



LGBTQ discrimination in US health care under scrutiny

A US Supreme Court ruling could undermine the Trump administration's plan to roll back some protections against sex discrimination. Susan Jaffe reports.

The Trump administration suffered a major defeat last week in the US Supreme Court, which could undermine its attempt to scrap protections under the Affordable Care Act (ACA) against sex discrimination.

In a landmark decision on June 15, the court ruled that the Civil Rights Act protects gay and transgender workers from discrimination by their employers. But days later, Trump administration officials at the Department of Health and Human Services (HHS) finalised a more permissive standard for discrimination in health care.

A new HHS rule takes effect in August and allows health-care providers and insurers to turn away transgender patients, whether they need a routine medical check-up or care related to gender reassignment. Physicians and other providers can also refuse to treat a woman who has had an abortion. The rule affects millions of people insured under any health programme funded by the HHS, such as Medicare and Medicaid, including those with ACA coverage.

"What this comes down to is how do we understand the principle of conscientious objection and how can it be used or misused", said Sofia Gruskin, a professor of law and preventive medicine and director of the University of Southern California (USC) Institute on Inequalities in Global Health.

The ACA provision at the centre of the controversy protects patients from discrimination on the basis of race, skin colour, national origin, sex, age, and disability.

Last year, a federal court judge in Texas ruled that transgender patients and those who have had abortions are not entitled to protection against discrimination because the provision

does not specifically mention gender identity or termination of a pregnancy. Therefore, the judge said that discrimination based on gender identity or abortion history is not a form of sex discrimination. Instead of challenging the decision, HHS officials rewrote the Obama administration's version to exclude the two groups.

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"They want people to only be able to express and live and get health care for the biological sex they were assigned at birth", said Chris Beyrer, a physician and professor of epidemiology at the Johns Hopkins Bloomberg School of Public Health in Baltimore. "And this is completely out of step with modern medicine, psychiatry, and psychology."

Ryan Anderson, a senior research fellow at the conservative Heritage Foundation, disagrees. "[The] HHS clarified that the word 'sex' does not mean 'gender identity' or 'termination of pregnancy'—as the Obama administration had unlawfully said."

Some legal experts and health-care provider groups are concerned that this narrow definition could weaken protections against discrimination based on sexual orientation, threatening members of the LGBTQ community.

"This sets up a sort of showdown between a provider's right to refuse care and what it means to discriminate on the basis of sex", said Katie Keith, a health law professor at Georgetown University Law Center and consumer representative for the National Association of Insurance Commissioners.

"We support efforts to fight the [HHS] ruling, which are already

underway", Rod Hanners, interim chief executive officer of the USC Keck Medicine Center and Laura Mosqueda, dean of the USC Keck School of Medicine, told their colleagues in a joint letter last week. USC joins opposition from some of the most influential provider groups, including the American Medical Association and the American Hospital Association.

The HHS unveiled its revised rule on Friday, June 12, but on the following Monday, the Supreme Court gave Americans a much more expansive definition of sex discrimination to protect gay and transgender people in the workplace. The effect was like "whiplash", said Jen Kates, director for global health and HIV policy and vice president at the Kaiser Family Foundation. Surprised LGBTQ activists were thrilled.

"An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex", wrote Justice Neil Gorsuch, a Trump appointee, in the precedent-setting ruling. "Sex plays a necessary and undisguisable role in the decision, exactly what Title VII [of the Civil Rights Act] forbids."

But Tom Fitton, president of Judicial Watch, a conservative advocacy group that supported the Gorsuch nomination, called the decision "sophistry" and "an end run around Congress" by attempting to create new law.

Yet Kates, Beyrer, and other health law experts say the Gorsuch decision will make it more difficult for the Trump administration to defend the HHS rule against lawsuits that are sure to come.

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