
New rule proposes removal of LGBT nondiscrimination provisions from Section 1557 and other health care regulations

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Introduction

On June 14, 2019, the Trump Administration officially released a proposed rule that would reverse the 2016 final rule implementing Section 1557, the nondiscrimination provision of the Affordable Care Act (ACA). The 2016 Section 1557 rule explicitly prohibits gender identity discrimination, including discrimination against intersex and non-binary people, in health care facilities and programs receiving federal funding. The rule also prohibits some forms of sexual orientation discrimination that take the form of sex stereotyping. In addition to reversing the 2016 ACA nondiscrimination rule, the Trump Administration is proposing to remove explicit sexual orientation and gender identity nondiscrimination language from half a dozen other federal health care regulations governing private health insurance, Medicaid, and elder health care and services. This move by the Trump Administration would reverse a decade of progress in health care policy, and would undermine efforts to increase access to care and reduce LGBT health disparities.

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The Impact of the Proposed Rule on Section 1557

The nondiscrimination language included in the 2016 final rule implementing Section 1557 of the ACA was a landmark accomplishment for LGBT nondiscrimination protections. It states that discrimination based on gender identity is a form of sex discrimination, thereby explicitly prohibiting gender identity discrimination across federally-funded health care programs and extending crucial protections to transgender, non-binary, and intersex patients.¹ The Section 1557 rule has also been critical for addressing discriminatory coverage exclusions for transgender people in health insurance plans, helping to expand access to medically necessary gender affirmation services for transgender people. The Section 1557 rule also prohibits some forms of sexual orientation discrimination that take the form of sex stereotyping. This could include, for example, denying fertility treatment to a lesbian couple based on the stereotypical belief that women should only be in relationships with men, or that every child should be raised by a mother and a father. In the final 2016 rule, the Office of Civil Rights at the Department of Health and Human Services stated:

OCR concludes that Section 1557's prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes. Accordingly, OCR will evaluate complaints alleging sex discrimination related to an

¹ U.S. Department of Health and Human Services. Nondiscrimination in health programs and activities. *Federal Register*. May 18, 2016. Vol. 81, No. 96, Page 31387. <https://www.federalregister.gov/articles/2016/05/18/2016-11458/nondiscrimination-in-healthprograms-and-activities>

individual's sexual orientation to determine whether they can be addressed under Section 1557.²

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The Section 1557 nondiscrimination rule represents a critical step by the federal government to expand health care access for LGBT people, especially for transgender, non-binary, and intersex people. LGBT people face widespread discrimination in health care, such as being verbally or physically harassed or being denied treatment altogether.³ This discrimination acts as a barrier to seeking necessary routine, preventive care as well as emergency care. For

example, the 2015 U.S. Transgender Survey of nearly 28,000 transgender people found that in the last year, 33% of respondents had experienced anti-transgender discrimination in health care, and 23% of respondents chose to forego necessary health care due to fear of discrimination.⁴ A 2018 survey by the Center for American Progress found that 14% of LGBT respondents who had previously experienced discrimination in health care avoided seeking necessary medical care, and 17% avoided seeking preventive care in the past year.⁵ This is why The Joint Commission has required SOGI nondiscrimination policies as a prerequisite to accreditation for health care programs since 2011. The Section 1557 final rule is necessary to address discrimination in health care, which in turn helps to reduce LGBT health disparities.

The Trump Administration's proposed rule threatens to undermine the progress that has been made over the past decade to address and reduce anti-LGBT discrimination in health care. The proposed rule also runs contrary to numerous rulings by federal courts and the Equal Employment Opportunity Commission that have found that federal prohibitions on sex discrimination prohibit discrimination based on sexual orientation and gender identity.⁶

Repealing Explicit Sexual Orientation and Gender Identity Nondiscrimination Provisions in other Health Care Regulations

² Ibid. Pages 31389-31390.

³ 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.

