GROOM LAW GROUP CHARTERED

BENEFITS BRIEF

January 9, 2017 www.groom.com

Authors: Jon W. Breyfogle, Tamara S. Killion, and Matthew W. Muma

If you have questions, please contact your regular Groom attorney or one of the attorneys listed below:

Jon W. Breyfogle
jbreyfogle@groom.com
(202) 861-6641

Lisa M. Campbell
lcampbell@groom.com
(202) 861-6612

Thomas F. Fitzgerald
tfitzgerald@groom.com
(202) 861-6617

Katy S. Kamen
kkamen@groom.com
(202) 861-6646

Christine L. Keller
ckeller@groom.com
(202) 861-9371

Tamara S. Killion
tkillion@groom.com
(202) 861-6328

Rachel Leiser Levy
rlevy@groom.com
(202) 861-6613

Matthew W. Muma
mmuma@groom.com
(202) 861-5405

Mark C. Nielsen
mnielsen@groom.com
(202) 861-5429

Seth T. Perretta
sperretta@groom.com
(202) 861- 6335

Malcolm C. Slee
mslee@groom.com
(202) 861-6337

Christy A. Tinnes
ctinnes@groom.com
(202) 861-6603

Vivian Hunter Turner
vturner@groom.com
(202) 861-6324

Allison Ullman
aullman@groom.com
(202) 861-6336

Brigen L. Winters
bwinters@groom.com
(202) 861-6618

Joel D. Wood
jwood@groom.com
(202) 861-6656

Court Enjoins Part of Final ACA Nondiscrimination Rule (Section 1557)

On December 31, 2016, United States District Court for the Northern District of Texas Judge Reed O'Connor issued a preliminary injunction, enjoining the Department of Health and Human Services' ("HHS") Office of Civil Rights ("OCR") from enforcing certain provisions of OCR's final rule implementing the Patient Protection and Affordable Care Act's ("ACA") prohibition against discrimination (section 1557). Specifically, OCR is enjoined from enforcing the prohibition of discrimination on the bases of "gender identity" and "termination of pregnancy" in its final rule. *Franciscan Alliance, Inc*. v. *Burwell*, No. 7:16-cv-00108-O (N.D. Tex. Dec. 31, 2016).

Executive Summary

- A U.S. District Court in Texas issued a *nationwide* preliminary injunction, preventing OCR from enforcing two provisions of its final section 1557 nondiscrimination rule: (1) the prohibition of discrimination on the basis of "gender identity" and (2) the prohibition of discrimination on the basis of "termination of pregnancy."

- OCR has already announced that it intends to enforce the rest of the rule, including "its important protections against discrimination on the basis of race, color, national origin, age, or disability and its provisions aimed at enhancing language assistance for people with limited English proficiency, as well as other sex discrimination provisions." OCR will continue to enforce other requirements such as notice and taglines.

- The injunction would prohibit OCR from enforcing, for example, the transgender services requirements in the regulation, but would not prevent an individual from bringing a private lawsuit to enforce those requirements. As such, at least for the time being, issuers and plan sponsors should exercise caution in changing plan designs based on the decision.

- The District Court's decision distinguished between sex discrimination under Title IX and sex discrimination under Title VII. This may be important to employers, because the Equal Employment Opportunity Commission ("EEOC") has taken the position that sex discrimination includes discrimination against transgender individuals under Title VII, which prohibits employers from discriminating, among other things, in the provision of fringe benefits (like health coverage).

- The injunction is preliminary and may be appealed. It is not clear whether this administration will appeal or, if it did, whether the new administration would continue to defend regulation.

GROOM
LAW GROUP
CHARTERED

I. Background

ACA section 1557 provides that an individual shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (race, color, national origin), Title IX of the Education Amendments of 1972 (sex), the Age Discrimination Act of 1975 (age), or Section 504 of the Rehabilitation Act of 1973 (disability), under any health program or activity, any part of which is receiving federal financial assistance, or under any program or activity that is administered by an executive agency or any entity established under title I of the ACA or its amendments. On August 1, 2013, OCR published a Request for Information asking for comments on ACA section 1557.

