summary: As LGBTQ rights have taken center stage in political and social issues, FordHarrison has been following groundbreaking litigation related to LGBTQ rights and providing updates. In the latest decision, a federal judge in Texas instituted a nationwide preliminary injunction against the enforcement of a regulation promulgated by the United States Department of Health and Human Services (HHS) under the authority of Section 1557 of the Patient Protection and Affordable Care Act (ACA) that the plaintiffs argued would have required health care providers to perform, and health insurance companies to cover, gender transition procedures and abortion effective January 1, 2017. See *Franciscan Alliance v. Burwell* (December 31, 2016).

Background: The ACA, also known as “Obamacare,” was passed on March 23, 2010. Its provisions were to be rolled out and implemented over the next 10 years. While it is most famously known for mandating health care insurance coverage and providing subsidies for those individuals whose income falls under certain thresholds, it also provides various protections. One of these prohibits discrimination by any “health program or activity which is receiving Federal financial assistance” on the basis of, among other things, sex (Section 1557). Federal financial assistance includes grants and Medicare and Medicaid payments, so entities covered by the Rule include hospitals, medical practices, nursing homes, health insurers, and self-funded employer health plans that receive federal payments, like Medicare Part D subsidies. A self-funded employer plan that does not receive any federal financial assistance is not subject to the Rule, but a third-party administrator that is subject to the Rule as an insurer or otherwise would be subject to the Rule in administering the employer’s self-funded plan, and the sponsoring employer would be subject to other applicable nondiscrimination laws with respect to the plan’s design.

Section 1557 incorporates the definition of sex from Title IX of the Education Amendments Act of 1972. For over 40 years, courts consistently have viewed the prohibition against sex discrimination in Title IX as related solely to the physiological differences between individuals’ gender assigned at birth. Recently, efforts have been made to expand the interpretation of this definition to also include gender identity and sexual orientation; however, the issue remains outstanding and undecided.

The effort to expand the definition of sex in Title IX was again brought to the forefront when HHS issued its Final Rule implementing Section 1557 on May 16, 2016. Pursuant to the Final Rule, health insurance companies and other healthcare facilities were provided until January 1, 2017, to make any necessary changes to coverage and services offered to comply with, among other things, the “sex” nondiscrimination provision in Subpart B. The Rule’s definition of sex explicitly includes “gender identity” and “termination of pregnancy.” Therefore, the Rule overtly prohibits discrimination in health care services on the basis of gender identity and pregnancy termination. It prevents providers and insurers from categorically refusing to provide or cover gender transition treatments and procedures, regardless of whether formerly considered “cosmetic,” and treatments for gender dysphoria, irrespective of age. The plaintiffs in *Franciscan Alliance* also argued that the Rule could be used to require covered entities to perform or provide coverage for abortion. Unlike Title IX, however, the Rule does not include a religious exemption allowing institutions to opt out of provisions contrary to their closely held religious beliefs. The plaintiffs challenged the Rule’s

definition of sex, arguing that it requires physicians to provide health care to patients in violation of their religion and contrary to their best medical judgment and that it will require costly and burdensome health insurance changes.

The Decision: On December 31, 2016, **just one day before** the regulation would have gone into effect, the court granted a nationwide preliminary injunction, limited to the implementation of the Rule’s “gender identity” and “termination of pregnancy” provisions.

First, the court held that the Rule violates the APA because it is contrary to law and exceeds statutory authority. Significantly, the court noted that Section 1557 unambiguously incorporates the meaning of sex as provided in Title IX. According to the court, in enacting Title IX, Congress did not intend to include gender identity in the definition of “sex.” Likewise, the court reasoned that had Congress wanted to include gender identity in the definition of “sex” in the ACA, it would have included it specifically in Section 1557, knowing that Title IX’s definition of sex did not include gender identity. Moreover, the court noted that when the ACA was passed in 2010, the common usage of sex did not include gender identity.

The court also focused on the fact that Title IX includes a religious exemption, which the Rule flatly ignores. The court relied on Congress’s citation to Title IX as “20 U.S.C. § 1681, *et seq.*,” as evidence of its intent to incorporate **all** of Title IX into the ACA, including the religious exemption. The Rule’s failure to do so, the court reasoned, renders the Rule contrary to law.

