

## Affordable Care Act, Section 1557 Sex discrimination requirements: Myth vs. fact

### **Myth: Section 1557 creates a new definition for the term “sex.”**

**Fact:** In the final rule implementing Section 1557 (the “final rule”), CMS does not define “sex,” but interprets it to include discrimination based on gender identity and sex stereotypes.

- Since 2012, the Office of Civil Rights (OCR) has interpreted Section 1557’s sex discrimination prohibition to extend to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity (“sex stereotypes”) and accepted such complaints for investigation.
- Numerous federal agencies, including the Department of Justice, the Department of Labor, the Department of Education, and the Department of Housing and Urban Development, have previously interpreted sex discrimination to include discrimination on the basis of gender identity.
- The rule’s inclusion of sex stereotyping reflects the Supreme Court’s holding in *Price Waterhouse v. Hopkins* (1989), which stated that discrimination based on stereotypical notions of appropriate behavior, appearance or mannerisms for each gender constitutes sex discrimination. Lower courts, including in the context of Section 1557, have recognized that sex discrimination includes discrimination based on gender identity.<sup>1</sup>

### **Myth: Section 1557 forces physicians to violate their medical judgment.**

**Fact:** The final rule states, “Nothing in this section is intended to determine, or restrict a covered entity from determining, whether a particular health service is medically necessary or otherwise meets applicable coverage requirements in any individual case.”<sup>2</sup> A covered entity must “apply the same neutral, nondiscriminatory criteria that it uses for other conditions when the coverage determination is related to gender transition. Thus, if a covered entity covers certain types of elective procedures that are beyond those strictly identified as medically necessary or appropriate, it must apply the same standards to its coverage of comparable procedures related to gender transition.”<sup>3</sup>

### **Myth: Section 1557 forces physicians to violate deeply held religious beliefs.**

**Fact:** The final rule balances a patient’s right to access health programs and activities free from discrimination with protections for religious beliefs and practices. It does not displace existing protections afforded by, for example, federal provider conscience laws, provisions in the Affordable Care Act (ACA) related to abortion services, regulations issued under the ACA related to preventive health services, and Federal and state Religious Freedom Restoration Act laws.<sup>4</sup> The final rule states, “[W]here application of this regulation would violate applicable Federal statutory protections for religious freedom and conscience, that application will not be required. The Department also retains the discretion to provide other accommodations or exemptions where permitted by Federal law and supported by sound public policy.”<sup>5</sup>

1. See, e.g., *Rumble v. Fairview Health Servs.*, Civ. No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Section 1557) (order denying motion to dismiss); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir.), cert. denied, 546 U.S. 1003 (2005) (Title VII); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (Title VII); *Schroer v. Billington*, 577 F.Supp.2d 293, 304 (D.D.C. 2008) (Title VII).

2. 45 CFR §92.207(d).

3. 81 Fed. Reg. 31435 (May 18, 2016).

4. 81 Fed. Reg. 31380 (May 18, 2016).

5. 45 SCFR 92.2(b)(2).

## **Myth: Section 1557 will force specialists to change the types of services they provide.**

**Fact:** The final rule states, “The rule would not invalidate specialties that focus on men or women, e.g., gynecology, urology, etc. Nor would providers have to fundamentally change the nature of their operations to comply with the regulation. For example, the rule would not require a provider that operates a gynecological practice to add to or change the types of services offered in the practice. Under the sex discrimination prohibition, however, providers of health services may no longer deny or limit services based on an individual’s sex, without a legitimate nondiscriminatory reason.”<sup>6</sup>

## **Myth: Section 1557 puts physicians at risk of unintentional discrimination if they ask questions about an individual’s biological sex or gender identity.**

**Fact:** Section 1557 protects individuals from undue burden or harassment related to protected characteristics.

- For example, a physician’s persistent and intentional refusal to use a transgender individual’s preferred name and pronoun and insistence on using those corresponding to the individual’s sex assigned at birth constitutes illegal sex discrimination if such conduct is sufficiently serious to create a hostile environment. Similarly, a provider using derogatory language because an individual is an unmarried sexually active or pregnant woman constitutes illegal sex-based harassment if such conduct is sufficiently serious to create a hostile environment. Consistent with the well-established interpretation of existing civil rights laws, OCR interprets the final rule to prohibit all forms of unlawful harassment based on a protected characteristic.<sup>7</sup>

- OCR states in the final rule, “We understand that, in some instances, a covered entity may need to ask transgender enrollees for additional information, including information related to their biological sex or sex assigned at birth, to facilitate overriding denials of coverage for sex-specific health services due to gender billing code mismatches in their computer systems. We clarify in this [rule] that a covered entity is permitted to ask transgender enrollees to provide such additional information, as long as the covered entity does not unduly burden enrollees or make unreasonable inquiries that serve to delay their receipt of coverage. In addition, we clarify that it is permissible for a covered entity to request information about the biological sex of the applicant on an insurance application form to assist the covered entity in identifying the medical appropriateness of sex-specific health services, as long as the information requested is not used in a discriminatory manner, and the collection and use of the information is otherwise lawful and complies with applicable HIPAA privacy requirements.”<sup>8</sup>

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6. 81 Fed. Reg. 31455 (May 16, 2016).

7. 81 Fed. Reg. 31406 (May 16, 2016).

8. 81 Fed. Reg. 31436 (May 16, 2016).