



## Regulations Regarding Sexual Orientation and Gender Identity

(As of August 22, 2016)

Two Supreme Court cases, *Obergefell v. Hodges* and *United States v. Windsor*, recently changed the landscape for marriage, forcing every state in the union to provide same-sex marriage licenses. *Obergefell* was a publicized case, and few people were surprised by the Supreme Court's illegitimate redefinition of marriage. However, what has surprised many is the subversive attempts of government agencies to elevate sexual orientation and gender identity as protected classes in regulation, even though agencies do not have the legal authority to take such action and multiple courts have ruled sex discrimination does not include sexual orientation or gender identity.<sup>1</sup> As summarized below, multiple federal government departments and agencies have proposed or adopted regulatory provisions that provide special protections based on sexual orientation and gender identity.

### *Center for Medicare & Medicaid Services*

On June 2, 2016, the Center for Medicare & Medicaid Services ("CMS") issued [Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery \(CAG-00446N\)](#) that acknowledges there is a lack of clinical studies proving gender reassignment surgery improves the health of the patient. However, even with that acknowledgement, the Memo determined gender reassignment surgery may be covered on an individual claim basis while comments are accepted on this topic and further rulemaking continues. In addition, on June 16, 2016, CMS released a [proposed rule](#) (ID: 81 FR 39448/ RIN: 0938-AS21) that would establish explicit requirements that a hospital not discriminate on the basis of, in part, gender identity (which the rule redefines sex to include) and sexual orientation, and requiring the hospital to implement a written policy prohibiting discrimination on the basis of gender identity or sexual orientation as a condition for participation in federal health programs.

### *Department of Defense*

On February 1, 2016, the Department of Defense ("DOD") issued a [proposed rule](#) (ID: 81 FR 5061/ RIN: 0720-AB65) that would remove the regulatory provision that categorically excludes all treatment of gender dysphoria in TRICARE (military insurance). However, sex change operations would not be covered, as covering such procedures is prohibited by a federal statute (10 U.S.C. § 1079). In justifying this change, DOD pointed to Section 731 of the NDAA for FY 1994, directing the Secretary of Defense to implement a health benefit option modelled on health maintenance organization plans offered in the private sector. However, without the regulations proposed in September of 2015 and approved by the Department of Health and Human Services in May of 2016 which force such coverage in the private sector, the DOD would not have justification for this change. Thus, the Departments within the Obama administration are relying on each other for justification of the regulations that provide for medical coverage of hormone treatment for transgendered persons.

## *Department of Education*

While the Department of Education (“ED”) has not formally adopted new regulations that incorporate special protections based on sexual orientation and gender identity, in April of 2015, in conjunction with issuing a “Dear Colleague” letter, it adopted a set of guidelines implementing Title IX of the Civil Rights Act of 1964, the [Title IX Resource Guide](#). Specifically, these guidelines state, the “sex discrimination prohibition extends to claims of discrimination based on gender identity” and that federal funding recipients have additional obligations to accommodate students based on “actual or perceived sexual orientation.”

On May 13, 2016, ED issued [a letter](#) that defined the types of accommodations transgendered persons are expected to receive in public schools, as a condition of the schools’ funding. In conjunction, ED issued [Examples of Policies and Emerging Practices for Supporting Transgender Students](#). Both of these documents highlight ED’s requirement that restrooms, locker rooms, classes, athletic programs, housing and overnight accommodations, and other activities be based on a student’s subjective gender identity rather than his or her biological sex, determinable even before birth, and that failure to provide accommodations based on subjective gender identity results in a hostile environment for transgendered students. The directive even goes so far as to direct schools to use the pronoun chosen by the student, rather than his or her biological sex assigned at birth, in the school’s daily routines and record keeping.

These guidelines subvert the traditional regulatory process that requires a sixty day comment period, and should not be treated as legal authority, and also subverts the privacy and safety of students across the country. This is why students at the University of North Carolina and fifty-one families in Illinois are now suing to secure privacy and safety in their campus bathrooms, locker rooms, and changing facilities.

