

Secretary Burwell
Department of Health and Human Services
200 Independence Ave., SW
Washington, DC 20201

March 3, 2015

RE: Sexual Orientation Protections Under Section 1557 of the Affordable Care Act

Dear Secretary Burwell,

On behalf of the undersigned organizations that serve lesbian, gay, bisexual, transgender, and queer (LGBTQ) populations, we write this letter to urge that you swiftly issue regulations implementing section 1557 of the Affordable Care Act, and ensure that any forthcoming regulations explicitly clarify that discrimination on the basis of sexual orientation or gender identity is prohibited under 1557 as a form of unlawful sex discrimination.

We appreciate the leadership your department has undertaken in implementing the Affordable Care Act, enrolling countless LGBTQ people in affordable health coverage, and actively investigating and enforcing complaints under Section 1557, including the Office for Civil Rights explicitly stating that 1557's sex-based discrimination protections include protections on the basis of gender identity. The legal landscape of how federal agencies and courts interpret sex-based discrimination protections and how they apply to sexual orientation discrimination claims continues to evolve. In light of important changes in this area, we write to ask that HHS clarify that discrimination based on sexual orientation similarly is prohibited under section 1557 of the Affordable Care Act and that regulations be issued to explicitly confirm that the scope of 1557 includes protections for both sexual orientation and gender identity.

Numerous courts have interpreted sex-based discrimination protections to include discrimination based on sexual orientation as a form of sex discrimination. For example, the U.S. District Court for the Western District of Washington held in *Hall v. BNSF Ry. Co.*, that a male employee stated a sex discrimination claim under Title VII when denied spousal health insurance for his husband because, as a man, he had been treated differently from his female coworkers who likewise had married men.¹ The U.S. District Court for the District of Columbia similarly held in *Terveer v. Billington* that a gay man stated a valid a sex discrimination claim under Title VII based on allegations that he had been discriminated against for being "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," and that "his orientation as homosexual had removed him from [his supervisor's] preconceived definition of male."² Other federal courts and the Equal Employment Opportunity Commission (EEOC) have also held that discrimination against an individual for being gay and taking his husband's last name is sex-stereotyping discrimination under Title VII,³ that sexual orientation discrimination is sex discrimination where the supervisor's actions were "motivated by the sexual stereotype that having relationships with men is an essential

¹ *Hall v. BNSF Ry. Co.*, Case No. C13-2160 RSM, 2014 U.S. Dist. LEXIS 132878, 124 Fair Empl. Prac. Cas. (BNA) 1419 (W.D. WA Sept. 22, 2014) (citing *In re Levenson*, 587 F.3d 925 (9th Cir. 2009), which similarly explained that "If Sears were female, or if Levenson himself were female, Levenson would be able to add Sears as a beneficiary. Thus, the denial of benefits at issue here was sex-based and constitutes a violation of the EDR Plan's prohibition of sex discrimination.").

² *Terveer v. Billington*, 34 F. Supp. 3d 100 (D. D.C. 2014).

³ *Koren v. Ohio Bell*, 894 F.Supp.2d 1032 (2012).

part of being a woman,”⁴ and in various contexts holding that stating a claim of discrimination on the basis of sexual orientation is a viable sex-based discrimination claim under Title VII.⁵

Additionally, in *Complainant v. DHS*, the EEOC held that claims of discrimination on the basis of sexual orientation may be construed as claims of discrimination on the basis of sex.⁶ Although the Complainant in the end failed to prove that the Agency actions had been discriminatory, the EEOC decision is significant because the Commission recognized that discrimination on the basis of sexual orientation is a cognizable form of sex discrimination under Title VII, effectively establishing that sexual orientation discrimination claims are to be treated as Title VII sex-based discrimination claims.⁷

This view was further established as EEOC policy in a recent memorandum to EEOC field officers. The memorandum, dated February 3, 2015, instructs field officers on how to process sexual orientation and gender identity employment discrimination complaints. Specifically, the memorandum instructs that “[i]ndividuals who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a charge with the EEOC, and their charges should be accepted under Title VII and investigated as claims of sex discrimination in light of Commission precedent[.]”⁸

As the Equal Employment Opportunity Commission has taken the explicit position based on case law and logic that sexual orientation protections are included as a form of protections against sex discrimination, we request that HHS take a consistent position for analogous reasons with regard to sexual orientation discrimination under section 1557 of the Affordable Care Act. We underscore the urgent need for regulations implementing section 1557 to clarify that discrimination based on sexual orientation or gender identity is prohibited under the health care law, and we appreciate the efforts of the Department to swiftly investigate and adjudicate such claims that are already being filed under section 1557. Indeed, without these protections explicitly named through federal regulations, many patients and providers lack adequate notice that these protections exist.⁹

Please feel free to contact Meghan Maury, Policy Counsel at the National LGBTQ Task Force at mmaury@thetaskforce.org or 202-639-6322 if you have any further questions about this recommendation.

Sincerely,

⁴ *Castillo v. Donahoe*, Decision to Reconsider, EEOC DOC 0520110649 (E.E.O.C.), 2011 WL 6960810 (2011).

⁵ *See, e.g., Couch v. Chu*, EEOC DOC 0120131136 (E.E.O.C.), 2013 WL 4499198 (2013) and *Varetto v. Donahoe*, EEOC DOC 0120110873 (E.E.O.C.), 2011 WL 2663401 (2011).

⁶ *Complainant v. DHS*, EEOC Appeal No. 0120110576 (August 20, 2014).

⁷ *Id.*

⁸ Memorandum from Nicholas M. Inzeo, Director of the Office of Field Programs, Equal Employment Opportunity Commission, to EEOC District Directors (February 3, 2015), available at: <https://s3.amazonaws.com/s3.documentcloud.org/documents/1670449/eec-lgbt-field-guidance.pdf>

⁹ Most of the undersigned organizations provided legal analysis and information showing the practical need for regulations as described in this letter in response to the Department’s 2013 Request for Information. Among those is the submission of Lambda Legal, in particular the discussion at pages 13-18, which is available at http://www.lambdalegal.org/sites/default/files/ltr_hhs_20130930_discrimination-in-health-services.pdf.

Advocates for Youth
AIDS United
Athlete Ally
American Civil Liberties Union
CenterLink: The Community of LGBT Centers
Central Conference of American Rabbis
Equality Federation
Family Equality Council
FORGE, Inc.
Gay & Lesbian Advocates & Defenders (GLAD)
GLMA: Health Professionals Advancing LGBT Equality
Human Rights Campaign
Lambda Legal
Los Angeles LGBT Center
Marriage Equality USA
National Asian Pacific American Women's Forum (NAPAWF)
National Black Justice Coalition (NBJC)
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women
National Latina Institute for Reproductive Health
National LGBTQ Task Force
National Organization for Women
PFLAG National
Pride at Work, AFL-CIO
Transgender Law Center
The Trevor Project
Union for Reform Judaism