

# CLIENT ALERT

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## UPDATE TO SUMMARY OF AMENDMENTS TO ACA RULES: FEDERAL COURT BLOCKS CERTAIN CHANGES

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On July 7, 2020, we published a client alert regarding the Department of Health and Human Services (the "HHS") June 19, 2020 rule ("2020 Rule") modifying the non-discrimination provision ("Section 1557") of the Patient Protection and Affordable Care Act ("ACA"). In that alert, we discussed the major changes to the rule, including a change in the definition of "on the basis of sex." As discussed in that alert, the 2020 Rule removed the definition of "on the basis of sex," which had previously included gender identity. HHS released a statement stating that it would instead "enforce Section 1557 by returning to the government's interpretation of sex discrimination according to the plain meaning of the word 'sex' as male or female and as determined by biology."<sup>1</sup>

On August 17, 2020, one day before the 2020 Rule was to take effect, the District Court for the Eastern District of New York issued a preliminary injunction staying the 2020 Rule's repeal of the definition of "on the basis of sex."<sup>2</sup> In *Asapansa-Johnson Walker v. Azar*, two transgender women with "serious medical conditions that require ongoing care," filed a lawsuit to prevent the implementation of the 2020 Rule.<sup>3</sup> Both claimed healthcare providers previously discriminated against them based on their transgender status. They also alleged that the past discrimination they experienced would likely "lead them to avoid necessary medical care out of fear of further discrimination."<sup>4</sup>

The Court determined that the 2020 Rules were both "contrary to law" and "arbitrary and capricious"<sup>5</sup> under the Administrative Procedures Act.<sup>6</sup> First, the Court considered the Supreme Court's recent decision in *Bostock v. Clayton Cnty, Ga.*, 140 S. Ct. 1731 (2020), which was handed down three days after the 2020 Rules were filed, and just four days before they were published. In *Bostock*, the Supreme Court held "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," under Title VII of the Civil Rights Act of 1964.<sup>7</sup> Acknowledging, as HHS did in the 2020 Rule, that an interpretation of Title VII has ramifications for Section 1557, the Court held that the 2020 Rule was contrary to law.<sup>8</sup>

Next, the Court noted that HHS was aware of the *Bostock* case, that a decision was likely to come before the end of the Supreme Court's term, and that the decision would have ramifications for the 2020 Rule. By failing to consider the *Bostock* decision after it was issued, the Court found HHS had failed to consider "an important aspect of the problem."<sup>9</sup> Because of this failure to consider the *Bostock* decision, the Court held that plaintiffs were like to succeed on their claim that the rules were arbitrary and capricious.<sup>10</sup>

Because the Court found the 2020 Rule contrary to law and arbitrary and capricious, the Court stayed the repeal of the 2016 definition of discrimination on the basis of sex and enjoined HHS from enforcing the repeal.

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1. <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>

2. No. 20-cv-2834, 2020 WL 4749859, at \*1 (E.D.N.Y. Aug. 17, 2020); in addition, the following cases have also challenged the 2020 Rule: *State of Washington v. United States Department of Health & Human Services*, Case No. C20-1105 JLR (W.D. Wa July 16, 2020) (challenging the rule's removal of a provision explicitly protecting LGBTQ individuals, women, individuals who are limited English proficient (LEP), and those with whom they are associated); *Boston Alliance Of Gay, Lesbian, Bisexual And Transgender Youth (BAGLY) v. United States Department of Health & Human Services*, No. 1:20-cv-11297 (D.Mass. July 9, 2020) (challenging HHS's change to the definition of "on the basis of sex," the rollback of the enforcement mechanisms, and the elimination of tagline requirements for LEP individuals, among other issues); *Whitman-Walker, Inc. v. United States Department of Health & Human Services*, No. 1:20-cv-01630 (D.D.C. June 22, 2020) (challenging HHS's change to the definition of "on the basis of sex" and the rollback of the enforcement mechanisms, among other issues); *State of New York v. United States Department of Health & Human Services*, No. 1:20-cv-5583 (S.D. NY July 20, 2020) (challenging the 2020 Rule's exemption of certain entities from Section 1557, incorporation religious and abortion exemptions under Title IX, and the limitation to the definition of sex discrimination, among others).

3. *Id.* at \*5.

4. *Id.*

5. *Id.* at \*8.

6. 5 U.S.C. § 706(2)(A).

7. 140 S.Ct. 1731, 1741 (2020).

8. *Id.* at \*9.

9. *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

10. *Id.*