



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.

Who's bound? The rule binds health care providers, including hospitals and physicians, group health insurers, third party administrators. Through foreclosure of morally-permissible options and coordinated-EEOC enforcement of Title VII, all employers with fifteen or more employees.

What's required? The rule defines “sex” discrimination as the failure to include so-called gender affirming care in employee health plans or as the refusal by a hospital or physician to perform such services. “Gender-affirming care” (“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 this means “termination of pregnancy.” HHS then refused to incorporate Title IX’s abortion neutrality provision, and it refused to follow court rulings in the *Catholic Benefits Association* and *Franciscan Alliance* cases that required this. Finally, HHS also recently issued “guidance” to pharmacies three weeks before publishing its rule that effectively required them to stock abortion pills. While cagey and contrary to other laws, the only reasonable interpretation is that the new rule mandates abortion coverage and, for hospitals and doctors, abortion services.

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.

Are there any meaningful exemptions? No, in fact, the rule prohibits Catholic hospitals from requiring its personnel to comply with the USCCB’s Ethical and Religious Directives when they are contrary to the new “gender-affirming” standards. It also forbids physicians from exercising their professional judgment when they conclude that transgender services will harm patients.

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 including compensatory and punitive damages, injunctions, and attorneys fees. Noncompliant hospitals will also be subject to Federal False Claims Act lawsuits, fines, treble damages, loss of federal funds, and even 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 from the GAC mandate. CBA will take action as necessary to protect them from any abortion mandate.