⁴ James SE, Herman JL, Rankin S, Keisling M, Mottet L, Anafi M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.

⁵ Mirza S and Rooney C. (2018). *Discrimination Prevents LGBTQ People from Accessing Health Care*. Center for American Progress.

⁶ 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

While many have focused on the revisions to Section 1557 and the anti-transgender implications of the proposed rule, the scope of the proposed rule actually extends beyond the gender identity and sex stereotyping provisions of the Obama-era Section 1557 final rule. The Trump Administration is also proposing to revise several other important health care regulations that explicitly prohibit both sexual orientation and gender identity (SOGI) discrimination. If finalized, the proposed rule would remove explicit SOGI nondiscrimination provisions from:

- Regulations governing the health insurance exchanges, including 34 federally facilitated exchanges and 17 state exchanges;
- Regulations governing Qualified Health Plans;
- Medicaid regulations, including language that explicitly prohibits sexual orientation and gender identity discrimination in Medicaid enrollment (42 CFR § 438.3(d)(4)) and availability of services (42 CFR § 438.206), and language highlighting the importance of access and cultural considerations that calls on states to care for LGBT patients and others in a culturally competent manner (42 CFR § 440.262);
- Regulations governing the access to services provided by the Program of All-Inclusive Care for the Elderly (PACE) (42 CFR § 460.98). PACE coordinates health care for elders to allow them to “age in place” in the community rather than going into a nursing home.

The scope of the proposed rule extends beyond the gender identity nondiscrimination provision of Section 1557. It would also remove sexual orientation and gender identity provisions from several other important health care regulations.

The proposed removal of SOGI nondiscrimination provisions from these regulations governing Medicaid enrollment and services, state and federal health insurance exchanges, insurance coverage, Qualified Health Plans, and the Program of All-Inclusive Care for the Elderly (the PACE Program) would hurt LGBT people who have disproportionately benefited from many of these programs. LGBT elders experience high rates of social isolation,⁷ and many LGBT elders have experienced discrimination in accessing health, aging, and disability services.⁸ Rescinding nondiscrimination provisions from the PACE program will likely make many LGBT elders more fearful of discrimination in accessing health care and elder services. This will likely exacerbate social isolation among LGBT older adults and could negatively affect their health.

⁷ Fredriksen-Goldsen K, Kim H, Barkan S, Muraco A, Hoy-Ellis C. (2013). Health disparities among lesbian, gay, and bisexual older adults: Results from a population-based study. *American Journal of Public Health*, 103(10), 1802–1809. doi:10.2105/AJPH.2012.301110

⁸ Fredriksen-Goldsen K, Kim H, Emler C, Muraco A, Erosheva E, Hoy-Ellis C, Petry H. (2011). *The aging and health report: Disparities and resilience among lesbian, gay, bisexual, and transgender older adults*. Seattle, WA: Institute for Multigenerational Health.

Medicaid is a critical program that expands health care access to LGBT people because of high prevalence of poverty among LGBT communities, especially among people of color and transgender people. A 2016 report by the Center for American Progress found that in 2014, Medicaid covered a significant portion (39%) of LGBT adults with incomes of 139% of the federal poverty level or less, and the uninsurance rate among low- and middle-income LGBT adults was much lower in

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Medicaid expansion states (18%) compared to non-expansion states (34%).⁹ Currently, Medicaid also explicitly covers transgender health care in 18 states and Washington D.C.¹⁰ Removing nondiscrimination provisions from regulations governing Medicaid enrollment and services, insurance exchanges, and Qualified Health Plans would undermine progress that has been made in expanding insurance coverage and access to care for LGBT people.

The proposed rule argues that the Section 1557 rule needed to be revised following a lawsuit that blocked the implementation of the rule. However, the other health care regulations that would be stripped of explicit SOGI nondiscrimination provisions never had those provisions challenged or blocked by lawsuits. Instead, the rule argues that these crucial nondiscrimination provisions must be removed from the other health care regulations simply for the sake of “conformity” with the revised Section 1557 rule. This is a specious argument.