## *Department of Health and Human Services*

In September of 2015, the Department of Health and Human Services (“HHS”) issued a [proposed rule](#) (ID: HHS-OCR-2015-0006-0001/ RIN: 0945-AA02), under the auspices of implementing Obamacare (Section 1557), that prohibited those receiving federal financial assistance from engaging in sex discrimination in the provision of health care services and health care coverage. However, the proposed rule defined sex not as biological sex determinable before birth, but construed sex to include everything from termination of pregnancy, to gender identity and sexual orientation. The proposed regulations specifically refer to gender identity as meaning “an individual’s internal sense of gender, which may be different from that individual’s sex assigned at birth.” The proposed regulations also required health insurance and coverage to provide for gender transition services, and prohibited discrimination in health care based on “termination of pregnancy.”

On May 11, 2016, much of this proposed rule was adopted and issued as a [final rule](#). The final rule, however, does not include sexual orientation as part of the definition of “on the basis of sex.” “On the basis of sex” does include “termination of pregnancy or recovery therefrom” and “gender identity.” Additionally, the final rule defines gender identity as “an individual’s internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual’s sex assigned at birth. The way an individual expresses gender identity is frequently called ‘gender expression,’ and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth.” The final rule also states that it is discriminatory for a covered entity to “deny or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other

limitations or restrictions on coverage, for any health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that an individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available," a covered entity to "[h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition," or a covered entity to "deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for specific health services related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual."

Sex is not subjective, it is an objective characteristic, and HHS should not prohibit discrimination based on subjective characteristics like gender identity. In addition, HHS should not force covered entities to provide controversial gender transition services and procedures that the medical community has not fully embraced because of their severe, negative, psychological, and physical impacts. Thus, HHS's mandate of such services and coverage does a disservice to the patients and may directly conflict with the religious and moral views of the covered entities, forcing the covered entities to violate their consciences.

Following HHS issuing this final rule, on June 2, 2016, the Centers for Medicare and Medicaid Services ("CMS") issued a [proposed decision memo](#) regarding coverage of treatment for gender dysphoria. Though CMS explored the "roles that psychological support, mental health care, cross-sex hormonal therapy, and the various gender reassignment related surgical procedures played in health outcomes," the interventions in the proposal focus on hormone therapy and surgery, neglecting psychological treatment for gender identity dysphoria. Ultimately, the proposal recommends determining Medicaid and Medicare coverage on an individual claim/case-by-case basis.

### ***Department of Housing and Urban Development***

On November 20, 2015, the Department of Housing and Urban Development ("HUD") [proposed a rule](#) (ID: FR-5863-P-01/ RIN:2506-AC40) to expand their February 2012 rule, *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity*. While the 2012 rule made substantial changes incorporating special protections based on sexual orientation and gender identity for long-term housing, it did not impose the rules on temporary, emergency shelters that involve shared sleeping quarters or shared bathing facilities. The November 2015 proposed rule, however, would do just that.

The proposed rule makes three primary changes: 1) It would require recipients and sub-recipients of assistance under the HOME Investment Partnerships Program, Community Development Block Grant Program, Housing Opportunities for Persons with AIDS Program, Emergency Solutions Grants Program, and the Continuum of Care Program, as well as owners, operators, and managers of shelters, buildings, and other facilities and providers of services covered by Community Planning and Development programs, to provide people who experience gender identity confusion with access to programs, benefits, and services based on the gender with which they identify at the time they seek the services. 2) It would change the definition of gender identity to mean "the gender with which a person identifies, regardless of the sex assigned to that person at birth. Perceived gender identity means the gender with which a person is perceived to identify based on that person's appearance, behavior, expression, other gender-related characteristics, or sex assigned to the individual at birth." And, 3) it would eliminate the 2012 ban on housing providers inquiring as to the recipient's sexual orientation or gender identity, but continue to prohibit discrimination on those bases. In addition, the rule bars "discrimination" based on sexual orientation and gender identity without providing accommodations for faith-based service providers.

