

Injunction Limits HHS Enforcement of Section 1557 Protections for Transgender Individuals

On December 31, 2016, a Texas Federal District Court issued a nationwide [preliminary injunction](#) prohibiting the Department of Health and Human Services (HHS) Office of Civil Rights from enforcing the specific transgender protections found in the [regulations](#) implementing Section 1557 of the Affordable Care Act.

The case, *Franciscan Alliance v. Burwell*, Civil Action No. 7:16-cv-00108-O, is a suit brought by religiously-affiliated insurers and providers arguing that the regulations would require them to provide coverage and services in violation of their religious beliefs. Plaintiffs further claimed, and for purposes of the preliminary injunction the judge agreed, that the sex discrimination prohibitions of the statute only address discrimination against an individual based on the sex at birth.

The injunction order has been criticized both for its [factual assertions](#) about the 1557 regulations, as well as its [legal reasoning](#), including the scope of the injunction.

The injunction, though important, is limited in its impact on transgender older adults:

- The HHS Office of Civil Rights will stop investigations and compliance actions with respect to complaints based on discrimination based on an individual's transgender status or termination of pregnancy. Individuals will continue to have the right to pursue private actions in the courts.
- HHS is not restrained from enforcement of the other sections of its 1557 regulations, including those related to language access, race, age, and disability discrimination, as well as sex discrimination not specifically covered by the injunction. Part of the sex discrimination portion of the regulations prohibits discrimination based on sex stereotyping. That portion of the regulations is not subject to the injunction.
- The preliminary injunction only applies to the regulations that HHS adopted. It does not affect the statutory provision itself.
- Medicare coverage of gender reassignment surgery is not affected. Those state Medicaid programs that currently cover GRS also will not see a change. The injunction may, however, slow the momentum to expand GRS coverage to other state Medicaid programs.
- Although Judge Reed O'Connor issued the injunction on New Year's Eve because transgender coverage requirements for insurers would have come into effect January 1, it is unlikely that the ruling will affect Marketplace coverage for 2017, since plans had already designed and sold their plans.

Over the longer term, the bigger threats to Section 1557 lie with Congress, which could repeal its provisions altogether, and with HHS, which could step back from the current vigorous enforcement posture of the agency or weaken the regulations. Both threats are broad and encompass all aspects of Section 1557, not just those that apply to discrimination against transgender individuals.

As discussed in a [Justice in Aging issue brief](#), Section 1557 offers significant promise both to stop discrimination in health care and, equally important, to help reduce disparities in the delivery of health care services. Judicial, legislative, or administrative actions that erode the power of Section 1557 will hurt those older adults who most need protection from discrimination.