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HHS' NEW ABORTION & TRANSGENDER MANDATE CHALLENGES CATHOLIC EMPLOYERS, PHYSICIANS, AND HOSPITALS

On August 4, 2022, HHS published a new proposed regulation that, when made final, will create substantial moral problems for Catholic employers and for Catholic physicians and hospitals.

What is the statutory foundation for HHS's new rule? Section 1557 of the Affordable Care Act.

Who's bound? The rule binds covered entities including hospitals and physicians, group health insurers, and third-party administrators ("TPAs"). Through foreclosure of morally permissible options and coordinated-EEOC enforcement of Title VII, employers with fifteen or more employees will be bound by the health plan coverage mandates.

How does the Rule bind employers? While the Rule states that it does not apply to employers with regard to their health plans, this is misleading for several reasons. First, because the rule expressly binds health insurers and TPAs, it forecloses all options for employers to have insurers and TPAs administer a health plan that excludes the immoral mandates. Second, HHS makes clear in its rule that it will refer complaints against employers to the EEOC so that the EEOC can enforce the coverage mandates under Title VII. Third, HHS states that its rule should serve as a "template" for other federal agencies. Given its coordination with the EEOC and the EEOC's actions and statements, the EEOC will enforce nearly identical coverage mandates against employers.

What's required? The rule defines "sex" discrimination as the failure to include so-called gender-affirming care ("GAC") in employee health plans or as the refusal by a hospital or physician to perform such services. GAC includes puberty blockers for children as young as 12, cross-sex hormones, genital mutilating surgeries, feminizing and masculinizing cosmetic surgeries, counseling, breast binding, testicular tucking, and more notwithstanding adverse effects including impotence and sterility. Covered entities must hire a "section 1557 coordinator," make assurances of compliance, post notices, and provide elaborate training.

Does the rule mandate chemical abortion and surgical abortion? Yes. HHS defined "sex" discrimination as including discrimination on the basis of "pregnancy or related conditions" and says in its commentary this also means "termination of pregnancy." To lessen any doubt that "termination of pregnancy" means "abortion," HHS then refused to incorporate Title IX's abortion neutrality provision even though Title IX yoked that provision with its prohibition of sex discrimination, and

Title IX's prohibition of sex discrimination provided the legal basis for HHS's new rule. HHS then refused to follow court rulings in the *Catholic Benefits Association* and *Franciscan Alliance* cases holding that Title IX's abortion neutrality provision was part of its prohibition of sex discrimination. Three weeks before publishing the proposed rule, HHS issued "guidance" to pharmacies saying that ACA section 1557's prohibition on sex discrimination required them to stock abortion pills. While cagey and contrary to other laws, the only reasonable interpretation is that the new rule mandates surgical and chemical abortion coverage and, for hospitals and doctors, surgical and chemical abortion services.

What is the role of WPATH, the American Pediatric Association, and other medical associations? HHS's commentary to its rule repeatedly states that the content of the new GAC mandate will be based on professional and generally accepted "standards of care." To determine the content of those professional standards, HHS cites to standards articulated by the World Professional Association of Transgender Health ("WPATH") and other medical professional associations. Jennifer Bilek has written extensively regarding the funding of these groups by billionaire "synthetic sex identity" activists. Leor Sapir has written about the dubious "science" informing the GAC standards adopted by the American Pediatric Association and others.

Is there a religious exemption? No. After endorsing a very restrictive view of religious freedom, HHS permits covered entities to ask it for religious or conscience exemption.

Is there an exemption for Catholic hospitals? No, in fact, the rule prohibits Catholic hospitals from requiring its personnel to comply with the USCCB's Ethical and Religious Directives when they conflict with the new GAC requirements.

Is there a professional judgment exemption? No. The rule says that "a provider's belief that gender transition or other GAC can never be beneficial for [patients] is not a sufficient basis for a judgment that a health service is not clinically appropriate."

Is there a state law exemption? No. The rule also says that a state law's limitation or proscription of any aspect of GAC "is not a sufficient basis for a judgment that a health service is not clinically appropriate."

What's the risk for those who do not comply? The rule will be enforced by government and private action, including class action, with the sanctions to include compensatory and punitive damages, injunctions, and attorneys fees. Noncompliant hospitals and physicians will also be subject to Federal False Claims Act lawsuits, civil penalties of \$11,000 for each false claim, treble damages, loss of federal funds, and even up to five years imprisonment.

Is there a solution for Catholic employers? Yes. The January 2021 permanent injunction that CBA won in its third lawsuit protects its present *and future* members (along with their insurers and TPAs) from any "gender-transition procedures" mandate derived from section 1557 of the Affordable Care. The court defined "gender-transition procedures" to include "surgery, counseling, provision of pharmaceuticals, or other treatments sought in furtherance of gender transition." CBA will take action as necessary to protect them from any abortion mandate present after HHS's rule become final.