



Open Doors for All

Sexual Orientation and Gender Identity Protections in Health Care

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Navigating our country's health system—from getting affordable insurance coverage to finding quality care—can be a challenge for anyone. But America's estimated 9 million lesbian, gay, bisexual, and transgender, or LGBT, individuals face an additional hurdle: Despite advances in public acceptance of LGBT issues over the past decade, LGBT people and their families seeking health coverage and care continue to encounter discrimination on the basis of sexual orientation and gender identity. As Secretary of Health and Human Services Kathleen Sebelius put it, "LGBT Americans face numerous barriers to health—from providers who just don't understand their unique health needs, to difficulty getting health insurance because they can't get coverage through a partner or a spouse. And unfortunately way too many LGBT individuals face discrimination and bigotry in the health care system."¹

Numerous surveys, studies, and reports have documented the widespread extent of the discrimination experienced by LGBT individuals and their families in the health system. The 2010 study "When Health Care Isn't Caring," a nationwide survey assessing the health care experiences of LGBT people and people living with HIV, found that more than half of the almost 5,000 respondents reported experiencing at least one of the following types of discrimination:²

- Health care providers refusing to touch them or using excessive precautions
- Health care providers using harsh or abusive language
- Health care providers being physically rough or abusive
- Health care providers blaming them for their health status

In the same study, 10 percent of lesbian, gay, and bisexual respondents and 25 percent of transgender respondents reported being refused needed medical care outright. Similarly, a 2011 study by the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that one-quarter of the more than 6,400 transgender and gender-nonconforming respondents reported experiencing discrimination that included:³

- Being denied needed treatment
- Being harassed in health care settings
- Postponing needed medical care because of discrimination from providers

These encounters with discrimination have serious negative consequences for the health and well-being of LGBT individuals and exacerbate the significant health disparities that affect the LGBT population. LGBT health disparities include higher rates of mental health concerns such as depression and suicide attempts, greater risk of HIV/AIDS, more frequent use of tobacco and other substances, and higher risk of certain cancers, such as breast cancer.⁴ These disparities are even greater for LGBT people who are also members of other groups disadvantaged because of their race, ethnicity, or other aspects of their identity.⁵

Fortunately, the Affordable Care Act, or ACA—the most significant reform of the U.S. health system in more than a generation—has enormous potential to help eradicate these disparities by applying a robust nondiscrimination framework to the U.S. health system.⁶ In particular, the law offers opportunities to deploy two promising legal approaches to address anti-LGBT discrimination and ensure that LGBT people and their families are able to access the health coverage and care they need. The first approach is enacting policies that specifically include sexual orientation and gender identity as enumerated protected classes, alongside other protected classes such as race, ethnicity, and age. The second involves recognition that discrimination against LGBT people is fundamentally rooted in stereotypes related to sex and gender norms, meaning that discrimination on the basis of sexual orientation and gender identity falls under existing laws prohibiting sex discrimination.

Two legal responses to discrimination against LGBT people

Since the passage of the Affordable Care Act, the U.S. Department of Health and Human Services, or HHS, has issued numerous regulations relating to different aspects of the law. Several of these regulations, particularly those related to health insurance coverage, expressly enumerate nondiscrimination protections on the basis of sexual orientation and gender identity alongside other protected classes:

- **Guaranteed issue:** 45 C.F.R. § 147.104(e) prohibits health insurance issuers in the individual, small group, and large group markets in any state from employing marketing practices or benefit designs that discriminate based on an individual's sexual orientation, gender identity, sex, race, color, national origin, disability, age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions.