On May 18, 2016 OCR published a final rule implementing section 1557. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376. This rule prohibits discrimination on the basis of race, color, national origin, sex, age, or disability, for any health program or activity, any part of which receives federal funding or assistance, or under any program or activity that is administered by an executive agency or any program or activity administered by an entity established by title I of the ACA. For additional information about the rule, please consult our September 11, 2015, client alert, available at: http://www.groom.com/media/publication/1700_HHS_Issues_Final_Rule_on_ACA_Nondiscrimination_Provisions__Section_1557_.pdf.

II. Court Challenge

The scope of the final rule was quite expansive, prohibiting (among other things) discrimination in health programs on the basis of sex, including significant requirements related to transgender individuals and the treatment of gender dysphoria. In late August of 2016, several states and private entities[1] filed suit in federal court in Texas, arguing that the rule forced physicians "to perform controversial and sometimes harmful medical procedures ostensibly designed to permanently change an individual's sex" and impermissibly defined "sex" to include "discrimination based upon 'termination of pregnancy' in covered programs." Plaintiffs' argued that these provisions

- violated the Administrative Procedures Act by not conforming with the text of the ACA and Title IX, by violating various constitutional and statutory rights, and being arbitrary and capricious (among other grounds);
- violated the First and Fifth Amendment rights of physicians;
- violated the Religious Freedom and Restoration Act ("RFRA") rights of physicians;
- violated the Constitution's spending clause;
- violated the Eleventh Amendment's doctrine of sovereign immunity; and
- violated the states' Tenth Amendment rights.

Before the District Court was a request for a preliminary injunction, which required the court to determine whether the plaintiffs had (1) a substantial likelihood that they will ultimately prevail on the merits; (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest.

[1] Arizona, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Texas and Wisconsin, joined by Specialty Physicians of Illinois, LLC, Christian Medical and Dental Associations, and the Franciscan Alliance, Inc.

With respect to the following two issues, the court concluded that the plaintiffs met their burden.

1. **"Sex" does not include gender identity.**

The final rule defined "sex" broadly and to include "gender identity." 45 CFR § 92.4. The District Court concluded that section 1557 clearly incorporated Title IX's prohibition of sex discrimination, but that "the meaning of sex in Title IX unambiguously refers to 'the biological and anatomical differences between male and female students as determined at their birth'" and "[i]n promulgating the Rule, HHS revised the core of Title IX sex discrimination under the guise of simply incorporating it." Slip. Op. at 31. As a result, the court would not defer to OCR's interpretation under *Chevron*.

Next the court considered whether the rule's definition of "sex" to include "gender identity," without deference, violated the APA. It concluded that it did. "Congress's intent in enacting Section 1557 is clear because the statute explicitly incorporates Title IX's prohibition of sex discrimination. ... It is also clear from Title IX's text, structure, and purpose that Congress intended to prohibit sex discrimination on the basis of the biological differences between males and females." *Id*. at 32. Because "[p]rior to the passage of the ACA in 2010 and for more than forty years after the passage of Title IX in 1972, no federal court or agency had concluded sex should be defined to include gender identity. Accordingly, HHS's expanded definition of sex discrimination exceeds the grounds incorporated by Section 1557." *Id*. at 35.

To come to this conclusion, the court rejected OCR's reliance on Title VII case law to define "sex" to include gender identity. In the preamble to the final rule, OCR discussed *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court case that recognized "gender stereotyping" was a form of sex discrimination, and the cases that followed *Hopkins*. OCR reasoned that the case law following *Hopkins* recognized that sex discrimination encompassed not only "sex," or biological differences between the sexes, but also "gender" and its manifestations, and therefore supported the inclusion of gender identity as a form of sex discrimination.

In contrast, the District Court reasoned that it should look to the accepted definition of "sex" at the time that Title IX was passed (1972), and that it was clear to the court that at that time, "sex" was commonly used to refer to the biological differences between males and females and that "gender identity" was distinct from "sex." Slip. Op. at 33. Further, the court reasoned, even if the appropriate time to determine the definition of "sex" was 2010 (when Congress included discrimination on the basis of sex into section 1557), the fact that "Congress did not understand 'sex' to include 'gender identity' when it passed the ACA is evidenced by the employment of the phrase 'gender identity' by the same Congress to include protections against crimes motivated by gender identity." *Id.* at 34.

