Federal Court Enjoins Enforcement of Section 1557's Gender-identity Protections in Healthcare

Andrew C. Stevens

On New Year's Eve, a federal court in the Northern District of Texas granted a nationwide preliminary injunction against two related HHS interpretations of the final Nondiscrimination rule issued under Section 1557 of the Affordable Care Act. (I previously wrote about this case and the questions it presented here.)[1]

First, the court ruled that HHS exceeded its authority by interpreting Section 1557's prohibition of sex discrimination as also prohibiting discrimination on the basis of gender identity. Second, the court also ruled that this interpretation—together with HHS's interpretation that sex discrimination includes discrimination on the basis of termination of pregnancy—likely violates the religious healthcare-provider Plaintiffs' religious liberty under the federal Religious Freedom Restoration Act.

Background on Section 1557 of the Affordable Care Act and the Final Regulatory Rule

Section 1557 of the Affordable Care Act is simply entitled "Nondiscrimination" and is the first civil rights law to specifically address the healthcare industry. It is also the first civil rights law to prohibit sex discrimination in healthcare, in addition to discrimination on the basis of race, color, national origin, disability, and age. For more background on Section 1557 generally, please see my earlier article.[2]

On May 18, 2016, HHS issued the final regulatory[3] rule under Section 1557, implementing its nondiscrimination provisions. In this rule, HHS required covered healthcare providers to take immediate action for compliance. For example, covered healthcare providers with 15 or more employees must: 1) designate an employee responsible for compliance with the final rule; 2) adopt a grievance procedure to resolve complaints of discrimination; and 3) post nondiscrimination notices and taglines in conspicuous physical locations, on the providers' websites, and in significant publications and communications.

In this final rule, HHS also adopted several significant interpretations of Section 1557. One such interpretation is that Section 1557 provides for a private right of action for a claim of disparate impact discrimination on the basis of any of the enumerated protected classes. As I've written before, this creates immediate new risks[4] for covered healthcare providers.

But HHS also interpreted Section 1557 (by way of its reference to Title IX) as prohibiting discrimination on the basis of gender identity and termination of pregnancy. These interpretations—as well as HHS's decision to not include any religious exemption to its final rule for religious healthcare providers—are the bases of the court's order granting the preliminary injunction.

1 https://www.linkedin.com/pulse/led-texas-several-states-challenge-section-1557s-gender-drew-stevens?trk=mp-author-card
2 http://www.agg.com/The-Future-of-Healthcare-Discrimination-LitigationSection-1557-of-the-ACA-08-17-2015/
3 https://www.linkedin.com/pulse/section-1557-aca-impact-final-rule-healthcare-drew-stevens?trk=pulse_spock-articles
4 http://www.jdsupra.com/legalnews/new-risks-for-healthcare-providers-86496/

The Court's Order Granting the Preliminary Injunction

A detailed summary of the court's order by Health Affairs' Timothy Jost can be found here.[5]

In short, the court first found that the plaintiffs had sufficient standing to seek the requested relief. The court then declined to apply *Chevron*[6] deference to HHS's gender-identity interpretation, ruling that Section 1557 is unambiguous. In doing so, the court held that Section 1557's reference to Title IX limits the scope of sex discrimination under Section 1557 to that covered by Title IX. Therefore, the court ruled, HHS's interpretation of sex discrimination as including gender-identity discrimination was contrary to the law under the Administrative Procedure Act.

Moving on to the religious healthcare-provider Plaintiffs, the court first found that HHS's failure to incorporate the religious exemptions provided for in Title IX were also contrary to law. Next, the court found that the religious healthcare providers were likely to succeed on their federal Religious Freedom Restoration Act claim because the final rule placed substantial pressure on the plaintiffs to perform or refer for gender transition procedures and/or abortions.

The court therefore enjoined HHS from enforcing the final rule's prohibition against discrimination on the basis of gender identity or termination of pregnancy. No other unchallenged provisions of the final rule are affected by this injunction.

Impact on Section 1557 and on Healthcare Providers

This order is important for several reasons. First, the federal government is—at present—enjoined nationwide from enforcing its Section 1557's gender identity and termination of pregnancy protections.

Second, this order conflicts with earlier district court orders that credited HHS's interpretation of Section 1557's prohibition on sex discrimination as extending to gender identity discrimination. *See, e.g., Rumble v. Fairview Health Services*, 2015 WL 1197415 at *10-11 (D. Minn. Mar. 16, 2015) (upholding Section 1557's gender identity protections under deference to then-Director Rodriguez's opinion letter on the question). It will, therefore, be important to monitor how courts address the several now-pending complaints laying claim to Section 1557's gender identity protections. *See, e.g., Robinson v. Dignity Health*, 2016 WL 7102832 (N.D. Cal. Dec. 6, 2016) (staying gender identity complaint under Section 1557).

As for healthcare providers in particular, this landscape now presents tremendous uncertainty. Although the incoming Trump Administration may not appeal the injunction against Section 1557's gender identity protections—private plaintiffs may continue to press the issue in the courts. In addition, the Northern District of Texas or the Fifth Circuit may allow the ACLU to intervene and defend the appeal since the ACLU had already sought to intervene in the case.

In sum, healthcare providers should closely monitor any new developments on Section 1557 moving forward and seek the advice of counsel where appropriate.

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5 http://healthaffairs.org/blog/2017/01/02/aca-pregnancy-termination-gender-identity-protections-blocked-wellness-program-incentives-survive/

6 "*Chevron* deference" requires courts to defer to administrative agencies' interpretations of statutes where the statute is ambiguous and the agency interpretation is reasonable. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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