- **Essential health benefits:** 45 C.F.R. § 156.125(a) and (b) state that an issuer cannot claim to provide the essential health benefits as defined in Section 1302 of the Affordable Care Act if its benefit design—or the implementation of its benefit design—discriminates on the basis of an individual’s sexual orientation, gender identity, sex, race, color, national origin, disability, age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions.
- **Qualified health plans:** 45 C.F.R. § 156.200(e) states that a qualified health plan issuer must not discriminate on the basis of race, color, national origin, disability, age, sex, gender identity, or sexual orientation with respect to its qualified health plans.
- **Health insurance marketplaces:** 45 C.F.R. § 155.120(c) requires the health insurance marketplaces—including all their contractors, employees, and enrollment assisters such as navigators—to comply with all applicable nondiscrimination statutes and to not discriminate in any of their activities on the basis of race, color, national origin, disability, age, sex, gender identity, or sexual orientation.

These protections from discrimination in health insurance are critical for LGBT people, who are significantly more likely than the general population to lack coverage. In the second quarter of 2014, 17.6 percent of LGBT people in all income ranges were uninsured, compared to 13.2 percent of the general population.⁷ LGBT individuals with incomes less than 400 percent of the federal poverty level, or FPL, experience particularly high levels of uninsurance: In mid-2014, 26 percent of LGBT people with incomes less than 400 percent of the FPL did not have insurance coverage.⁸

Enumerating sexual orientation and gender identity as protected classes is also a cornerstone of national efforts to eradicate anti-LGBT discrimination in areas of everyday life such as employment, housing, and public accommodations.⁹ This strategy has already been successful in many state and local jurisdictions: More than 200 jurisdictions across the United States, including 22 states, have laws expressly prohibiting discrimination on the basis of sexual orientation and/or gender identity. Together, however, these laws protect only about 50 percent of LGBT Americans.¹⁰ The majority of LGBT people and their families—especially female couples, same-sex couples raising children, and LGBT people of color—live in states that offer them no explicit protection from discrimination in health care on the basis of sexual orientation and gender identity.¹¹

Thus, while these state laws and existing regulations promulgated by HHS under the Affordable Care Act provide significant protections for LGBT people, nondiscrimination protections that are both nationwide in scope and clearly applicable throughout the health system are still needed. Fortunately, the health reform law offers a solution. The law’s primary statutory nondiscrimination provision, ACA Section 1557, has the power to address the discrimination that continues to hinder access to coverage and care for members of many marginalized communities—including LGBT people and their families.

Section 1557 of the Affordable Care Act provides that an individual shall not be excluded from participation in, denied the benefits of, or be subject to discrimination on the basis of race, color, national origin, sex, disability, or age under any health program or activity, any part of which is receiving federal financial assistance, or in any program or activity administered by a federal agency or established under Title I of the ACA.¹²

While Section 1557 has been in effect for five years, HHS has yet to issue regulations clarifying the scope and effect of this provision. In developing these critically needed regulations, HHS has a crucial opportunity to clarify that discrimination on the basis of gender identity and sexual orientation is a form of sex discrimination prohibited under the Affordable Care Act. Explicit regulatory clarification that ACA Section 1557's sex nondiscrimination protections extend to gender identity and sexual orientation will ensure that these protections reinforce and harmonize with the existing protections in ACA regulations that expressly reference gender identity and sexual orientation. It is also consistent with evolving jurisprudence and recent actions that HHS and other federal agencies have taken to protect LGBT people.

How the sex nondiscrimination provisions in Section 1557 extend to gender identity and sexual orientation

HHS has already taken steps to indicate that ACA Section 1557 protects LGBT people from discrimination. In 2012, the HHS Office for Civil Rights, or HHS OCR, explicitly stated in an agency opinion letter that Section 1557's protections against sex discrimination include gender identity and sex stereotyping.¹³ In order to be maximally effective in providing protections for LGBT individuals, however, this interpretation must be codified in regulation, and, as part of this codification, the regulations should further clarify that the concept of sex stereotyping extends to claims of sex discrimination on the basis of sexual orientation. Below is a more detailed look at how the federal agencies and the courts have increasingly come to recognize that sex nondiscrimination protections extend to both gender identity and sexual orientation.

