



Biden Administration Revives LGBTQ Health Care Protections

Gender-transition services at religiously affiliated hospitals remain controversial

By Stephen Miller, CEBS

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LGBTQ individuals will be protected against sexual orientation and gender identity discrimination when receiving health care, Health and Human Services (HHS) Secretary Xavier Becerra announced May 10, as the Biden administration reversed a policy put in place by the Trump administration that had removed protections based on sexual orientation and gender identity issued under the Obama administration.

Health care nondiscrimination protections for LGBTQ individuals have raised debate over whether religiously affiliated hospitals should be required to allow doctors to provide treatment and perform surgeries related to gender transition, among other matters. These issues led to litigation under the Obama-era rules and are likely to do so again.

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age or disability by entities that primarily provide health care and receive federal funding.

HHS announced in a statement (<https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html>) that its Office for Civil Rights will define sex discrimination in light of a June 2020 U.S. Supreme Court ruling in *Bostock v. Clayton County* (www.shrm.org/resourcesandtools/hr-topics/benefits/pages/3-checklists-for-avoiding-lgbtq-discrimination-in-your-benefit-programs.aspx), which extended the federal civil rights prohibition on sex discrimination to include sexual orientation and gender identity.

"Fear of discrimination can lead individuals to forgo care, which can have serious negative health consequences," Becerra said in the HHS statement. "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."

Grazie Pozo Christie, policy advisor for The Catholic Association, criticized the policy shift (<https://thecatholicassociation.org/politics-has-no-business-in-medicine/>). "Coercing doctors to carry out highly controversial and unproven 'treatments' like administering puberty blocking hormones to children and performing irreversible sex changes—against their best medical judgment and conscience—is the latest effort by the Biden administration to force anyone who dissents from its radical ideology into compliance," she said in a statement.

For further insights on the issues involved, *SHRM Online* has gathered the following articles.

A Policy Shift

Becerra said HHS action would restore protections under a provision of the ACA against sexual discrimination in health care.

"So now it's clear, there's no ambiguity: You cannot discriminate against people based on sexual orientation or gender identity," he said.

The Biden administration had recently reversed the prior administration's ban on transgender individuals serving in the U.S. military, among other actions.

(Reuters (<https://www.reuters.com/business/healthcare-pharmaceuticals/biden-administration-protect-gay-transgender-against-health-care-discrimination-2021-05-10/>))

Support and Opposition

Chase Strangio, deputy director for transgender justice with the LGBTQ and HIV project of the American Civil Liberties Union, said the Biden administration's action "affirms what transgender people have long said: Gender-affirming care is lifesaving care. ... With health care for transgender youth under attack by state legislatures, this move to protect LGBTQ people from discrimination in health care is critical."

Emily Kao, director of the DeVos Center for Religion and Civil Society at the Heritage Foundation, a conservative think tank, issued a statement that said, "The Biden administration's actions are unlawful overreach, not health care protections." Kao said the move "needlessly and dangerously politicizes medicine and threatens the conscience rights of medical providers."

(*The Washington Post* (https://www.washingtonpost.com/health/transgender-protection-hhs/2021/05/10/0852ce88-b17d-11eb-a980-a60af976ed44_story.html))

New Rulemaking Expected

Effective immediately, HHS said it will interpret Section 1557 of the ACA to encompass discrimination against someone on the basis of their sexual orientation or gender identity in health care.

The Biden administration has yet to put forward a formal rule on this issue, however. Normally, federal agencies must follow a lengthy process for issuing new rules and regulations. The Trump administration's rule, which took effect in August, took about a year to finalize and is still technically on the books.

"This is a policy announcement by the administration to say that this is the way that they read the statute and the way that they'll enforce it—and they can begin doing that without a rule," said Valarie Blake, a law professor at West Virginia University. "But I anticipate that they'll promulgate a new rule anyway that gives a little more shape to what sex discrimination means."

(NPR (<https://www.npr.org/2021/05/10/995418963/u-s-will-protect-gay-and-transgender-people-against-discrimination-in-health-care>))

New Rule May Not Be Needed

A senior HHS official, speaking on the condition of anonymity about the change, said the current administration does not need to rework the Trump-era rules. The official said two federal circuit courts have extended the Supreme Court's workplace-related ruling to apply its anti-discrimination holding to Title IX.

And in March, the official said, the Justice Department issued an opinion that also extended the Supreme Court's decision to Title IX.

With litigation still underway on the question of what "on the basis of sex" means, the official said HHS's Office for Civil Rights would obey any injunctions now in effect in limited circumstances, plus future court decisions. Still, the official said, the department's move marks the first time that the broader anti-discrimination interpretation will largely be able to be enforced.

(*The Washington Post* (https://www.washingtonpost.com/health/transgender-protection-hhs/2021/05/10/0852ce88-b17d-11eb-a980-a60af976ed44_story.html))

Lawsuits Assured

Litigation over the expanded HHS interpretation of sex discrimination is practically assured. Lawsuits remain over the Obama- and Trump-era rules to implement Section 1557, notwithstanding the Supreme Court's resounding decision in *Bostock*.

The Obama administration's rule to implement Section 1557 in 2016—including interpreting "sex" to include gender identity—was preliminarily enjoined and ultimately vacated by a federal district court in Texas. This litigation, known as *Franciscan Alliance*, was brought by a group of states and religiously affiliated health care organizations.

The plaintiffs asked that the HHS Office for Civil Rights be permanently enjoined from enforcing any interpretation that stems from the challenged provisions, but the district court judge concluded that an injunction was unnecessary since he had vacated the challenged parts of the rule, finding that they violated the Religious Freedom Restoration Act.

The religious plaintiffs in the *Franciscan Alliance* litigation are likely to soon cite the new HHS interpretation as another reason why their request for a permanent injunction should be granted.

(*Health Affairs* (<https://www.healthaffairs.org/doi/10.1377/hblog20210511.619811/full/>))

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