

Report on Medicare Compliance Volume 30, Number 19. May 17, 2021 In Sec. 1557 Reversal, HHS Will Enforce 2016 Regulation's Definition of Sex Discrimination

By Nina Youngstrom

Discriminating against patients because of their sexual orientation or gender identity will again put hospitals and other covered entities at risk of penalties under Sec. 1557 almost a year after the Trump administration told them not to worry about it.^[1] In a May 10 notice,^[2] HHS said it “will interpret and enforce Section 1557’s prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity.” The notice will guide the HHS Office for Civil Rights as it processes complaints and does investigations.

“It’s a step in the right direction for access to health care” and “for health equity,” said Toby Morgan, director of compliance, Section 1557 & Section 504 at Emory Healthcare in Atlanta.

The announcement is both a reversal of the Trump administration’s June 2020 Sec. 1557 regulation,^[3] which rewrote the Obama administration’s definition of sex discrimination, and a recognition of the landmark June 15 ruling from the U.S. Supreme Court in *Bostock v. Clayton County*.^[4] The court ruled that the Civil Rights Act of 1964,^[5] which bans sex discrimination, applies to discrimination against gay and transgender people in the workplace.

“The notification is a reflection of what the Supreme Court had already decided,” Morgan said. Emory won’t have to adjust its policy because its definition of sex discrimination includes discrimination based on gender identity and sexual orientation consistent with the 2016 version of the HHS rule. “We made sure not to change our discrimination policy at all,” Morgan said. “If you did amend the rule, you need to change it to what HHS is looking for and Bostock is looking for.”

Iliana Peters, former OCR acting deputy director, said the HHS enforcement notification is “exciting news,” but it won’t be the last word on the matter. “The history of this particular regulation is a mess” and the multiple previous regulations are still being litigated, said Peters, an attorney with Polsinelli in Washington, D.C. “HHS has put the regulated community on notice of how it will move forward, and that’s very important, but I think given all the outstanding questions, it’s very unclear from a compliance perspective what the specifics will look like.” She predicts HHS will promulgate rules at some point. In the meantime, covered entities should worry about enforcing their own nondiscrimination policy, including with regard to sexual orientation and gender identity.

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