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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.

Gathering Information at Registration

So far HHS hasn't modified the rest of the Sec. 1557 regulation, which also prohibits discrimination on the basis of race, color, national origin, age or disability. The Obama administration's 2016 regulation had comprehensive requirements, including posting nondiscrimination notices and taglines in 15 languages, but the Trump administration's 2020 version scaled them back considerably. Whether the Biden administration restores some is unclear because many hospitals welcomed the burden relief.

"I think they will probably amend it again," but "I doubt it's on top of his to-do list, so they're sending out the notification to let people know they took Bostock into consideration," Morgan said.

Although there are other civil rights laws with similar protections, such as Title VII and Title IX of the Civil Rights Act, Sec. 1557, which comes from the Affordable Care Act, was the first to specifically address discrimination in the health care industry. The 2016 version of the regulation defined discrimination "on the basis of sex" to include termination of pregnancy and gender identity, which it described as a person's internal sense of being "male, female, neither, or a combination of male and female." But it turned out to be just words on paper at the time because Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas in December 2016 entered a nationwide injunction barring HHS from enforcing the Sec. 1557 nondiscrimination provision on the basis of gender identity or termination of a pregnancy in *Franciscan Alliance, Inc. v. Burwell*.[6]

'Make Sure Your Operations Reflect Your Policy'

His order became moot, however, when the Trump administration revamped the Sec. 1557 regulation. Among other things, it eliminated gender identity and termination of a pregnancy from the definition of sex discrimination. "'Sex' according to its original and ordinary public meaning refers to the biological binary of male and female that human beings share with other mammals," according to the 2020 version.

But it couldn't be enforced either because of two 2020 court decisions that stayed the portions of the rule that addressed sexual orientation and gender identity. On Aug. 17, 2020, the U.S. District Court for the Eastern District of New York "preliminarily enjoined" the enforcement of the repeal of the 2016 provisions in *Asapansa-Johnson Walker v. Azar*,[7] and on Sept. 2, 2020, the U.S. District Court for the District of Columbia did the same thing in *Whitman-Walker Clinic v. HHS*.[8]

"When you see two courts doing something like that, it sends a strong signal," Morgan noted. "They're saying [the 2020 rule] was an unlawful interpretation" of sex discrimination. And now, with the HHS notification, hospitals should have policies that prohibit sex discrimination as it's defined in the HHS notification and "make sure your operations reflect your policy," Morgan said. "You can have policies that don't discriminate on the basis of sex, including gender identity and sexual orientation, but if you don't accommodate patients in those two classes, that makes the policy empty. Make sure you have things in place to reflect the policy of nondiscrimination."

To that end, Morgan thinks hospitals should have a landing page that addresses the LGBTQ community "so they're aware of your stance with regard to nondiscrimination." She recommends a "forward-facing page for patients. They don't necessarily see a policy unless something happens. That's a great first step." In addition, hospitals should collect information in their registration process and electronic health records that would be beneficial to the LGBTQ community, Morgan said. "Make sure you capture and collect information to assess them appropriately for routine exams or surgical procedures." Otherwise, for example, a transgender man may not be referred for a mammogram or a transgender woman may not be offered prostate antigen screening in time to catch cancer early.

Having accurate information about gender also prevents tests that may waste a patient's money (e.g., pregnancy tests before imaging or surgery). "Also be sensitive to how you communicate with the person," Morgan said. "Using their preferred pronouns is important to their feeling respected."

The Fate of Taglines and Other Requirements

Even though the 2020 regulation ditched other Sec. 1557 requirements in the name of burden relief, Emory kept

them in place, Morgan said. The Sec. 1557 regulation requires covered entities—including hospitals, health clinics and nursing homes—to "take steps to provide meaningful access" to limited English proficiency (LEP) patients, including qualified interpreters, and ensure effective communication with people with disabilities. To achieve that goal, the 2016 regulation had a litany of mandates. For example, covered entities were required to post nondiscrimination notices and "taglines" in 15 languages that explain that free language assistance services are available on their website and in conspicuous places in their buildings and publish them in major publications. They had to have a compliance coordinator and a written grievance procedure, among other things. The 2020 regulation gutted a lot of the requirements, saying some of it was overkill. Covered entities don't have to post nondiscrimination notices and taglines in 15 languages "on significant documents and significant communications," or have a compliance coordinator or grievance procedure.

The regulation, however, retains the requirement that covered entities provide qualified translators and interpreters to LEP patients. They can't require patients to bring their own interpreter or rely on a friend, family member or minor child to interpret except in an emergency. And hospitals and other providers must give "primary consideration" to deaf and hard-of-hearing patients who request in-person interpreters instead of video remote interpreting services. In other words, their wishes must be honored unless a health system can provide an equally effective alternative or if the patients' preferences present an undue administrative or financial burden.

Notwithstanding the offer of burden relief, Emory didn't change anything. It has posters about its nondiscrimination policies all over its hospitals and clinics and taglines. "For people with disabilities and those from non-English-speaking countries, that's huge," she noted. Also, "we have a forward-facing website for patients that includes our Nondiscrimination Policy and an LGBTQ landing page reaffirming that we don't discriminate on the basis of gender identity or sexual orientation." One of Emory's aesthetic surgery centers also is revamping portions of its website specifically for people who are transgender, Morgan said. "It's good to include as much stuff on the website as possible" (e.g., about breast reduction, removal and augmentation). The idea is to make sure the information is out there so transgender people don't have to work harder to find it.

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1 Nina Youngstrom, "Sec. 1557 Rule Drops Taglines, Narrows Definition of 'Sex'; Court Decision Opens It Up," *Report on Medicare Compliance* 29, no. 23 (June 22, 2020), https://bit.ly/34kU9xX.
2 HHS, "Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972," May 10, 2021, https://bit.ly/3oe5yrC.
3 Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020), https://bit.ly/2YR6vd2.
4 Bostock v. Clayton County, 590 U.S. ____ (2020), https://bit.ly/2zN7LW8.
5 Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (July 2, 1964).
6 Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660 (2016).
7 Asapansa-Johnson Walker v. Azar, Case No. 20-CV-2834 (E.D.N.Y. 2020), https://bit.ly/3f9yPPU.
8 Whitman-Walker Clinic v. HHS, Civil Action No. 20-1630 (D.C. 2020), https://bit.ly/3tFWDzZ.