

HHS Final Rule Rolls Back Health Care Protections for Transgender Workers

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The U.S. Department of Health and Human Services (HHS) announced a final rule on June 12 eliminating anti-discrimination protections based on gender identity in health care and health insurance that the agency says were unenforceable and exceeded the prior administration's authority.

The announcement came several days before the Supreme Court's landmark decision (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Supreme-Court-Title-VII-scope-of-protection.aspx) holding that an employer who fires a worker merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.

The HHS final rule focuses on the Affordable Care Act (ACA). The rule amends regulations interpreting Section 1557 of the ACA, the law's main anti-discrimination provision. Congress prohibited ACA-covered health programs from discriminating based on protected categories, such as race and sex, under federal civil rights statutes. In 2016, President Barack Obama's administration interpreted "sex discrimination" to include gender identity. However, a judge issued a preliminary injunction halting the interpretation in December 2016, and in October 2019, a federal court held that the provisions were unlawful.

"HHS has not been able to enforce these provisions since December 2016, and the provisions have been vacated since October 2019," the agency said.

The final rule keeps certain protections that were part of the 2016 rule, such as ensuring health care facilities provide access for people with disabilities and appropriate communication technology for those with visual or hearing impairments. The new rule also retains certain protections for patients who don't speak English.

"HHS respects the dignity of every human being, and as we have shown in our response to the pandemic, we vigorously protect and enforce the civil rights of all to the fullest extent permitted by our laws as passed by Congress. We are unwavering in our commitment to enforcing civil rights in health care," said Roger Severino, director of the HHS office for civil rights.

We've rounded up articles from *SHRM Online* and other trusted news sources on the proposed rule.

Defining Sex Discrimination

President Donald Trump's administration has consistently issued rules and regulations (<https://www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump>) defining "sex discrimination" as applying when people face discrimination for being male or female and not extending coverage to discrimination based on sexual orientation or gender identity. Supporters of the HHS final rule say the Obama administration exceeded its authority by defining "sex discrimination" too broadly. "We're going back to the plain meaning of those terms, which is based on biological sex," Severino said.

Feedback

(NPR (<https://www.npr.org/sections/health-shots/2020/06/12/868073068/transgender-health-protections-reversed-by-trump-administration>))

Supreme Court Ruling

On June 15, the Supreme Court ruled that the definition of sex under Title VII bars employment discrimination against workers based on their lesbian, gay, bisexual, transgender and queer (LGBTQ) status. "It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," wrote Justice Neil Gorsuch. The ruling could make it difficult for the Trump administration to argue that gender identity is excluded from the definition of sex under the ACA's anti-discrimination provisions. The HHS has not commented on how the high court decision will affect its rule, but the agency could argue that health care and employment are different issues, the agency has the authority to interpret the ACA's provisions or adopting the Supreme Court's definition of sex would infringe on health care providers' religious freedoms if they are required to provide transgender-related services.

(Fortune (<https://fortune.com/2020/06/15/supreme-court-lgbtq-discrimination-ruling-vote-decision-sctus-transgender-health-care-protections-obama-trump-law-gorsuch/>))

Legal Challenge Expected

Under the new HHS rule, health care providers and insurance companies that receive federal funding could refuse to provide or cover services such as transition-related care for transgender individuals. Lambda Legal, an advocacy group for LGBTQ individuals, plans to file a lawsuit (<https://twitter.com/LambdaLegal/status/1271549416969629697>). "We know that LGBTQ people experience discrimination at disproportionately higher rates when seeking medical care which, even before the COVID-19 pandemic, led to devastating health outcomes," said Sasha Buchert, senior attorney and co-director of Lambda Legal's Transgender Rights Project.

(Bloomberg Law (<https://news.bloomberglaw.com/health-law-and-business/hhs-moves-to-curtaill-abortion-transgender-health-protections>))

[SHRM members-only toolkit: *Employing Transgender Workers* (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/employingtransgenderworkers.aspx)]

Many Companies Oppose Retracting Transgender Rights

After the district court barred the government from enforcing the Obama administration's nondiscrimination rule, there were rumors that HHS would retract transgender rights. More than 50 companies—including Amazon, Apple, Facebook and Google—signed a letter sent to the department in 2018, asking the federal government to uphold legal protections for transgender individuals. "We oppose any administrative and legislative efforts to erase transgender protections through reinterpretation of existing laws and regulations," they wrote.

(SHRM Online (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/companies-oppose-retraction-transgender-rights.aspx))

Eliminating 'Costly' Regulations

HHS said the final rule will also save taxpayers about \$2.9 billion in "unnecessary regulatory burdens" over five years by eliminating the requirement for covered entities to send patients notices in 15 or more languages in many health care mailings. "Now more than ever, Americans do not want billions of dollars in ineffective regulatory burdens raising the costs of their healthcare, Severino said. "We are doing our part to reel in unnecessary costs that add economic burdens to patients, providers, and insurers alike,"

(Department of Health and Human Services (<https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>))

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