Overall, the proposed rule would be harmful to the health and wellbeing of the LGBT community. The removal of nondiscrimination provisions from the Section 1557 rule and regulations governing Medicaid and other health insurance and elder service programs would disproportionately hurt transgender people as well as LGBT elders, disabled LGBT people, LGBT people of color, and low-income LGBT people. In one fell swoop, the Trump Administration would make it harder for vulnerable LGBT people to access care by repealing several of the key advances in LGBT health policy accomplished over the past decade.

Broader Context of Anti-LGBT Policy

The proposed health care discrimination rule is just the latest in a long string of anti-LGBT actions from the Trump Administration. The Trump Administration recently finalized a health care

⁹ Baker K, McGovern A, Gruberg S, and Cray A. (2016). *The Medicaid Program and LGBT Communities: Overview and Policy Recommendations*. Center for American Progress. Available online at: <https://cdn.americanprogress.org/wp-content/uploads/2016/08/08125221/2LGBTMedicaidExpansion-brief.pdf>

¹⁰ Movement Advancement Project. (2019). *Healthcare Laws and Policies: Medicaid Coverage for Transition-Related Care*. Available online at: <https://www.lgbtmap.org/img/maps/citations-medicaid.pdf>

regulation to “protect” the “statutory conscience rights” of health care providers.¹¹ Under this final rule, providers and staff who have religious objections to certain procedures, such as abortion or sterilization, are allowed to refuse to participate or even be involved in any way that has an “articulable connection” to the procedure. While the language of this conscience rule focuses on abortion, assisted suicide, and sterilization, it could also have negative implications for LGBT people seeking health care. Potential conduct protected by the final rule could include a refusal to serve LGBT people based on the religious belief that homosexuality is a sin, that sex outside of heterosexual marriage is immoral, or that gender identity should not differ from sex at birth. The Trump Administration has demonstrated its support for religious liberty protections that could be used to discriminate against LGBT people in various agency strategic plans, memoranda, friend of the court briefs, and through attendance at religious right activist conferences that promote the repeal of LGBT nondiscrimination laws.^{12,13}

The very same week that the proposed rule was announced, the U.S. Department of Housing and Urban Development proposed a change that would allow homeless shelters to use an “individual’s sex as reflected in official government documents” rather than gender identity for the purposes of determining admission to facilities.

The very same week that the health care discrimination proposed rule was announced, the U.S. Department of Housing and Urban Development (HUD) announced a proposal to amend the Equal Access Rule, which ensures that homeless shelters do not discriminate based on sexual orientation or gender identity. HUD’s proposed change would allow homeless shelters to use an “individual’s sex as reflected in official government documents” rather than gender identity for the purposes of determining admission to facilities.¹⁴ Similarly, the U.S. Bureau of Prisons changed its policy in 2018 to house transgender inmates according to “biological sex” rather than gender identity,¹⁵

¹¹ Department of Health and Human Services, Office of the Secretary, 45 CFR Part 88 RIN 0945-AA10, *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*. Final Rule. No date. Issued May 2, 2019. <https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf>

¹² Cahill S, Geffen S, Wang T. (2018). *One year in, Trump Administration amasses striking anti-LGBT record*. The Fenway Institute. Available online at: <https://fenwayhealth.org/wp-content/uploads/The-Fenway-Institute-Trump-Pence-Administration-One-Year-Report.pdf>

¹³ Cahill S, Wang T, Jenkins B. (2019) *Trump Administration continued to advance discriminatory policies and practices against LGBT people and people living with HIV in 2018*. The Fenway Institute. Available online at: https://fenwayhealth.org/wp-content/uploads/Trump-Administration-Impact-on-LGBTs-Year-Two-Brief_Web.pdf

