

Will the Affordable Care Act's Non-Discrimination Regulations Continue to Cover Gender Identity and Transition Services?

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Section 1557 of the Affordable Care Act ("ACA") prohibits covered entities from discriminating on the basis of characteristics protected under several statutes, namely Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and Section 794 of Title 29. 42 U.S.C. § 18116. In 2016, the Department of Health and Human Services ("HHS") published [final regulations](#) implementing Section 1557. The regulations prohibit discrimination in providing or administering health care coverage for gender identity or gender transition services. 45 C.F.R. § 92.207. On December 31, 2016, a [Northern District of Texas judge](#) found that the regulations may have failed to incorporate exceptions for religious exemptions in violation of the Religious Freedom Restoration Act ("RFRA"), thereby potentially violating the Administrative Procedure Act by contradicting existing law. The court granted a nationwide injunction prohibiting enforcement of Section 1557 relating to gender identity. Despite the injunction, parties continue to argue that the text of Section 1557 protects gender identity and transgender services because it incorporates various anti-discrimination statutes. See *Prescott v. Rady Children's Hospital-San Diego*, 2017 U.S. Dist. LEXIS 160259 (S.D. Cal. Sept. 27, 2017).

Given the Trump Administration's ACA strategy, it appears quite possible that HHS regulations implementing Section 1557 will be revisited and re-written to exclude protections for gender identity and transgender services. After the failed attempts to repeal and replace the ACA, the Administration altered its strategies, resulting in President Trump's October 12, 2017 [Executive Order](#) directing agencies to amend guidance and regulations associated with the ACA to alter how the existing law is implemented. While this Executive Order is aimed at relaxing Health Insurance Rules, it signals a continued focus on contracting ACA requirements.

Moreover, the Administration's other recent actions demonstrate a shift away from inclusion of gender identity and transgender status as protected for various purposes. For instance:

- On August 25, 2017, President Trump signed a memorandum directing the Pentagon to ban transgender individuals from openly serving in the military due to asserted "national security considerations." However, on October 30, 2017, a D.C. federal judge partially enjoined the policy, reverting to the status quo prior to the August memorandum, because the court determined that a number of factors strongly suggest that the policy violates the Fifth Amendment.
- More recently, Attorney General Jeff Sessions issued a [letter](#) to the U.S. Attorneys' offices and agency heads stating that Title VII of the Civil Rights Act of 1964's sex discrimination protections do not extend to transgender individuals. This demonstrated a sudden reversal of the Department of Justice's ("DOJ") position (as set forth in former Attorney General Eric Holder's December 2014 order) that "sex" includes



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gender identity and protected transgender individuals.

- The Attorney General's letter aligned with the DOJ's position in *Zarda v. Altitude Express* (and contradicted the EEOC's position) that sexual orientation is not covered under Title VII. *Zarda* was heard on September 26, 2017 by the full complement of active judges of the U.S. Court of Appeals for the Second Circuit.
- On October 6, 2017, Attorney General Sessions issued a [directive](#) for federal agencies to review regulations to ensure as much accommodation as possible for those who believe their religious freedoms are being violated, and contended that the RFRA applies to corporations, companies and private firms, in addition to individuals.

These actions will likely encourage federal agencies to scale back regulations prohibiting discrimination on the basis of sexual orientation, gender identity and transgender status. Given the current climate surrounding the ACA, and the Administration's position that current anti-discrimination statutes do not prohibit discrimination on the basis of gender identity and transgender status, a revision of Section 1557 regulations to exclude protections for gender identity and transgender services seems likely. As *Prescott v. Rady Children's Hospital* illustrates, however, a change in policy by the Administration likely will not deter individuals and advocacy groups from continuing to contend that Section 1557 does provide rights to health care benefits for gender identity and gender transition services. Health care providers, insurers, and employers should closely monitor this issue and consult with counsel as further developments occur to ensure compliance with Section 1557 and its implementing regulations.

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