

August 7, 2017

Michael S. Marquis  
U.S. Department of Health and Human Services  
Director FOI/Privacy Acts Division  
Hubert H. Humphrey Building  
200 Independence Avenue, SW  
Washington, D.C. 20201

Dear Mr. Marquis:

This is a request for a production of documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552, on behalf of the National Women's Law Center.

The National Women's Law Center (NWLC) seeks documents and communications related to the non-discrimination provision of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18116 (commonly referred to as "Section 1557"). Recently, information on the "Frequently Asked Questions" (FAQ) portion of the Department of Health and Human Services' website (<https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/>) was deleted. The deleted text – previously in response to question #13: "what types of discrimination constitute discrimination on the basis of sex?" – explained to the public that "discrimination on the basis of sex" includes discrimination on the basis of sex stereotyping and gender identity, and the Department "supports prohibiting sexual orientation discrimination as a matter of policy." The deletion of this text makes the Department's explanation of the types of sex discrimination wholly inadequate. As it stands, the FAQ lists only "discrimination on the basis of pregnancy" as a type of illegal sex discrimination.

Moreover, the Department's alteration of the definition of discrimination on the basis of sex on its website signals to the public that its interpretation of sex discrimination conflicts with decades of legal precedent. Nearly 30 years ago, the Supreme Court confirmed that discrimination based on stereotypical ideals about an individual's sex—or sex stereotyping—constitutes illegal sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). Since *Price Waterhouse*, courts have repeatedly held that discrimination on the basis of sex stereotyping—including on the basis of sexual orientation and gender identity—constitutes illegal sex discrimination. *See, e.g., Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); *Hively v. Ivy Tech Community College*, 853 F.3d 339, 345 (7th Cir. 2017), *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).<sup>1</sup>

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<sup>1</sup> Courts have also recognized that discrimination on the basis of gender identity, even in the absence of evidence of sex stereotyping, constitutes illegal sex discrimination. *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

NWLC acknowledges that the Department is currently enjoined from enforcing the termination of pregnancy and gender identity prohibitions of its final Section 1557 rule. *Franciscan Alliance, Inc. v. Burwell*, No. 7:16-cv-00108-O, 2016 WL 7638311 (N.D. Tex. Dec. 31, 2016).<sup>2</sup> The existence of this injunction, however, does not explain why the Department would signal that it has changed its interpretation or enforcement of other categories of sex discrimination, such as its legal obligation and duty to enforce prohibitions of discrimination on the basis of sex stereotyping, including in cases related to sexual orientation.

The National Women’s Law Center is filing this FOIA request in order to collect information that will demonstrate why this change was made, and to make sure that the Department is fulfilling its obligation to enforce the nondiscrimination provision of the ACA in regards to sex discrimination to the fullest extent as required by law.

I hereby request access to, or copies of, the following documents:

1. Any documents and communications relating to the decision to delete the following underlined language from the Department’s website: “Under the final rule, sex discrimination includes, but is not limited to, discrimination on the basis of pregnancy, gender identity and sex stereotyping. More than 25 years ago, the U.S. Supreme Court held that discrimination based on stereotypical ideas about gender is unlawful sex discrimination. While the final rule does not resolve whether discrimination on the basis of an individual’s sexual orientation status alone is a form of sex discrimination under Section 1557, the rule makes clear that OCR will evaluate complaints that allege sex discrimination related to an individual’s sexual orientation to determine if they involve the sorts of stereotyping that can be addressed under 1557. HHS supports prohibiting sexual orientation discrimination as a matter of policy and will continue to monitor legal developments on this issue.”
  - a. The documents sought include, but are not limited to, legal opinions, memoranda, or advisories addressing the decision to alter this language from January 20, 2017 to the present.
  - b. Communications sought include, but are not limited to, emails and letters to or from HHS officers or employees addressing the decision to alter this language from January 20, 2017 to the present.

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<sup>2</sup> In March 2017, NWLC filed a FOIA request with HHS prompted in part by another change to the Department’s Section 1557 FAQ webpage. (<https://nwlc.org/wp-content/uploads/2017/03/NWLC-HHS-FOIA-Request-3.31.17.pdf>). Language was removed from the HHS website that assured the public that the Department would continue to protect individuals from forms of sex discrimination not implicated by *Franciscan Alliance*. NWLC’s March request, which is currently pending, sought to gather information about the new administration’s enforcement of Section 1557’s sex discrimination prohibition and any changes in enforcement in relation to the injunction in *Franciscan Alliance*. While some of the information disclosed under NWLC’s March request may overlap with the present request, the present request is separate and distinct, seeking documentation and communications which may explain the alteration of the definition of sex discrimination on the FAQ and any change in interpretation or enforcement of sex stereotyping discrimination.

2. Any documents and communications relating in whole or in part to the Department's interpretation of its enforcement obligations and/or authority, including but not limited to the scope of such obligations and/or authority, to enforce its duty to protect individuals from discrimination on the basis of sex stereotyping—including but not limited to, discrimination on the basis of sexual orientation—under Section 1557 from January 20, 2017 to the present.
  - a. The documents sought include but are not limited to legal opinions, memoranda, or advisories addressing the Department's interpretation of sex stereotyping discrimination (including but not limited to discrimination on the basis of sexual orientation), HHS's resulting enforcement obligations under the case law concerning sex stereotyping (including but not limited to discrimination on the basis of sexual orientation), and changes in enforcement directives related to sex stereotyping discrimination (including but not limited to discrimination on the basis of sexual orientation) from January 20, 2017 to the present.
  - b. Communications sought include but are not limited to emails and letters to or from HHS officers or employees addressing the Department's interpretation of sex stereotyping discrimination (including but not limited to discrimination on the basis of sexual orientation), HHS's resulting enforcement obligations under the case law concerning sex stereotyping (including but not limited to discrimination on the basis of sexual orientation), and changes in enforcement directives related to sex stereotyping discrimination (including but not limited to discrimination on the basis of sexual orientation) from January 20, 2017 to the present.

I am requesting this information for non-commercial use in the public interest, and believe that it will contribute significantly to public understanding of the operations and activities of the government. Disclosure of the information will enable the public to better understand how the Department of Health & Human Services interprets and enforces its duty to protect individuals from illegal sex discrimination in health care. Without the information requested here, it would be difficult for the public to gather much information at all about the Department's interpretation or enforcement. Accordingly, I request a waiver of fees.

Thank you for your consideration of this request. I will expect a response within 20 working days as provided by law, 5 U.S.C. §552(a)(6)(A)(i). If my request is denied in whole or in part, I expect a detailed justification for withholding the records. I also request any segregable portions that are not exempt to be disclosed.

Thank you for your consideration of this request.

Sincerely,



Emily Martin, General Counsel and Vice President of Workplace Justice  
National Women's Law Center

*With the law on your side, great things are possible.*