

# PUBLICATION

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## Employers and Health Care Providers Take Note: Recent Announcements Forecast Increased Government Enforcement of Discrimination Laws Regarding Gender Identity and Sexual Orientation

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**The law regarding discrimination on the basis of "sex" continues to evolve rapidly. Perhaps sparked by last year's landmark discrimination ruling in the *Bostock* case and by President Biden's day-one Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, this summer has seen two significant changes in anti-discrimination policy.**

First, the U.S. Department of Health and Human Services (HHS) Office of Civil Rights (OCR) announced enforcement of Section 1557 of the Affordable Care Act (ACA) will begin using an interpretation that protects individuals from discrimination in health care on the basis of gender identity and/or sexual orientation.

Second, the U. S. Equal Employment Opportunity Commission (EEOC) has issued new guidance clarifying Title VII's protections based on sexual orientation and gender identity. Both announcements are anticipated to generate a renewed and robust government interest in enforcement of these protections.

### **Brief Background**

The ACA's Section 1557 has seen a number of interpretations in recent years. In 2016, under the Obama Administration, Section 1557's discrimination protections were expanded to include discrimination based on sex stereotyping and gender identity. As a result of this 2016 expansion, health providers and insurance companies receiving federal funding were required to provide equal access to coverage, services, and care to people regardless of gender identity. Four years later, the Trump Administration reversed these protections. The reversal was somewhat short lived, however, as just last year, the United States Supreme Court issued its landmark opinion in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020). The opinion addressed the protections afforded to employees based on sex pursuant to Title VII and held that discrimination "on the basis of sex" included discrimination on the basis of gender identity, sexual orientation, and transgender status.

Since then, the Fourth and Eleventh Circuits have also applied the *Bostock* ruling to Title IX's prohibition on sex discrimination. This broader definition of "sex" now also applies to Section 1557 of the ACA because the statute incorporates the non-discrimination protections of other federal statutes by reference, including Title IX. Accordingly, any changes in protections under the referenced statutes likewise apply to the protections granted under the ACA.

### **OCR Announcement**

On May 10, 2021, HHS OCR announced it will immediately interpret and enforce Section 1557's prohibition on sex discrimination to include discrimination on the basis of sexual orientation and gender identity. This reversal and notice of intent to enforce Section 1557's anti-discrimination policies are likely to have great practical significance. Prior to the May 10 announcement, OCR had paused its investigation of complaints on the basis of gender identity due to a 2016 federal injunction that relied on policies of the previous Administration. Accordingly, OCR has not investigated these claims in roughly five years. Moreover, OCR previously indicated its analysis of prior complaint data showed transgender patients were particularly susceptible to discrimination

involving denials of care or insurance coverage. Given the current Administration's focus on this issue, as OCR begins accepting complaints again and gathering data, we expect to see a marked increase in the number of OCR investigations involving this type of discrimination. Notably, OCR has stated it may take enforcement action if an entity has violated Section 1557, and it will do so based on the facts of each particular complaint. **Therefore, it is important any entity to which the ACA applies (almost all health care providers and some insurers, for example), take care to ensure its policies and procedures are non-discriminatory with particular regard to gender identity and sexual orientation.**

## EEOC Guidance

In addition to the OCR announcement, the EEOC issued new guidance clarifying the impact of *Bostock* on employers on June 15, 2021, the one-year anniversary of the *Bostock* decision. Though not binding, the EEOC publication provides further guidance and details the protections likely afforded to individuals based on sexual orientation and gender identity under Title VII.

Key provisions from the EEOC's new guidance include the following:

- Non-LGBTQ+ job applicants and employees are now also protected against sexual orientation and gender identity discrimination (e.g., an employer may not discriminate against an applicant or employee for being heterosexual or cisgender).
- Protections based on sexual orientation and gender identity include discrimination and harassment.
- An employer's discriminatory action may not be justified by customer or client preferences.
- Regardless of whether an employer knows of an employee's sexual orientation or gender identity, employers may not discriminate against an employee because that employee does not conform to sex-based stereotypes.
- Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity constitutes sex discrimination.
- Employers must allow employees equal access to a bathroom, locker room, or shower that corresponds to the employee's subjective gender identity.
- In certain circumstances, use of pronouns or names inconsistent with an individual's gender identity may be considered harassment.

Importantly, this guidance applies to employers with at least 15 employees, including federal, state, and local governments, unions, and employment agencies.

## Key Takeaways

In summary, the Biden Administration is clearly focused on ensuring meaningful protections with regard to gender identity and sexual orientation discrimination in both the workplace and in health care. Key takeaways from these recent events include the following:

- Health care providers should review training modules to ensure they appropriately educate staff on non-discriminatory patient care.

- Health care providers should review written policies, including information collection forms, patient bill of rights policies, and signage.
- Health care providers may want to develop verbal and written patient communication strategies.

If you have any questions about this topic, reach out to [Jennifer L. Curry](#), [Shayna Giles](#), [Melodie Hengerer](#) or your Baker Donelson attorney.