Second, the court held that the Rule likely violates the Religious Freedom Restoration Act (RFRA) with respect to the three religious private healthcare provider plaintiffs. The RFRA provides that the “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is the least restrictive means of furthering [a] compelling government interest.” For the RFRA to apply, there must be a sincere religious belief or exercise that has been substantially burdened by government action. In this case, the court found that the Rule, as written, “places substantial pressure on [them] to perform and cover transition and abortion procedures.” Because the religious organizations associated with the three healthcare providers have long-held religious beliefs that gender transition and abortion are “immoral” and “evil,” the court doubted that there was a “compelling interest” that would permit such a restriction on religious beliefs.

Of note, the court asserted that the government’s various programs for providing health insurance did not mandate coverage for gender transition, which belied the existence of a compelling interest. The court noted that neither Medicare nor Medicaid mandates such coverage and that TRICARE specifically excludes transition surgeries. The court also cited an HHS report indicating that there was insufficient evidence to determine whether gender reassignment surgery would be effective for the Medicare population. Additionally, the court concluded that even if there was a compelling interest, this was not the least-restrictive means available. This reasoning is consistent with a Michigan federal court’s ruling last year in *EEOC v. R.G. & G.R. Harris Funeral Homes*, where the defendant funeral home was granted summary judgment on the grounds that it was entitled to an RFRA exemption from Title VII – and the body of case law concerning sex stereotyping that has developed

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under it – based on the unique facts and circumstances of that case, which involved discrimination against a transgender employee and application of the employer’s uniform policy.

What Does This Mean? LGBTQ and women’s rights remain developing areas of the law. The law, especially in relation to LGBTQ rights, remains conflicted. The *Franciscan Alliance* analysis regarding the meaning of “sex” as used in Title IX could be derailed by the U.S. Supreme Court as it prepares to decide precisely that issue in *Gloucester County School Board v. G.G.* In that case, G.G., a transgender student, was denied access to the bathroom corresponding to his gender identity. The Fourth Circuit deferred to the Department of Education’s interpretation of sex to include gender identity, and held that a claim alleging discrimination based on gender identity is a viable claim under Title IX. The U.S. Supreme Court has agreed to hear the case and briefing is currently taking place.

The definition of sex, as defined by Title VII, is also under examination by the Seventh Circuit in *Hively v. Ivy Tech Community College, South Bend*, the Eleventh Circuit in *Evans v. Georgia Regional Hospital*, and the Second Circuit in *Christiansen v. Omnicom Group, Inc.* and *Carrigan v. Brietling USA, Inc.* As reported in a previous [Legal Alert](#), it appears likely that *Hively* will be decided soon, concluding that the definition of sex in Title VII does include sexual orientation. This decision may also influence how other courts interpret “sex” in other statutes, such as Section 1557 of the ACA and Title IX.

Additionally, practitioners, business owners and Human Resource specialists should be on the lookout for further RFRA challenges to similar government legislation and regulations, as well as Title VII claims. Healthcare providers and employers that sponsor self-insured health plans that receive federal subsidies (i.e., Medicare Part D subsidies) should also be aware that the outcome of this case may impact the coverage their health plans must provide for gender transition procedures, to the extent Section 1557 even survives ACA

repeal efforts. Otherwise noncovered employers that sponsor insured health plans may see insurance policy gender transition coverage options change based on the outcome of this action.

As the injunction only applies to the Rule’s “gender identity” and “termination of pregnancy” provisions, covered entities, including most healthcare providers and self-funded health plans that receive Medicare Part D subsidies, must continue to comply with other parts of the Rule, such as the requirement to provide language assistance to participants with limited English proficiency.

Bottom Line: In the employment context, this decision has several implications. First, the regulation itself will be influenced by President-Elect Trump’s actions relating to the ACA when he takes office. Total repeal of the ACA or portions of it could make this preliminary injunction moot. Even if the ACA is not repealed, Trump’s policies in the immediate aftermath of his election could influence whether this injunction becomes permanent. Second, employers with self-insured health plans subject to the Rule should watch this litigation closely to ensure compliance with the enjoined provisions if the injunction is removed. Healthcare facilities should also follow this litigation closely to ensure nondiscrimination in services provided. Finally, employers with insured plans may want to consult with their health insurance carriers and brokers to ensure that the plans they sponsor comply with the Rule and should keep an open line of communication with employees who may be concerned about health insurance coverage for gender transition related procedures.

Stay tuned for further updates on this rapidly developing area of the law.

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