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Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
New York
New Jersey
Illinois
Delaware

Federal Court Issues Nationwide Injunction Against Enforcement of Affordable Care Act Rules on Gender Identity and Termination of Pregnancy

On the eve of their effective date, a federal district court enjoined the enforcement of certain regulations implementing Section 1557 of the Affordable Care Act (ACA), which prohibits discrimination in health programs and activities on the basis of race, color, national origin, sex, age or disability. In May, the Department of Health and Human Services (HHS) issued a final rule providing guidance on how Section 1557's protections will be implemented and enforced (Final Rule). Most controversial among these protections were provisions prohibiting discrimination on the basis of gender identity and termination of pregnancy under the mantle of "sex discrimination."

Five states sued to stop the rules as not authorized by federal statutory law. Three religious health care entities also challenged the Final Rule, adding that the regulations impinged on their religious rights. On Saturday, Dec. 31, the U.S. District Court for the Northern District of Texas granted a nationwide preliminary injunction, finding that the gender identity and termination of pregnancy provisions of the Final Rule contradict existing law, exceed statutory authority and, as applied to religious entities, likely violate the Religious Freedom Restoration Act (RFRA).

Section 1557's Prohibition Against Sex Discrimination

Pursuant to Section 1557, individuals cannot be discriminated against (e.g., denied health care or health coverage) based on their sex. The ACA has no definition of "sex" or "sex discrimination." Instead, the statute looks to other federal laws, such as Title IX (the federal statute prohibiting sex discrimination in education), for guidance in understanding the term "sex." Aimed at assuring equality of treatment, most of these rules are not controversial. But under the Final Rule, an entity that receives federal financial assistance (which includes health care providers accepting Medicare Part A or Medicaid) could not refuse to provide or insure gender transition services. Although HHS asserted in the Final Rule that including gender identity within the definition of sex discrimination "is consistent with well-accepted interpretations of other federal agencies and courts," Title IX does not specifically address those issues in the definition of "sex discrimination." HHS also declined to adopt a blanket religious exemption for the gender transition regulations or other provisions of the Final Rule that might conflict with religious principles, even though other federal law provides those exemptions. HHS explained that a blanket religious exemption could delay the provision of health care and discourage such individuals from seeking necessary care, with potentially life-threatening impacts.[1] Instead, HHS decided that "any religious concerns are appropriately addressed pursuant to pre-existing laws such as RFRA and provider conscience laws."[2]

Mark E. Chopko

Kristin J. Jones

For more information, contact Mark E. Chopko at 202.419.8410 or mchopko@stradley.com or Kristin J. Jones at 484.323.1355 or kjones@stradley.com.

A Challenge to Section 1557: *Franciscan Alliance v. Burwell*

Rejecting HHS's attempt to protect religious freedom in the Final Rule, the plaintiffs in *Franciscan Alliance v. Burwell*, alleged the Final Rule required doctors to "perform controversial and sometimes harmful medical procedures ostensibly designed to permanently change an individual's sex" and "forces them to violate their deeply held religious beliefs."[3] Additionally, the parties argued that the Section 1557 regulations would require health care providers to perform or refer patients for certain abortion services to avoid sex discrimination on the basis of "termination of pregnancy."

In deciding to enjoin enforcement, the district court considered the impact of the regulations on religious health care providers through the lens of the religious plaintiffs' submissions. The court reasoned that Section 1557 incorporates the statutory scheme set forth in Title IX, but Title IX includes religious protections that are inconsistent with Section 1557's implementing regulations. The failure to incorporate Title IX's religious and abortion exemptions "nullifies Congress's specific direction to prohibit only [sex discrimination] proscribed by Title IX" and "[t]hat is not permitted."[4]

Further, the court observed that RFRA allows the government to substantially burden a person's exercise of religion *only* if it demonstrates that the application of the burden to the person is the least restrictive means of furthering a compelling government interest. According to the court's analysis, the Section 1557 regulations did impose a substantial burden on the plaintiffs' religious exercise and the government failed to identify any compelling interest that would justify burdening religious exercise.

The government failed to submit much briefing on the issue, presumably expecting RFRA to be inconsequential given the Final Rule's express carve-out for RFRA-protected activities. The court, however, viewed the government's failure to identify a compelling interest as a serious deficit. The court further observed that the government's own health insurance programs — Medicare and Medicaid — do not mandate coverage for gender transition surgeries and that the military's TRICARE health insurance program specifically excludes transition coverage. According to the court, these facts supported its conclusion that the government did not have a compelling interest in substantially burdening religious exercise, as required by RFRA. Moreover, even assuming that the government had a compelling interest, the court held that the government had numerous alternatives available to provide access and coverage for gender transition and abortion procedures, and that these alternate means were less restrictive than the Section 1557 regulations. As a result, the court found that the religious plaintiffs were likely to prevail on the merits and that imminent and irreparable harm warranted a preliminary injunction.

Scope of the Injunction

The preliminary injunction applies nationwide and extends to the Section 1557 regulations prohibiting discrimination on the basis of gender identity and termination of pregnancy, in the context of both insurance coverage and the provision of health care services. In a press release on Tuesday, Jan. 3, HHS reminded involved organizations that it will continue to enforce other provisions of the law. HHS specifically highlighted that the regulations enhancing language assistance for people with limited English proficiency and other sex discrimination provisions are still in effect. Certainly, any health care agencies are not prohibited from providing gender transition and termination of pregnancy services if they so choose.

The case is still pending, and the government may appeal the decision. However, after Jan. 20, President-elect Donald Trump could decide to forego or revise the Final Rule, given his promised repeal of the ACA. This controversy will be one that most assuredly will occupy administrators and lawmakers as they chart the course of the next administration. Stay tuned …

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[1] 81 Fed. Reg. 31380.
[2] 81 Fed. Reg. 31435.
[3] Compl., at 2, *Franciscan Alliance v. Burwell*, No. 7:16-cv-00108 (N.D. Tex. Aug. 23, 2016). The ACLU has published the pleadings of the case here: https://www.aclu.org/cases/franciscan-alliance-v-burwell.
[4] Dec. 31, 2016, Order Granting Prelim. Inj. 37, ECF 62 (*Franciscan Alliance v. Burwell*, Civ. A. No. 7:16-cv-00108-O, N.D. Tex.).