¹⁴ Department of Housing and Urban Development. (2019). *Revised Requirements Under Community Planning and Development Housing Programs (FR-6152)*. Available online at: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53>

¹⁵ Federal Bureau of Prisons (2018). Change Notice to Transgender Offender Manual. <https://www.documentcloud.org/documents/4459297-BOP-Change-Order-Transgender-Offender-Manual-5.html>

counter to established best practices to reduce sexual and physical victimization against transgender prisoners.¹⁶ The Trump Administration also instated a military ban preventing transgender Americans from serving openly in the military.^{17,18}

Other anti-LGBT actions that the Trump Administration has taken include appointing anti-LGBT conservative judges, rolling back sexual orientation and gender identity data collection, and attempting to dismantle the ACA, which has been critical for increasing health insurance coverage for low-income LGBT people and people living with HIV.

Areas for Action

Advocates and health care professionals should submit comment urging the Trump Administration to reconsider the removal of SOGI nondiscrimination provisions from the Obama-era Section 1557 rule and other important health care regulations.

The Trump Administration's proposed rule is now open for public comment until August 13, 2019. Advocates and health care professionals should submit comment urging the Trump Administration to reconsider the removal of SOGI nondiscrimination provisions from the Obama-era Section 1557 rule and other important health care regulations. Removing these provisions runs counter to the mission of the Department of Health and Human Services to ensure the health and wellbeing of all Americans, including LGBT Americans. It would also undermine the federal government's current efforts to reduce new HIV infections by 75% in 5 years and by at least 90% in 10 years.¹⁹ Some 66% of HIV diagnoses in 2017 were among gay and bisexual men,²⁰ and reversing nondiscrimination protections in health care could reduce access to health care, including prevention and screening for HIV and other sexually transmitted infections. Public comments can be submitted electronically at <http://www.regulations.gov> using docket number HHS-OCR-2019-0007 or by regular mail to:

U.S. Department of Health and Human Services, Office for Civil Rights
ATTN: Section 1557 NPRM, RIN 0945-AA11

¹⁶ National PREA Resource Center. *Committing to Safety and Respect for LGBTI Youth and Adults in Confinement: Lessons from Two Agencies*. Available online at: <https://www.prearesourcecenter.org/node/2868>

¹⁷ Barnes R. (2018). Trump Administration asks Supreme Court to immediately take up military transgender ban. *The Washington Post*. https://www.washingtonpost.com/politics/courts_law/trump-administration-asks-supreme-court-to-immediately-take-up-transgender-militaryban/2018/11/23/6cf11b32-ef39-11e8-8679-934a2b33be52_story.html?utm_term=.b8e2e5c3709e

¹⁸ AP Staff. (2019). "Appeals court sides with Trump in transgender military case." Associated Press. <https://www.wric.com/news/politics/appeals-court-sides-with-trump-in-transgender-military-case-1/1688792700>

¹⁹ U.S. Department of Health and Human Services. *Ending the HIV Epidemic: A Plan for America*. Available online at: <https://files.hiv.gov/s3fs-public/ending-the-hiv-epidemic-flyer.pdf>

²⁰ Centers for Disease Control and Prevention. (January 2019). *HIV in the United States and Dependent Areas*. Available online at: <https://www.cdc.gov/hiv/pdf/statistics/overview/cdc-hiv-us-ataglance.pdf>

Hubert H. Humphrey Building, Room 509F
200 Independence Ave. SW
Washington, DC 20201

Acknowledgments

Written by:

Katherine Laurila
Health Policy Fellow
The Fenway Institute

Reviewed by:

Carl Sciortino, MPA
Vice President of Government and Community Relations
AIDS Action Committee

Jennifer Potter, MD
Director of LGBT Population Health Program and Co-Chair
The Fenway Institute

Kenneth Mayer, MD
Medical Research Director and Co-Chair
The Fenway Institute

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Jordan Hutensky

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