## *Department of Justice*

In April of 2014, the Office of Civil Rights (Office of Justice Programs) at the Department of Justice (“DOJ”) provided [guidance](#) that sex-segregated or sex-specific housing should not isolate or segregate victims of violence based upon actual or perceived gender identity. However, unlike the regulations of other departments, these regulations interpret legislation, the *Violence Against Women Act Reauthorization of 2013*, that provides special protections on the bases of sexual orientation and gender identity, and is in effect from 2014 to 2018. Thus, while these special protections are bad policy, the DOJ’s regulations do have legal authority based in law, passed by Congress. A few other Departments have pointed to these regulations for justification for also redefining sex discrimination, despite those departments not having a basis in federal statute.

## *Department of Labor*

On January 26, 2016, the Department of Labor (“DOL”) issued a [notice of proposed rules](#) (ID: 81 FR 4550/ RIN: 1291-AA36) that discusses the DOL’s intention to prohibit discrimination based on sex, and to redefine the term “sex” to include transgender status and gender identity, in the implementation of the Workplace Innovation and Opportunity Act (“WIOA”), which provides federal funding for job programs and training. In addition, the rule specifically includes as a discriminatory practice, “denying individuals access to the bathrooms used by the gender with which they identify.” Also, while the proposed rule acknowledges that no Federal appellate court has concluded that Title VII’s prohibition on discrimination on the basis of sex prohibits discrimination on the basis of sexual orientation, the DOL also states “[a]s a matter of policy, we support banning discrimination on the basis of sexual orientation in the administration of, or in connection with, any programs and activities funded or otherwise financially assisted” under Title I of WIOA.

On June 14, 2016, DOL issued its [final rule](#), which governs federal contractors and subcontractors and federally assisted construction contractors and subcontractors and states, “The term sex includes, but is not limited to, pregnancy, childbirth, or related medical conditions; gender identity; transgender status; and sex stereotyping.” In addition, in the appendix, DOL included best practices for contractors, including an admonition for “Avoiding the use of gender-specific job titles such as ‘foreman’ or ‘lineman’ where gender-neutral alternatives are available.” While DOL did not include sexual orientation in its definition of sex, it does provide this example of discrimination: “Treating employees or applicants adversely based on their sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.”

## *Department of the Treasury*

On October 23, 2015, the Department of the Treasury [proposed regulations](#) (ID: 80 FR 64378/ RIN: 1545-BM10) to: 1) that redefine spouse, husband, and wife by stating, “For federal tax purposes, the terms *spouse*, *husband*, and *wife* mean an individual lawfully married to another individual. The term *husband and wife* means two individuals lawfully married to each other. And, 2) a marriage of two individuals is recognized for federal tax purposes if the marriage would be recognized by any state possession, or territory of the United States. However, it also says “the terms *spouse*, *husband*, and *wife* do not include individuals who have entered into a registered domestic partnership, civil union, or other similar relationship not denominated as a marriage under the law of a state, possession, or territory of the United States. The term *husband and wife* does not include couples who have entered into such a relationship, and the term *marriage* does not include such relationships.”



## *General Services Administration*

On August 8, 2016, the General Services Administration (“GSA”) released a [rule](#) to clarify that nondiscrimination requirements include gender identity as a prohibited basis of discrimination under the existing prohibition of sex discrimination for any facility under the jurisdiction, custody, or control of GSA. The rule went into effect on August 18, 2016, and relied on the regulations promulgated by the Departments of Education and Justice, the Equal Employment Commission, and the U.S. Office of Personnel Management to justify the GSA’s decision to require “Federal agencies occupying space under the jurisdiction, custody, or control of GSA [to] allow individuals to use restroom facilities and related areas consistent with their gender identity.” Additionally, the rule states, “Federal agencies may not restrict only transgender individuals to only use single-occupancy restrooms, such as family or accessible facilities open to all genders.” The scope of this rule’s impact is far-reaching, as GSA provides workspace to more than 1 million federal civilian workers and oversees the preservation of more than 480 historic buildings. GSA’s Public Building Service alone manages 354 million rentable square feet in 8,603 buildings in all 50 states, 6 U.S. territories, and the District of Columbia. GSA’s portfolio is comprised of GSA-owned properties and private sector leased properties, and GSA manages a variety of facility types including office buildings, courthouses, land ports of entry, and warehouses.

