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District Court Blocks Enforcement of HHS Final Rule on ACA Section 1557

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On August 17, 2020, a U.S. district court decided in the case of *Walker v. Azar* to block enforcement of final regulations from the U.S. Department of Health and Human Services (“HHS”) relating to section 1557 of the Affordable Care Act, to the extent that the regulations fail to define sex discrimination as including discrimination based on sexual orientation and gender identity. This means discrimination on the basis of sexual orientation and gender identity is prohibited by section 1557.

Background

ACA section 1557 prohibits hospitals, doctors’ offices, insurance carriers and other entities that receive financial assistance from the federal government relating to a health program or activity (such as Medicare or Medicaid) from discriminating on the basis of sex and other factors set forth in Title IX of the Civil Rights Act. Employers outside of the healthcare industry are generally exempt from the nondiscrimination requirements of ACA section 1557, although other federal and state civil rights laws may apply to them. Regulations issued in 2016 (“2016 regulations”)

expanded these nondiscrimination requirements to prohibit discrimination on the basis of sexual orientation and gender identity.

On Friday, June 12, 2020, HHS issued final regulations (the “2020 regulations,” published in the Federal Register on June 19, 2020) on the nondiscrimination requirements of ACA section 1557. The 2020 regulations repeal provisions of the 2016 regulations that defined sex discrimination as including discrimination based on sexual orientation and gender identity. Enforcement of the 2016 regulations had previously been blocked by another U.S. district court in the case of *Franciscan Alliance, Inc. v. Burwell* (N.D. Tex. 2016) because of the Religious Freedom Restoration Act. That litigation appears to be ongoing.

The following Monday, June 15, 2020, the U.S. Supreme Court decided in the case of *Bostock v. Clayton County* that termination of an employee because of the employee’s sexual orientation or gender identity is a form of sex discrimination under Title VII of the Civil Rights Act.

Walker v. Azar Case

The U.S. District Court for the Eastern District of New York decided in *Walker v. Azar* that HHS should have voluntarily reconsidered the 2020 regulations once the U.S. Supreme Court released its decision in the *Bostock* case. The court's ruling states, "Since HHS has been unwilling to take that path voluntarily, the Court now imposes it." The U.S. district court issued a preliminary injunction preventing the 2020 regulations from repealing the more expansive definition of sex discrimination found in the 2016 regulations thereby maintaining the prohibition on discrimination on the basis of sexual orientation and gender identity.

Employer Action

Hospitals, doctors' offices, insurance carriers, and other entities that are subject to the ACA section 1557 nondiscrimination requirements should proceed with caution around exclusions or limitations in health benefit programs (or other employee benefit plans) based on sexual orientation or gender identity. They should consult with their legal counsel before restricting certain services to only a single sex based on a participant's sex at birth, or otherwise excluding transgender services from a group health plan.