



# SCWA Legislative Update

August 22, 2022



## HHS Proposes Changes to ACA Nondiscrimination Rule

The Department of Health and Human Services (HHS) has issued a proposed rule implementing Section 1557 of the Patient Protection and Affordable Care Act (ACA) that prohibits discrimination on the basis of race, color, national origin, sex, age, and disability in certain health programs and activities.

Section 1557 is the ACA's primary nondiscrimination provision and portions of the provision went into effect the day the ACA was signed. The HHS issued implementing regulations in 2016, which were challenged in court. Under the Trump administration, a new rule was issued in June 2020 that eliminated major provision of the 2016 rule and limited the scope of Section 1557.

In the newly-issued proposed rule, the HHS would reverse the 2020 rule, and in some cases, expand the 2016 rule.

The HHS noted that the proposed rule affirms the protections against discrimination on the basis of sex, including sexual orientation and gender identity, and reiterates protections from discrimination for seeking reproductive health care services.

Specifically, the proposed rule would:

- reinstate the scope of Section 1557 to cover HHS' health programs and activities.
- clarify the application of Section 1557 nondiscrimination requirements to health insurance issuers that receive federal financial assistance.
- align regulatory requirements with federal court opinions to prohibit discrimination on the basis of sex including sexual orientation and gender identity.
- make clear that discrimination on the basis of sex includes discrimination on the basis of pregnancy or related conditions, including "pregnancy termination."
- ensure requirements to prevent and combat discrimination are operationalized by entities receiving federal funding by requiring civil rights policies and procedures.
- require entities to give staff training on the provision of language assistance services for individuals with limited English proficiency (LEP), and effective communication and reasonable modifications to policies and procedures for people with disabilities.
- require covered entities to provide a notice of nondiscrimination along with a notice of the availability of language assistance services and auxiliary aids and services.

- explicitly prohibit discrimination in the use of clinical algorithms to support decision-making in covered health programs and activities.
- clarify that nondiscrimination requirements applicable to health programs and activities include those services offered via telehealth, which must be accessible to LEP individuals and individuals with disabilities.
- interpret Medicare Part B as federal financial assistance.
- refine and strengthen the process for raising conscience and religious freedom objections.



## **Federal Court Blocks Enforcement of EEOC Sexual Orientation and Gender Identity Guidance**

In June 2021, the U.S. Equal Employment Opportunity Commission (EEOC) issued resources on workplace protections for LGBTQ+ employees, including a technical assistance document entitled “Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity.”

A federal district court has now blocked enforcement of that guidance. Among other things, the guidance took the following rather aggressive positions: employers cannot require a transgender employee to dress in accordance with the employee’s sex assigned at birth; employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee’s gender identity; and use of pronouns or names that are inconsistent with an individual’s gender identity could be considered harassment.

In issuing the guidance, the EEOC asserted that it was explaining the Supreme Court’s decision in *Bostock v. Clayton County*, which held that Title VII’s protections against sex discrimination encompass sexual orientation and transgender status; however, the court found that the guidance extends far beyond the limited reach of the *Bostock* decision, in which the Supreme Court specifically “refused to decide whether ‘sex-segregated bathrooms, locker rooms, and dress codes’ violate Title VII.”



## **EEOC Updates Guidance on COVID-19 Testing in the Workplace**

The U.S. Equal Employment Opportunity Commission (EEOC) has updated its guidance regarding COVID-19 workplace viral screening testing.

The EEOC's original position on COVID-19 workplace viral screening testing was that it always met the Americans with Disabilities Act ("ADA") standard for

conducting medical examinations. However, the EEOC explained that going forward, "employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission of COVID-19."

The EEOC's guidance now provides that an employer, as a mandatory screening measure, may administer a COVID-19 viral test "if the employer can show it is job-related and consistent with business necessity."



## **Final COVID-19 OSHA Regulation Covering Healthcare Employers Is on OSHA's Agenda for Issuance in September 2022**

The U.S. Occupational Safety and Health Administration (OSHA's) emergency temporary standard (ETS) requiring healthcare employers to adhere to numerous regulatory requirements addressing COVID-19 was largely withdrawn in December 2021.

The U.S. Department of Labor (DOL) published its regulatory agenda forecasting that employers in healthcare settings can anticipate that OSHA will roll out permanent COVID-19 regulations in September 2022.

It is expected that many of the requirements in the ETS will be resurrected in the new final rule. The healthcare ETS required employers to develop and implement COVID-19 plans that included paid time off for vaccination, social distancing, personal protective gear, physical barriers, ventilation, patient and employee screening, employee training, recordkeeping and reporting.



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