

# Talking points for health care providers regarding LGBTQ nondiscrimination in health care

**NOTE:** The talking points below have been drafted for use **after** the issuance of a new rule implementing Section 1557 of the Affordable Care Act, the Health Care Rights Law. Please note that the **contents may change** depending on the content of the proposed rule. If you have any questions about the below and the contents of the rule, please contact Sharita Gruberg at [sgruberg@americanprogress.org](mailto:sgruberg@americanprogress.org) or Sean Cahill at [scahill@fenwayhealth.org](mailto:scahill@fenwayhealth.org).

## **The attack on the Health Care Rights Law is the latest instance of the Trump-Pence Administration pursuing an anti-LGBTQ agenda.**

- The Trump-Pence Administration has proposed changes to the Health Care Rights Law, also known as Section 1557 of the Affordable Care Act, which would make it harder for transgender people, lesbian, gay and bisexual individuals, same-sex parents, pregnant individuals, and other patients to get medical attention.
- The proposed rules, announced May 2, 2019, constitute another attempt to grant a **license to discriminate**. The administration should **put patients first** rather than creating barriers to receiving the care they need.
- The Trump Administration’s attack on the Health Care Rights Law is the latest in its push to create a license to discriminate. It has also enacted a number of religious refusal policies prior to this proposed rule seeking to allow individuals and businesses, including health care providers, to refuse to serve LGBTQ people and same-sex couples based on religious or moral beliefs.<sup>1,2,3</sup>

**Health care is a civil and human right. Nobody should be turned away from care, with their health and lives put at risk, because of who they are. President Trump and Vice President Pence are using every tool at their disposal to undermine the law and deny basic rights to LGBTQ people.**

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<sup>1</sup> U.S. Department of Health and Human Services. (2017). *Draft Strategic Plan FY 2018-2022*.

<https://www.hhs.gov/about/strategic-plan/index.html>

<sup>2</sup> Attorney General Jeff Sessions. 2017. “Federal law protections for religious liberty. Memorandum for all executive departments and agencies.” Washington, DC. <https://www.justice.gov/opa/press-release/file/1001891/download>

<sup>3</sup> U.S. Department of Health and Human Services. “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority.” Proposed Rule, January 26, 2018. <https://www.federalregister.gov/documents/2018/01/26/2018-01226/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority>



**Anti-LGBTQ discrimination is a barrier to accessing care and exacerbates LGBT health disparities.**

- Anti-LGBTQ discrimination in health care acts as a barrier to accessing necessary preventative and emergency health care, and it contributes to the health disparities that disproportionately burden the LGBT community.<sup>4,5</sup> Discrimination—and even the potential for discrimination—can deter LGBT people from seeking care. A survey by the Center for American Progress found 14 percent of LGBTQ people who had experienced discrimination on the basis of their sexual orientation or gender identity in the past year reported avoiding or postponing care that they needed.<sup>6</sup> Organizations like the Joint Commission,<sup>7</sup> Healthy People 2020,<sup>8</sup> and the Institute of Medicine<sup>9</sup> have all noted these disparities and prioritized reducing or eliminating them. The ability of LGBT people to access nondiscriminatory health care is essential to reducing LGBT health disparities and improving health equity and quality of care.

**Providing nondiscriminatory care to LGBTQ patients improves quality and patient satisfaction**

- Providing care to all patients in a nondiscriminatory manner enables providers to deliver high quality and patient-centered care. Most health care organizations have quality improvement strategies and include in their mission statements providing comprehensive and competent health care to all who need it. Ensuring that LGBT patients can access care is in line with the mission statements of most health care organizations and will contribute to quality improvement efforts and help improve patient satisfaction.

**LGBTQ nondiscrimination policies have been required by the Joint Commission since 2011, and have been adopted by hundreds of hospitals and other health care institutions**

- While many providers strive to do the right thing and treat all patients equally to ensure quality care, robust legal protections and enforcement of these protections is critical to ensure that no matter where someone goes for care, that individual is treated with

<sup>4</sup> Lambda Legal. 2010. *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination against LGBT People and People with HIV*. New York: Lambda Legal.

<sup>5</sup> Reisner SL, White Hughto JM, Dunham E, Heflin K, Begenyi JB, Coffey-Esquivel J, Cahill S. 2015, July. Legal protections in public accommodations settings: A critical public health issue for transgender and gender nonconforming people. *Milbank Q*. 2015 Sep;93(3):484-515. doi: 10.1111/1468-0009.12127. Epub 2015 Jul 29.