## *U.S. Equal Employment Opportunity Commission*

While Title VII of the Civil Rights Act of 1964 does not include sexual orientation or gender identity in its list of protected categories, which does include race, age, sex, and religion, the Equal Employment Opportunity Commission (“EEOC”) has [begun to interpret the statute’s sex discrimination provision](#) as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.

In fact, the EEOC filed a case in 2014 claiming sex discrimination on behalf of a transgender employee against an eye clinic in Florida. The eye clinic paid \$150,000 to settle its case. In settling this case, the EEOC has claimed success, and other federal departments have pointed to this reported success as justification for redefining sex to include gender identity. This is despite a majority of courts opining unwillingness to find that Congress intended to provide special protections based on gender identity when it provided Title VII protections from discrimination based on sex. For example, in *Etsitty v. Utah Transit Authority*, the Tenth Circuit held in 2007, “This Court agrees with... the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII.”

In addition, the EEOC filed a complaint in 2015 alleging sex discrimination on behalf of an air traffic controller who believes he was not selected for a permanent position as a front line manager because of his sexual orientation. While this case is ongoing, most of the Federal Circuit Courts have held Title VII’s prohibition on sex discrimination also does not prohibit discrimination on the basis of sexual orientation. Thus, case law supports a holding against the EEOC and the air traffic controller.

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<sup>1</sup> Sexual Orientation: *Larson v. United Air Lines*, 482 Fed. App’x 344, 348 n.1 (10th Cir. 2012); *Gilbert v. Country Music Ass’n*, 432 Fed. App’x 516, 520 (6th Cir. 2011); *Pagan v. Gonzalez*, 430 Fed. App’x 170, 171-72 (3d Cir. 2011); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005); *Osborne v. Gordon & Schwenkmeyer Corp.*, 10 Fed. App’x 554, 554 (9th Cir. 2001); *Richardson v. BFI Waste Sys.*, 2000 WL 1272455, \*1 (5th Cir. Aug. 15, 2000); *Hamner v. St. Vincent Hospital & Health Care Center, Inc.*, 224 F.3d 701, 704, 707 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751-52 & n.3 (4th Cir. 1996); *Williamson v. A.G. Edwards*

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*and Sons*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (binding on the Eleventh Circuit, as well as the Fifth, because it was decided before October 1, 1981, as held in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)). The case law often does not differentiate between same-sex attraction and same-sex conduct; none of the cited cases affirmatively suggests that either sexual attraction or sexual conduct is protected under Title VII.

Gender Identity: *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir.2007) (the use of women’s public restrooms by a biological, cross-dressing male could result in liability for employer, and such a motivation constitutes a legitimate, nondiscriminatory reason); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir.1995); *Braninburg v. Coalinga State Hosp.*, No. 1:08-cv-01457-MHM, 2012 WL 3911910, at \*8 (E.D.Cal. Sept.7, 2012) (“it is not apparent that transgender [sic] individuals constitute a ‘suspect’ class”); *Jamison v. Davue*, No. S-11-cv-2056 WBS, 2012 WL 996383, at \*3 (E.D.Cal. Mar.23, 2012) (so-called “transgender” individuals do not constitute a ‘suspect’ class, so allegations that defendants discriminated...are subject to a mere rational basis review”); *Kaeo-Tomaselli v. Butts*, No. 11-cv-00670 LEK, 2013 WL 399184, at \*5 (D.Haw. Jan.31, 2013) (noting the plaintiff’s status as a claimed “transgender” person did not qualify the plaintiff as a member of a protected class and explaining the court could find no “cases in which transgender [sic] individuals constitute a ‘suspect’ class”); *Lopez v. City of New York*, No. 05-cv-1032-NRB, 2009 WL 229956, \*13 (S.D.N.Y. Jan.30, 2009) (explaining that because such individuals are not a protected class for the purpose of Fourteenth Amendment analysis, claims that a plaintiff was subjected to “discrimination” based on his status as a transvestite are subject to rational basis review).