Section 1557 Suffers Challenges as Agency Deference Dissolves in *Loper Bright*'s Wake

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In July 2024, three federal district court judges blocked enforcement of several Section 1557 nondiscrimination provisions, which prohibit discrimination within certain health programs and activities for those who have protected health status, including race, color, national origin, sex, disability, and age. These cases lead the way for what is likely to be an onslaught of litigation redefining the regulatory landscape now that *Loper Bright* has removed the 1984 *Chevron* doctrine. Post-*Loper Bright*, the substantial deference *Chevron* previously afforded to administrative agencies' statutory interpretation is gone and, in its place, is a preference for judicial interpretation.

Background

Section 1557 prohibits discrimination in health programs and activities that receive federal financial assistance from the Department of Health and Human Services (HHS) on the basis of a protected status, including race, color, national origin, sex, disability, and age. On April 26, 2024, HHS released the 2024 final Section 1557 regulations and a list of FAQs. As covered in our April 2024 article, New Section 1557 Regulations: Focused on Healthcare Industry but Indirectly Impact Employee Benefits, the 2024 final regulations are the third iteration of Section 1557 provisions subject to lawsuits and injunctions almost since their inception in 2016.

The 2024 final regulations broadly interpret discrimination on the basis of sex to include sexual orientation, gender identity, sex stereotyping, sex characteristics including intersex traits, pregnancy, and pregnancy-related conditions. "Covered entities" under Section 1557 are "health programs or activities" that receive "federal financial assistance" from HHS, which also includes the Marketplace. A "health program or activity" is an entity that administers or provides individuals with health-related services, health insurance coverage, or other health-related coverage; provides clinical, pharmaceutical, or medical care; engages in health or clinical research; or provides health education to health care professionals.

Section 1557 covered entities must follow specific steps to ensure that their provided health care is nondiscriminatory, including making assurances to HHS that they will comply with Section 1557, not discriminating on the basis of any protected status, providing meaningful access for those with limited English proficiency, ensuring buildings and facilities are accessible, establishing effective communication for disabled individuals, and providing a nondiscrimination notice. Additional requirements apply for covered entities with 15 or more employees, including naming a Section 1557 coordinator to address grievances, establishing and training employees on policies and procedures, and establishing a grievance process.

On June 28, 2024, the Supreme Court overruled the decades-long *Chevron* doctrine (set forth in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*) in *Loper Bright Enterprises v. Raimondo*. For 40 years, *Chevron* dictated that when a statue was silent or ambiguous, courts were required to defer to the administrative agency's interpretation. But post-*Loper Bright*, the responsibility to untangle statutory ambiguities is reallocated to the general expertise of the federal judiciary. In a complete reversal to its holding in *Chevron*, the Supreme Court in *Loper Bright* held that under the Administrative Procedure Act, courts should favor their own judgment when interpreting disputed statutes without deferring to agency expertise.

With the *Chevron* framework dismantled, federal courts now have amplified interpretative clearance, and the 2024 Section 1557 regulations were the first of likely many targets in the new regulatory landscape, with lawsuits challenging the regulations filed just days after *Loper Bright* was handed down.

Lower Courts Use *Loper Bright* to Block Expansion of Nondiscrimination Rules for Gender Identity

In July 2024, federal courts in Mississippi, Texas, and Florida used the post-*Chevron* legal framework described above to issue stays or injunctions challenging Section 1557 regulations just before the provisions' effective date. Appeals are likely as challenges continue through the court system, but other than the explicitly stayed provisions described below, the regulations remain in effect.

In *Tennessee v. Becerra*, a Mississippi court found that the HHS likely exceeded its statutory authority when it interpreted "on the basis of sex" to specifically include discrimination based on gender identity. The court stayed the effective date of the regulations' inclusion of gender identity in sex discrimination and further enjoined HHS from implementation or enforcement of the provisions nationwide.

Separately, in *Texas v. Becerra*, a Texas court went further and accepted the argument that since HHS' improper interpretation permeated the 2024 Section 1557 regulations, they should be stayed in their entirety. Thus, all 2024 Section 1557 provisions (not merely those relating to the interpretation of sex discrimination) were stayed for covered entities in Texas and Montana.

Finally, in *Florida v. HHS*, a Florida court blocked HHS' interpretation of discrimination "on the basis of sex" as it relates to gender identity and postponed the rule within Florida only. See HHS' covered entities resource page for the current status of all stays and injunctions.

Employer Action Steps

While *Loper Bright* did not explicitly involve employee benefits or the employers that provide them, its result will nonetheless be far-reaching with regulatory uncertainties becoming more common, as shown by the lower court cases above.

With these court cases, currently all 2024 Section 1557 regulations related to the inclusion of gender identity in the definition of sex discrimination are stayed and HHS is enjoined from enforcing them nationwide while the litigation continues. Additionally, the entirety of the 2024 Section 1557 regulations are stayed for covered entities in Texas and Montana, regardless of their connection to sex discrimination. Employers should continue to monitor for legal updates and be prepared to take action, if necessary, when the litigation concludes. We will continue to track developments and will keep you aware of any that directly impact employers and benefit plans.

The intent of this analysis is to provide general information regarding the provisions of current laws and regulation. It does not necessarily fully address all your organization's specific issues. It should not be construed as, nor is it intended to provide, legal advice. Your organization's general counsel or an attorney who specializes in this practice area should address questions regarding specific issues.