# LCR/LEF Board Briefing - HHS Obamacare Revisions x LGBTQ Protections

*Summary:* On June 12th, the Dept. of Health & Human Services announced the Final Ruling on Section 1557 of the Affordable Care Act of 2010. HHS will use the original, Congressionally-approved version of the definition of "sex", not the Obama 2016-era modified Executive Order (the 2016 Rule).

Frequently Asked Questions

***What happened?***
The U.S. Department of Health and Human Services (HHS) completed its final rule implementing Section 1557 of the Affordable Care Act (ACA). Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities.

***What is Section 1557 of the ACA?***
Section 1557 is a civil rights provision in the ACA that prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities.

***What's the problem and how does this apply to us?***
Section 1557 did not create new protected categories under civil rights law. It simply applied existing civil rights protections to certain areas of healthcare where they may not have previously applied. But the 2016 Rule - an Executive Order (EO) from President Obama- redefined discrimination "on the basis of sex" to include gender identity […]with gender identity defined as "one's internal sense of gender, which may be male, female, neither, or a combination of male and female." The 2016 Rule explicitly stated that it was not including "sexual orientation" as a protected category under Section 1557.

***So this isn't LGB, just T(ransgender)?***
Yes, just gender identity.

***Did this EO redefining "sex" ever go into effect?***
No. It was challenged legally- twice - in federal court, and the Obama EO never went into effect.

***So was anything "rolled back?"***
No – you can't 'roll back' something that was never actually implemented.

***What were the federal court cases***?
On December 31, 2016, the U.S. District Court for the Northern District of Texas in *Franciscan Alliance Inc. et al. v. Burwell*, preliminarily enjoined, on a nationwide basis, HHS's attempt to prohibit discrimination on the basis of gender identity and termination of pregnancy as sex discrimination in the Obama 2016 Rule. This federal court concluded the provisions were likely

contrary to applicable civil rights law, the Religious Freedom Restoration Act, and the Administrative Procedure Act.

A separate federal court in North Dakota agreed with the reasoning of the Franciscan Alliance decision, and blocked the rule's effect on the plaintiffs before it.

On October 15, 2019, the U.S. District Court for the Northern District of Texas issued a final judgment, in which it vacated and remanded the provisions it deemed unlawful.

This final ruling is binding on the Department, despite the appellate proceedings that were brought by intervenors.

***So what happened on Friday?***
HHS said in its announcement Friday that it "will enforce Section 1557 by returning to the government's interpretation of sex discrimination according to the plain meaning of the word 'sex' as male or female and as determined by biology."

***So the original definition of sex before the Obama EO?***
Yes - "sex" being what you were born as, not what you "internally identify as."

***So what's the baseline?***

1.) The new federal policy announced by HHS on Friday makes Section 1557 align and comply with court rulings.
2.) People are free to choose their gender, but under the Affordable Care Act, 'sex' is defined as the anatomical birth gender for the purpose of healthcare treatment. The goal is to not give anyone a disadvantage or disparate negative treatment based on physical differences.

***What's the government's defense?***
With the final rule, HHS eliminates certain provisions of Obama's 2016 Rule that exceeded the scope of the authority delegated originally by Congress in Section 1557. Section 1557 will be enforced in the original, Congressionally approved sense, where the plain meaning of "sex" is male or female and as determined by biology. HHS is simply applying Congress' words using their plain meaning. The final rule does not provide a new definition of sex discrimination, and the 2016 Rule's definition "on the basis of sex" is not included in this final rule because it exceeded the Department's statutory authority.

***So do medical care providers now have license to discriminate against transgender individuals for things like cancer, a broken arm or the common cold?*** The latitude now allowed is not in the patient – it's in the course of treatment. Violation of treating a trans (or cis-gendered) patient for the above would go against the Hypocratic Oath.

***What are the conservative principles at stake?***

1.) Congress never voted on anything with this. It was intentionally left vague by the Obama Admin, hoping the courts would step in and define it. That hasn't happened (yet). It still may (a Supreme Court challenge is currently pending).

2.) The Government can't force doctors to perform procedures that they are medically, professionally or morally opposed to performing. Remember, this is a ruling on the type of *procedures*, not the type of *patients.*

***Potential Remedy?***
*Congress needs to pass legislation that would include specific language on protections on healthcare discrimination. Executive Orders are too easy for a.) judicial override & b.) reversal by a subsequent Administration.*

***Key Messaging Points:***

- Congress never voted on transgender discrimination in the Affordable Care Act.
- The Obama Administration hoped to redefine "sex" retroactively, attempting as usual to weaponize civil rights law in the name of unilateral overreach.
- If the president can simply redefine the meaning of words, he can effectively make any law he wants—this would be autocratic and un-American.
- It is ironic that Trump's detractors, who often accuse him of tyranny, seem so eager for him to follow in his predecessor's footsteps by aggregating to himself the wrongful power of reinventing laws on which Congress has already voted.
- The Left can flip-flop on this all it wants. As conservatives, we are consistent: it is the Executive branch's job to enforce laws, not make them.
- That is why we were glad when Obama's ill-conceived executive order was struck down in the courts, and it is why we are glad now that Trump has restored the ACA to the meaning originally intended and voted upon by the legislative branch.

***Log Cabin Republicans statement***:
"President Obama illegally bypassed Congress and altered the Affordable Care Act and the courts invalidated that overreach time and time again. The Trump Administration's action brings HHS policy in line with existing law and does not change how healthcare is currently practiced or implemented. We call on Congress to pass legislation that explicitly includes fair and equitable rules providing healthcare protections without discrimination, disadvantage or disparate care for the civil rights of all LGBTQ persons."

***Where can I find the official documents to review?***
The information can be found on the HHS Office of Civil Rights website:
https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html

*This Fact Sheet is really easy to digest and has the most useful information:
https://www.hhs.gov/sites/default/files/1557-final-rule-factsheet.pdf

To download the entire Section 1557 rule, go here:
https://www.federalregister.gov/documents/2020/06/19/2020-11758/nondiscrimination-in-health-and-health-education-programs-or-activities-delegation-of-authority