This distinction—Title VII sex discrimination vs. Title IX sex discrimination—is important for at least two reasons. First, as OCR noted in its preamble discussion of *Hopkins*, courts have previously looked to Title VII case law when interpreting Title IX. This may be a point of contention if the Administration decides to appeal. Second, as employers that sponsor group health plans are aware, the EEOC has taken the position that sex discrimination *does* include gender identity for purposes of Title VII. As a result, although section 1557 may no longer be enforced by OCR to include gender identity as a basis on which plans may not discriminate, the EEOC presumably will continue to include gender identity as a basis on which employers may not discriminate, including in the provision of fringe benefits (like health coverage).

2. "Sex" does not include "termination of pregnancy."

Looking again at the text of Title IX, the court considered whether the final rule's failure to incorporate a religious exemption was arbitrary and capricious, thus violating the APA. Title IX exempted entities controlled by a religious organization from the prohibition on discriminating on the basis of sex "when the proscription would be inconsistent with its religious tenets. ... Title IX also categorically exempts any application that would require a covered entity to provide abortion or abortion-related services." *Id*. at 37. Therefore, the court concluded, the rule—which did not include an express exemption for religious entities—was too expansive and violated the law. Moreover, the court determined that the rule imposed a substantial burden on religious entities (both with respect to termination of pregnancy and the coverage of gender transition services) but did not do so using the least-restrictive means, as is required under RFRA. *Id.* at 38-42.

3. Scope of the injunction

The injunction, by its terms, applies "nationwide." *Id*. at 45. But it applies only to "the prohibition of discrimination on the basis of 'gender identity' and 'termination of pregnancy.'" *Id.* at 46. The rest of the rule, including the notice and language access provisions, continues to apply, as confirmed by OCR in a statement to the press on January 1, 2017. ("HHS's Office for Civil Rights will continue to enforce the law - including its important protections against discrimination on the basis of race, color, national origin, age, or disability and its provisions aimed at enhancing language assistance for people with limited English proficiency, as well as other sex discrimination provisions - to the full extent consistent with the Court's order.")

III. Conclusion

The fact that the District Court found that Title IX's prohibition on discrimination on the basis of "sex" did not include discrimination on the basis of "gender identity"—including the court's rejection of Title VII precedents—to conclude that the final rule does not deserve deference is important and will undoubtedly be relied upon by others that are challenging the rule. The fact that the injunction is nationwide makes the decision even more significant.

Although not as widely discussed as an issue under section 1557, the court's decision with respect to discrimination on the basis of "termination of pregnancy" may affect some plans beyond coverage of abortion. For example, some plans may not want to cover emergency contraceptives, like Plan B, but included them as a result of section 1557. These design decisions may be open for reconsideration following the injunction.

Some notes of caution. This injunction is preliminary, and may be appealed. That said, it is not clear if the current administration will appeal the case and, if so, whether the incoming administration would be inclined to continue to defend the rule. Moreover, other courts that are considering the final rule—for example, when a participant sues for transgender coverage—may disagree with this court's conclusion regarding whether the rule deserves deference, or whether Title IX's prohibition on the basis of sex extends to transgender individuals. Indeed, since this injunction was issued, additional transgender discrimination cases have been filed in other courts. *See, e.g.*, *Conforti v. St. Joseph's Healthcare System, Inc.*, 2:17-cv-00050 (D.N.J. Jan. 5, 2017).

In addition, most plan and policy designs are already set for 2017, making changes difficult for plans that may want to change benefit designs (for this plan year) as a result of this ruling. The EEOC continues to interpret Title VII's sex discrimination prohibition to include gender identity, and that interpretation is not changed by this ruling, so employer-sponsored plans should consider those implications in any benefit design change.

GROOM
LAW GROUP
CHARTERED

* * *

Please contact any of the attorneys in the Health and Welfare Practice Group at Groom Law Group or your regular Groom Law Group attorney for further information on the injunction of enforcement of part of the nondiscrimination (ACA section 1557) final rule.