Gender identity

The first federal court ruling to involve an in-depth analysis of the meaning and scope of Section 1557 provides clear evidence that the ACA's sex nondiscrimination protections do indeed extend to gender identity. In a March 2015 ruling in the case of *Rumble v. Fairview Health Services*, a federal judge in the District of Minnesota found that a transgender individual has cause under Section 1557's sex nondiscrimination protections to pursue a lawsuit alleging health care discrimination on the basis of his gender identity.¹⁴

The plaintiff, Jakob Rumble, is a transgender man. According to the court’s understanding, transgender is “an umbrella term that may be used to describe people whose gender expression does not conform to cultural norms and/or whose gender identity is different from their sex assigned at birth.” In Jakob’s case, he was assigned a female sex at birth but identifies as male. In 2013, Jakob visited Fairview Southdale Hospital seeking treatment for a fever and severe genital pain. Over the course of his time in the emergency department and his six-day hospital stay, he encountered numerous instances of poor treatment, such as being misgendered, neglected while in medical distress, and subjected to repeated mistreatment by health providers, including an assaultive physical examination of his genitals in the emergency room.¹⁵ Jakob subsequently filed a complaint alleging that his negative experiences at the hospital were directly related to his gender identity and therefore constitute sex discrimination that is prohibited under Section 1557.

The hospital responded to the complaint by arguing that Jakob is not protected by Section 1557 because, as a transgender individual seeking relief from discrimination related to his gender identity, he was not plausibly alleging discrimination on the basis of sex. The opinion issued by Judge Susan Nelson bluntly disagrees, finding that Jakob’s experiences are not simply poor bedside manner or a lack of transgender cultural competency: They are actionable instances of discrimination that denied Jakob the benefits of appropriate medical care. Because Jakob’s mistreatment at the hands of the providers charged with caring for him was motivated by his gender identity, Judge Nelson concluded that he therefore has cause to pursue a claim of discrimination on the basis of sex.

Similarly, the Equal Employment Opportunity Commission, or EEOC, has formally ruled that gender identity discrimination is per se sex discrimination under Title VII of the Civil Rights Act.¹⁶ Moreover, every major federal agency responsible for enforcing laws prohibiting sex discrimination—including the Departments of Justice, Labor, Education, and Housing and Urban Development—has taken the position that these laws protect transgender individuals by prohibiting discrimination on the basis of gender identity.¹⁷

On the state level, insurance regulators in several states have recently invoked their own laws prohibiting sex discrimination and/or unfair trade practices relating to sex to address discrimination against transgender people. Specifically, state regulators have issued bulletins clarifying that these laws prohibit health plans from discriminating against transgender individuals by denying them coverage for medically necessary services related to gender transition.¹⁸ In addition to state law, several of these bulletins also cite the nondiscrimination protections of ACA Section 1557.¹⁹

These steps by state regulators are particularly important because the majority of private insurers in the United States, as well as some state Medicaid programs, continue to use discriminatory transgender-specific exclusions in their policies. These exclusions are worded in a variety of ways. For example, they may deny “treatment related to sex transformations, sexual function, sexual dysfunctions or inadequacies regardless of medical necessity,”²⁰ “all services related to gender dysphoria or gender

identity disorder,”²¹ or “all services related to sexual reassignment.”²² Regardless of their specific wording, however, these exclusions have the common effect of blocking transgender people from receiving coverage for hormone therapy and other medically necessary health care services related to gender transition. They also obstruct access to preventive services that are commonly associated with only one gender, such as Pap tests and mammograms, and frequently prevent transgender people from getting coverage for any care at all.