<sup>6</sup> Ahmed Mirza, Shabab and Rooney, Caitlin. 2018. *Discrimination Prevents LGBTQ People from Accessing Health Care*. Washington, DC: Center for American Progress. Retrieved from: <https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

<sup>7</sup> The Joint Commission: *Advancing Effective Communication, Cultural Competence, and Patient- and Family-Centered Care for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community: A Field Guide*. Oak Brook, IL, Oct. 2011. Retrieved from: <http://www.jointcommission.org/assets/1/18/LGBTFieldGuide.pdf>

<sup>8</sup> Healthy People 2020. *Lesbian, Gay, Bisexual, and Transgender Health*. Office of Disease Prevention and Health Promotion. <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health>

<sup>9</sup> Institute of Medicine. 2011. *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*. <https://www.iom.edu/~media/Files/Report%20Files/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People/LGBT%20Health%202011%20Report%20Brief.pdf>.



dignity and respect. It is now the norm for health care institutions to have sexual orientation and gender identity nondiscrimination policies to protect patients against discrimination in clinical settings. The Joint Commission has required health care institutions to have sexual orientation and gender identity nondiscrimination policies as a condition of accreditation since 2011.<sup>10</sup> According to the Human Rights Campaign's Healthcare Equality Index in 2018, at least 621 health care institutions across the U.S. had sexual orientation and gender identity nondiscrimination policies.<sup>11</sup>

**The attempt to erase protections for LGBTQ people shows little regard for the law itself. The Health Care Rights Law builds on longstanding federal civil rights laws. As President Trump has discovered on numerous occasions, his administration cannot ignore the law. An attempt to exclude LGBTQ people and pregnant people from the Health Care Rights Law would *contradict decades of federal court interpretations* of who is protected under sex discrimination laws.**

- While there is no federal nondiscrimination law explicitly prohibiting discrimination on the basis of sexual orientation and gender identity, a number of federal court rulings and Equal Employment Opportunity Commission rulings have found that prohibitions on sex discrimination protect LGBTQ people. The Affordable Care Act's prohibition on sex discrimination derives its protections from Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Although these laws do not explicitly protect LGBTQ people, the existing rule reflects the consensus of many federal courts that the sex discrimination prohibitions in Title VII, Title IX, and the Health Care Rights Law also prohibit discrimination based on gender identity and prohibit certain forms of discrimination based on sexual orientation under prohibitions on sex stereotyping.<sup>12,13</sup>
- Trump's proposals would exclude LGBTQ people and pregnant individuals from the law and endorse discrimination against patients. No one should be judged or shamed for their personal health decisions. But these proposals would open the door to this widespread discrimination.

**LGBTQ nondiscrimination in health care is even more important given the rise in religion-based discrimination policies at the state and federal level**

- LGBTQ nondiscrimination in health care is even more important now as states such as Mississippi and Tennessee have enacted anti-LGBTQ laws that could allow health care providers to discriminate against LGBTQ people. Altogether 12 states have some form of

<sup>10</sup> The Joint Commission. *Advancing Effective Communication, Cultural Competence, and Patient- and Family-Centered Care for the Lesbian, Gay, Bisexual, and Transgender (LGBT) Community: A Field Guide*. 2011. Oak Brook, IL: Joint Commission Resources. <https://www.jointcommission.org/assets/1/18/LGBTFieldGuide.pdf>

<sup>11</sup> Human Rights Campaign. *Healthcare Equality Index 2018: Rising to the New Standard of Promoting Equitable and Inclusive Care for Lesbian, Gay, Bisexual, Transgender & Queer Patients and Their Families*. [https://assets2.hrc.org/files/assets/resources/HEI-2018-FinalReport.pdf?\\_ga=2.117680842.2127962061.1532708305-649349840.1531233752](https://assets2.hrc.org/files/assets/resources/HEI-2018-FinalReport.pdf?_ga=2.117680842.2127962061.1532708305-649349840.1531233752)

<sup>12</sup> U.S. Equal Employment Opportunity Commission (updated 2017). Examples of court decisions supporting coverage of LGBT-related discrimination under Title VII. [https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt\\_examples\\_decisions.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm)

<sup>13</sup> Cianciotto J, Cahill S. *LGBT youth in America's schools*. Ann Arbor: University of Michigan Press. 2012. 63-65, 79.



religious refusal legislation that could authorize discrimination against LGBTQ people.<sup>14</sup> Four states, including Mississippi and Tennessee, have religious refusal laws that allow medical professionals to refuse to serve LGBTQ people.<sup>15</sup> The Mississippi law, HB 1523, allows people to refuse to provide services based on their personal belief that “marriage is or should be recognized as the union of one man and one woman; sexual relations are properly reserved to such a marriage; and male (man) or female (women) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”<sup>16</sup> The Tennessee law, HB 1840, allows therapists and counselors to reject any patient who has “goals, outcomes, or behaviors” that would violate the “sincerely held principles” of the provider.<sup>17</sup>

**BOTTOM LINE:** The Health Care Rights Law is key to ensuring that everyone can access the care they need, free of discrimination, and enjoy the full benefits and protections of the Affordable Care Act. An attack on the Affordable Care Act is an attack on LGBTQ people and their health and wellbeing.

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<sup>14</sup> Movement Advancement Project. (2017). *State Religious Exemption Laws*. [http://www.lgbtmap.org/equality-maps/religious\\_exemption\\_laws](http://www.lgbtmap.org/equality-maps/religious_exemption_laws)

<sup>15</sup> *Ibid.*

<sup>16</sup> Mississippi House of Representatives. 2016. House Bill No. 1523. <http://billstatus.ls.state.ms.us/documents/2016/pdf/HB/1500-1599/HB1523SG.pdf>

<sup>17</sup> Tennessee State Legislature. (2016). An Act to amend Tennessee Code Annotated, Title 4; Title 49 and Title 63, relative to conscientious objections to the provision of counseling and therapy. Amendment No. 1. Available online at: <http://www.capitol.tn.gov/Bills/109/Amend/HA1006.pdf>