

Insights

HHS To Review Anti-Discrimination Rule That Applies Protections to Transgender Patients

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A Texas District Court judge presiding over a lawsuit challenging a Federal Regulation that expands protections to transgender patients, among others (“Rule”) recently agreed to stay judicial proceedings while the Health and Human Services (“HHS”) agency reviews the Rule. The court had earlier granted a nationwide injunction as to certain portions of that Rule, and that injunction remains in effect while HHS reevaluates the Rule.

On August 23, 2016, a group of health providers and several states filed a lawsuit that challenged the Rule’s expansion of the term “sex discrimination” to include “gender identity” and “termination of pregnancy.” The Plaintiffs alleged that the Rule violated certain Federal laws, including those protecting religious freedoms. On December 31, 2016, the court enjoined HHS from enforcing those two provisions on the basis that the Plaintiffs were likely to succeed on the merits of their lawsuit. Specifically, the court agreed that the expanded definition of “sex discrimination” exceeded HHS’s statutory authority, and that it failed to incorporate religious and abortion exemptions under Federal law.

The lawsuit continued under the Trump administration despite that administration’s early efforts to roll back similar sex discrimination protections set up under the Obama administration. On May 1, 2017, the Department of Justice (“DOJ”) asked the court to remand the case to HHS and stay all proceedings so that the agency could “reevaluate” the Rule. The DOJ stated that new leadership at HHS were concerned with the need for the protections and burdens of the Rule after scrutinizing the two provisions at issue, and asked for the opportunity to initiate rulemaking proceedings to reconsider the Rule. The court agreed to allow HHS to proceed with rulemaking changes, though it kept the injunction in place and will continue monitoring HHS’s efforts to revisit the Rule.

The court asked the DOJ to report on HHS’s efforts to initiate rulemaking by August 4, 2017. To date, HHS has not published a proposed rule announcing any changes to the two provisions in the Rule, and as such, it is unclear whether and to what extent HHS will revise these and/or other portions of the Rule. For now, HHS will not enforce the controversial sex discrimination provisions due to the nationwide injunction. Health care providers should continue to monitor HHS’s regulatory activities and provide comment when given the opportunity.