

## Affordable Care Act Anti-Discrimination Developments

On June 12, 2020 the U.S. Department of Health and Human Services (HHS) issued a revised final regulation (2020 Rule) implementing Section 1557 of the Affordable Care Act (ACA) to be effective August 18, 2020. The 2020 Rule significantly changes many of the provisions contained in the previous Section 1557 regulation (2016 Rule), including, notably, specific provisions prohibiting discrimination on the basis of sex. Days after the Final Rule was announced, the U.S. Supreme Court issued a joint opinion in three cases: (i) *Bostock v. Clayton County*; (ii) *Zarda v. Altitude Express, Inc.*; and (iii) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* (collectively, *Bostock*) in which it held that Title VII protects gender identity and sexual orientation as connected to “sex.” Below is a discussion of the differences between the 2016 and 2020 Rules, as well as the relationship of *Bostock* to the 2020 Rule.

Section 1557 of the ACA is a civil rights provision that prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities by applying existing civil rights protections (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 504 of the Rehabilitation Act of 1973). Section 1557 has been in effect since 2010.

The 2016 Rule interpreted Section 1557 as applying to a broad array of entities, which were defined as “covered entities.” Covered entities were defined by the 2016 Rule to include: (i) an entity that operates a health program or activity, any part of which receives Federal financial assistance; (ii) an entity established under Title I of the ACA that administers a health program or activity; and (iii) HHS. “Health program or activity” was also defined by the 2016 Rule, and the 2016 Rule applied Section 1557 to all operations of an entity under this definition, not just to those entities principally engaged in health care.

Specific provisions were contained in the 2016 Rule that required: (i) notices to be provided (such as the posting of taglines); (ii) meaningful access for individuals with limited English proficiency (language assistance services, translators, etc.); and (iii) effective communication for individuals with disabilities.

In addition, the 2016 Rule contained specific provisions prohibiting discrimination on the basis of sex. The 2016 Rule defined discrimination “on the basis of sex” to include discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy or recovery therefrom, childbirth or related medical conditions, sex stereotyping and gender identity. The 2016 Rule also defined “gender identity” as one’s internal sense of gender, which may be male, female, neither or a combination of male and female. No blanket religious exemption to the requirements of Section 1557 was provided in the 2016 Rule.

The discrimination on the basis of sex prohibitions in the 2016 Rule were the subject of litigation and consequently HHS had not had the ability to implement or enforce these provisions since December 2016.

The 2020 Rule significantly differs from the 2016 Rule by: (i) reducing the scope of the rule’s applicability; (ii) eliminating the definitions section; (iii) generally eliminating the notice and tagline requirements; (iv) eliminating the specific provisions prohibiting discrimination on the basis of sex; and (v) including a specific religious exemption from the requirements of Section 1557.

The 2020 Rule does not contain a definitions section and therefore does not define “covered entity,” however the 2020 Rule does state that it applies to: (i) any health program or activity, any part of which is receiving Federal financial assistance provided by HHS; (ii) any program or activity administered by HHS under Title I of the ACA; or (iii) any program or activity administered by any entity established under Title I of the ACA. Whereas the 2016 Rule defined “covered entity” to encompass “**an entity that operates a health program or activity**, any part of which receives Federal financial assistance,” the 2020 Rule applies to **any health program or activity**, any part of which is receiving federal financial assistance. This change in language has the effect of reducing the entities subject to the requirements of Section 1557.

Pursuant to the 2020 Rule, if an entity is a health care entity, Section 1557 will apply to the entirety of that entity's operations. Section 1557 also applies to non-health care entities under the 2020 Rule, however, only if those entities receive federal financial assistance and only to the portions of those entities receiving the assistance. The 2020 Rule defines health insurers as non-health care entities. Therefore, the lines of business of health insurers not receiving federal financial assistance are no longer subject to Section 1557.

The notice and tagline requirements of the 2016 Rule have generally been eliminated in the 2020 Rule. However, taglines may still need to be provided pursuant to other rules, such as for Summaries of Benefits and Coverage.

While the 2020 Rule includes a general prohibition against discrimination based on race, color, national origin, sex and disability, many of the detailed prohibitions against specific forms of discrimination in the 2016 Rule have been eliminated, such as the specific provisions prohibiting discrimination on the basis of sex. Furthermore, the 2020 Rule does not adopt a new definition of "sex." However, in the preamble to the 2020 Rule HHS indicates that it interprets "sex" to mean biological sex (i.e., sex at birth). Therefore, for purposes of Section 1557 HHS does not interpret discrimination on the basis of sex to include discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy or recovery therefrom, childbirth or related medical conditions, sex stereotyping and gender identity. Additionally, the 2020 Rule contains a specific religious exemption stating that Section 1557 will not apply if any part of the rule would violate, depart from or contradict definitions, exemptions, affirmative rights or protections under a wide range of federal laws.

Although the 2020 Rule does eliminate some provisions from the 2016 Rule, the 2020 Rule does contain various provisions prohibiting discrimination, including provisions that: (i) enforce all applicable laws and regulations that prohibit discrimination on the basis of race, color, national origin, disability, age and sex according to the meaning of federal laws and based on civil rights regulations; (ii) protect individuals with disabilities by ensuring physical access for individuals with disabilities to healthcare facilities and appropriate communication technologies to assist persons who are visually or hearing impaired; and (iii) contain qualifications for foreign language translators and interpreters for non-English speakers, and limitations on the use of minors and family members as translators or interpreters. Additionally, the 2020 Rule adds a 4-factor analysis to ensure meaningful access for limited English proficient individuals while also securing flexibility to providers in meeting such obligation.

As mentioned above, within days of the announcement of the 2020 Rule the U.S. Supreme Court's opinion in *Bostock* was issued. In *Bostock*, the Court held that Title VII protects gender identity and sexual orientation as connected to "sex." Notably, the court specifically limited the *Bostock* decision to Title VII. Section 1557 does not reference Title VII, rather it references Titles VI and IX. Therefore, Section 1557 and the 2020 Rule may not be impacted directly by *Bostock*. However, some commentators believe that the 2020 Rule will be challenged following *Bostock*. Bond is continuing to monitor these issues and will provide updates regarding any developments.

For plans that may be subject to state insurance laws (generally, insured plans), it is important to remember that state specific anti-discrimination laws may apply. For example, New York law contains various requirements with which insured plans must comply.

If you have any questions about this information memo, please contact Daniel Nugent, any [attorney](#) in our [Employee Benefits and Executive Compensation practice](#) or the attorney at the firm with whom you are regularly in contact.



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