

Alert | Labor & Employment



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Department of Health and Human Services’ LGBTQ+ Discrimination Rule Blocked by Eastern District of New York

On August 17, 2020, the Eastern District of New York granted the Plaintiffs’ request for a stay and a preliminary injunction precluding the U.S. Department of Health and Human Services (HHS) from implementing a recently issued final agency rule that would remove anti-discrimination provisions presently provided under the Affordable Care Act (ACA) for LGBTQ+ patients. (*Walker v. Azar*, E.D.N.Y., No. 1:20-cv-02834, Order 08/17/20). The Human Rights Campaign challenged the HHS rule on behalf of two transgender women, who sought a nationwide injunction to prevent its implementation. U.S. District Judge Frederic Block granted the request for stay and preliminary injunction the day before the rule was to go into effect.

Announced in June, HHS’s proposed final rule struck language from existing ACA regulations that afforded protection from discrimination to individuals on the basis of “sex stereotyping, or gender identity.” Those ACA regulations define sex stereotyping as “stereotypical notions of gender, including expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms or body characteristics.” HHS’s proposed new final rule sought to impose a narrower definition of “on the basis of sex,” arguing the ACA did not provide discrimination protection for patients based on a medical provider’s “stereotypical notions of masculinity and femininity.” If this new HHS rule were to go into effect, it would effectively remove gender identity

and sex stereotyping from the ACA's anti-discrimination protections, which themselves are grounded in Title IX of the Education Amendments of 1972.

In enjoining implementation of HHS's new rule, the *Walker* Court noted that the rule ignored the Supreme Court's recent decision in *Bostock v. Clayton Cty. Ga.*, 140 S. Ct. 1731 (2020), which was issued three days before HHS's new final rule was to take effect. This omission was conspicuous because, in *Bostock*, the Supreme Court held that discrimination "on the basis of sex" encompasses biased treatment predicated on gender identity or sexual orientation. Although *Bostock* focused on the definition of "sex" under Title VII of the Civil Rights Act, both HHS and the Court acknowledged the applicability of this decision to Title IX given that "Title VII case law often informed Title IX case law with respect to the meaning of discrimination 'on the basis of sex.'" The *Walker* Court thus concluded that HHS's rule contravened *Bostock* insofar as it removed protections the Supreme Court expressly recognized.

In finding the Plaintiffs were likely to succeed on the merits of their claim (a necessary element to entry of a preliminary injunction), the *Walker* Court expressly noted that the Supreme Court issued its *Bostock* decision three days before the proposed rule was set to take effect, but HHS chose not to revisit its new proposed rule in response to the decision. This led the *Walker* Court to hold Plaintiffs were likely to establish HHS's decision was arbitrary and capricious in light of the agency's failure to revisit its proposed Rule when *Bostock* was decided. Per the *Walker* Court, "[t]he timing might [...] suggest to a cynic that the agency pushed ahead specifically to avoid having to address an adverse decision, [b]ut whether by design or bureaucratic inertia, the fact remains that HHS finalized the 2020 Rules without addressing the impact of the Supreme Court's decision in *Bostock*."

Walker deals a clear blow to HHS's effort to exclude gender identity from the protections afforded under the ACA. It remains to be seen whether the HHS will accept the decision, seek to amend the rule to account expressly for *Bostock*, or appeal. In the meantime, the rule is on hold.

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