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New Final Rule and Supreme Court Developments**

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# Sex-Based Discrimination in Healthcare Under Section 1557: The New Final Rule and Supreme Court Developments

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## **Abstract**

One of the primary goals of the Patient Protection and Affordable Care Act (PPACA) has been the reduction and elimination of health disparities, generally defined as population-level health differences that adversely affect disadvantaged groups, including disparities associated with sex and gender. Many of PPACA's general provisions — expanded access to public and private insurance coverage, guarantee issue and pricing reforms, and coverage mandates — were expected to reduce barriers and eliminate discriminatory practices targeting or disproportionately impacting women and transgender individuals. Provisions like the Women's Health Amendment, which mandated women's preventive healthcare to be covered without cost sharing, and the even broader prohibition of discrimination on the basis of race, color, national origin, disability, age, and sex in Section 1557 of PPACA also promote gender equity.

Prior to PPACA, a patchwork of federal laws targeted only certain areas for sex nondiscrimination protections and enforcement, notably employment (Title VII of the Civil Rights Act of 1964) and education (Title IX of the Education Amendments of 1972). Such laws had been used to address healthcare access to some degree, but their scope has been limited. For example, Title VII has been used to eliminate coverage exclusions that uniquely harm women, such as pregnancy-related care, but only in employment-based plans.

Section 1557 filled this critical gap by creating a new healthcare-specific prohibition of sex discrimination. Prohibiting sex and gender discrimination was a dominant focus of the May 2016 Final Rule implementing Section 1557 (2016 Final Rule) issued by the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR). Notably, the 2016 Final Rule clarified that Section 1557's sex discrimination provision would protect transgender individuals from discrimination on the basis of gender identity in healthcare delivery and insurance.

By contrast, in June 2020, OCR issued new regulations that dramatically narrowed Section 1557's scope, including interpreting the prohibition on sex discrimination to not include discrimination on the basis of gender identity or transgender status (2020 Final Rule). In addition, the 2020 Final Rule significantly expanded the grounds for providers of care or insurance to obtain exemptions from nondiscrimination mandates.

The battle over the scope of sex discrimination protection is also playing out in the courts. Indeed, the United States Supreme Court recently weighed in on this issue, though not in the healthcare context. In *Bostock v. Clayton County, Georgia*, a consolidation of three high-profile cases involving claims of sex discrimination in employment under Title VII, the Supreme Court affirmed a definition of sex discrimination consistent with the 2016 Final Rule. In a 6-3 decision, the Court held that an employer that fires an individual merely for being transgender or gay violates the sex discrimination prohibition under Title VII. *Bostock's* implications for Section 1557 are significant, but the fact that it is a non-healthcare case means the battle over the scope of sex discrimination protections under Section 1557 will continue.

This article examines the current regulatory and litigation landscape for defining and enforcing PPACA's prohibition on sex discrimination in healthcare. It considers three key questions engaging regulators and courts at this time, which are discussed below: Who is protected? What kind of activity is prohibited or required? How should religious objections to these requirements be balanced against the health and equity interests advanced by nondiscrimination protections?

**Keywords:** ACA, Affordable Care Act, Section 1557, health discrimination, health disparities, gender discrimination, sex discrimination, *Bostock*

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