In order to eliminate any doubt that Section 1557 protects transgender individuals from discrimination in care and coverage, HHS regulations implementing Section 1557 must clarify that the provision’s sex nondiscrimination protections include gender identity. To promote a common understanding among state and federal regulators, covered entities, and consumers of the rights and responsibilities contained in Section 1557, the regulations should include specific examples of actions or policies that could trigger an investigation of alleged discrimination on the basis of gender identity. In reflection of the kinds of discrimination that transgender individuals frequently encounter, these might include but should not be limited to:

- A health care provider refusing to treat a transgender individual
- A health care provider or other service provider creating a hostile environment for a transgender individual through mistreatment, such as consistently and intentionally referring to the individual by the incorrect name and/or gender pronoun or refusing to allow the individual to use sex-segregated facilities that correspond to the individual’s gender identity
- A health insurance carrier refusing to cover “gendered” preventive screenings, such as mammograms, prostate exams, or cervical Pap tests, for a transgender individual on the grounds that the individual’s gender on their insurance paperwork does not match the gender typically associated with the procedure
- A health plan incorporating language denying equal coverage for otherwise medically necessary treatments and procedures, such as hormone therapy, mental health counseling, or surgeries, on the basis of an insured individual’s gender identity, transgender status, or diagnosis of gender identity disorder or gender dysphoria

Sexual orientation

As mentioned above, the 2012 HHS agency opinion letter regarding ACA Section 1557 recognizes that sex nondiscrimination protections include sex stereotyping. Importantly, a growing trend in the courts and at the federal agencies indicates that these protections should be understood to extend not just to sex stereotyping, but to sexual orientation itself.

The EEOC, for instance, has held that discrimination on the basis of sexual orientation is a viable sex-based discrimination claim under Title VII. The EEOC's reasoning recognizes that intentional discrimination based on an individual's sexual orientation—such as harassment for identifying as gay or being in a relationship with a partner of the same sex—can be shown to be rooted in the stigmatization of people who contravene sex-based norms of masculinity and femininity.

Recent actionable claims brought before the federal courts and the EEOC by individuals alleging sex discrimination on the basis of their sexual orientation have included instances in which:

- A gay man experienced discrimination because his “sexual orientation is not consistent with [his supervisor’s] perception of acceptable gender roles” and whose “orientation as homosexual had removed him from [his supervisor’s] preconceived definition of male.”²³
- An employer declined to offer a male employee’s husband spousal insurance benefits that were available to the male spouses of female employees.²⁴
- A lesbian employee experienced workplace harassment “motivated by the sexual stereotype that having relationships with men is an essential part of being a woman.”²⁵

The EEOC further clarified its view of sexual orientation discrimination as sex discrimination in a February 2015 memorandum to all its field offices. The memorandum clearly states, “individuals who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a charge with the EEOC, and their charges should be accepted under Title VII and investigated as claims of sex discrimination in light of Commission precedent.”²⁶

Clarifying that the sex nondiscrimination protections of ACA Section 1557 extend to sexual orientation is also consistent with the intent of several recent HHS actions that recognize the seriousness of and seek to address the discrimination that lesbian, gay, and bisexual people and their families experience in the health system.

When Lisa Pond collapsed with a brain aneurysm during a family vacation in Florida, for instance, staff at Florida’s Jackson Memorial Hospital denied her partner, Janice Langbehn, and their children access to Lisa’s bedside. Hospital staff told Janice that they were in an “anti-gay state” and refused to acknowledge legal documents authorizing visitation and powers of attorney for health care decisions between the two women.²⁷ Janice and the couple’s children were not allowed to visit Lisa until shortly before she passed away in the hospital. The tragic circumstances of this case prompted President Barack Obama to issue a presidential memorandum in 2010 directing the Centers for Medicare and Medicaid Services, or CMS, to use its regulatory authority to require all hospitals receiving federal financial assistance to recognize and enforce nondiscrimination in visitation and health care decision-making for same-sex couples, as well as other patient-designated support persons.²⁸

