

Legal Update

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HHS Announces New Interpretation of Section 1557 Sex Discrimination

On May 10, 2021, the Department of Health and Human Services (HHS) issued a [notice](#) announcing that, effective immediately, it will now interpret and enforce the prohibitions on discrimination based on sex under Section 1557 of the Affordable Care Act (ACA) to include:

- Discrimination on the basis of **sexual orientation**; and
- Discrimination on the basis of **gender identity**.

ACA Section 1557

Under Section 1557, discrimination on the basis of sex is prohibited in any health program or activity that receives federal funds or is administered by a federal agency. A 2016 HHS regulation defined the term “sex” to include sex stereotypes and gender identity, along with pregnancy termination and other pregnancy-related conditions.

In 2020, HHS issued new regulations that changed the 2016 definition of “sex” to allow for distinctions based on “the biological binary of male and female.” The 2020 rule was set to go into effect on Aug. 18, 2020. However, a federal district court blocked HHS from enforcing the 2020 version of the rule. The 2016 regulation remained in effect pending further court action.

HHS Interpretation

As a result of HHS’ new interpretation, entities covered by Section 1557 are prohibited from discriminating against consumers on the basis of sexual orientation or gender identity. This interpretation will guide the Office of Civil Rights (OCR) in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

This interpretation was issued in light of the U.S. Supreme Court’s decision in [Bostock v. Clayton County](#), which states that employment discrimination based on sexual orientation or gender identity violates Title VII of the Civil Rights Act.

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Highlights

Bostock Ruling

Employment discrimination based on sexual orientation or gender identity violates Title VII of the Civil Rights Act

Sexual Orientation Defined

A person’s sexual attractions, whether directed toward individuals of the same sex (homosexual), the other sex (heterosexual) or both sexes (bisexual).

Gender Identity Defined

One’s internal sense of gender, which may be different from the sex assigned at birth.

HHS will now enforce Section 1557 to include discrimination on the basis of sexual orientation or gender identity.