People in same-sex relationships also often have particular difficulty obtaining health insurance coverage for a partner or spouse, since a lack of legal relationship recognition in many states makes it difficult for same-sex couples to cover each other. In a recent study, among low- and middle-income LGBT adults who have tried to access employer-sponsored coverage for a same-sex partner, more than 50 percent reported encountering overt difficulties, and as many as 75 percent reported feeling discriminated against in the process.²⁹ In 2014, HHS addressed this issue by requiring health insurance carriers offering non-grandfathered health coverage in all states to offer legally married same-sex couples the same spousal or family benefits available to different-sex couples.³⁰ In issuing this guidance, HHS concluded that discriminating on the basis of sexual orientation by offering family or spousal coverage only to different-sex spouses contravenes federal nondiscrimination protections under the ACA. Similarly, in issuing regulations under ACA Section 1557, HHS should take the opportunity to address discrimination against lesbian, gay, and bisexual people by expressly clarifying that Section 1557's sex nondiscrimination protections extend to sexual orientation.

Conclusion

As implementation of the Affordable Care Act continues, more LGBT people in states across the country will gain access to health insurance coverage and regular health care, some for the first time in their lives. Many LGBT people, however—particularly transgender people and people in same-sex relationships—remain skeptical of the degree to which the health reform effort will address their concerns and meet their needs.³¹ Nationwide nondiscrimination protections that clearly include both sexual orientation and gender identity and that apply throughout the health system are essential to help LGBT individuals successfully connect with the coverage and care they need.

In order to help achieve the goals of the health reform effort by addressing the ongoing problem of discrimination against LGBT people in the health system and promoting optimal health outcomes for the LGBT population, HHS should issue regulations implementing Section 1557 of the Affordable Care Act and clarifying that the section's sex nondiscrimination protections extend to gender identity and sexual orientation. As discussed above, doing so is consistent both with trends in the courts and with numerous laudable actions that HHS and other federal agencies have recently taken to protect LGBT people.

These regulations should be coupled with robust sexual orientation and gender identity data collection efforts in federally supported surveys and programmatic data collection instruments such as the health insurance marketplace applications. Together, robust nondiscrimination protections and data collection efforts are essential components of establishing and enforcing open and equitable access to the rights and benefits of the Affordable Care Act for everyone—including LGBT people and their families.

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Endnotes

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- 11 Sarah McBride, "Infographic: Legally Married and Legally Fired," Center for American Progress, March 9, 2015, available at <https://www.americanprogress.org/issues/lgbt/news/2015/03/09/106966/infographic-legally-married-and-legally-fired>.
- 12 42 U.S.C. § 18116
- 13 Office for Civil Rights Director Leon Rodriguez, "Letter to Maya Rupert, OCR Transaction Number: 12-000800" (U.S. Department of Health and Human Services, 2012), available at <http://www.nachc.com/client/OCRLetterJuly2012.pdf>; This interpretation accords with the opinion of the Office for Civil Rights at the Department of Education, which has concluded that Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity and sex stereotyping. See Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (U.S. Department of Education, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; this guidance states, "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation."
- 14 *Rumble v. Fairview Health Services*; D. Minn. (2015 WL 1197415), available at <http://www.washingtonblade.com/content/files/2015/03/259302140-0-14-cv-02037-31.pdf>.
- 15 *Ibid.* Among other allegations of mistreatment, Rumble alleged that Dr. Randall Steinman began a painful physical examination of Rumble's swollen genitals and that Dr. Steinman continued to "forcefully jab" at Rumble's genitals even after Rumble repeatedly asked him to stop.
- 16 *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.
- 17 See, for example, Attorney General Memorandum, "Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964" (2014); *Macy v. Holder*, EEOC Appeal No. 0120120821.
- 18 See, for example, Massachusetts Office of Consumer Affairs and Business Regulation, "Division of Insurance Bulletin 2014-03" (2014), available at <http://www.mass.gov/ocabr/docs/doi/legal-hearings/bulletin-201403.pdf>.
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- 21 Utah Basic Plus State Employee Plan (Utah, 2011)
- 22 Kaiser Ded/CO HMO 1200D plan (Colorado, 2011)
- 23 *Terveer v. Billington*, 34 F. Supp. 3d 100 (D. D.C. 2014).
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