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LEGAL UPDATES

PUBLISHED: FEBRUARY 25, 2025

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# HHS Rescinds 2022 Guidance on Anti-Discrimination and Privacy in Gender-Affirming Care

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On February 20, 2025, the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) issued a letter rescinding with immediate effect its March 2022 “HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy.” The March 2022 guidance established a framework for the application of civil rights protections and health information privacy laws to gender-affirming care (the GAC Guidance). This action was required by two Trump administration executive orders: “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government” (EO 14168) and “Protecting Children from Chemical and Surgical Mutilation” (EO 14187).

## **What was the GAC Guidance?**

The GAC Guidance established a framework for how federal civil rights and patient privacy laws should be applied to support gender-affirming care in three ways:

**Section 1557 of the Affordable Care Act (ACA):** The GAC Guidance determined that any action by federally funded covered entities that restricts an individual’s ability to receive gender-affirming care likely violates Section 1557, which prohibits discrimination based on certain protected classes.

**Section 504 of the Rehabilitation Act and the American with Disabilities Act (ADA):** The GAC Guidance took the position that gender dysphoria may qualify as a disability. It asserted that any restriction on access

to medically necessary care based on gender dysphoria, a gender dysphoria diagnosis, or perceptions of gender would also violate Section 504 of the Rehabilitation Act and the ADA.

**Health Insurance Portability and Accountability Act of 1996 (HIPAA):** The GAC Guidance sought to enhance HIPAA protections for protected health information (PHI) related to gender-affirming care by taking the position that the disclosure of such PHI should occur only with the patient's authorization or in limited circumstances when explicitly required by law.

### **Rationale for rescission**

The February 2025 letter states that the GAC Guidance no longer reflects the views and policies of the office and provided the following rationale:

**Section 1557 of the ACA:** HHS believes the legal basis of the GAC Guidance has been called into question by two recent federal cases—*Texas v. EEOC et al.* and *Bostock v. Clayton County*—which determined that Section 1557 of the ACA neither prohibits discrimination based on gender identity nor does the Supreme Court's interpretation of sex discrimination apply the type of discrimination identified in Section 1557.

**Section 504 of the Rehabilitation Act and the ADA:** HHS stated that gender dysphoria likely does not meet the definition of a disability under Section 504 of the Rehabilitation Act because the applicable statute explicitly excludes gender identity issues not resulting from physical impairments as a recognized disability.

**HIPAA:** The letter indicated that the GAC Guidance lacked a legal basis to restrict the exceptions for the disclosure of PHI under HIPAA's Privacy, Security, and Breach Notification Rules, because HIPAA allows covered entities and business associates to disclose an individual's PHI without their authorization in various circumstances, including when required by law.

### **What this means to you**

**Compliance challenges:** The decision by HHS to revoke its GAC Guidance aligns HHS's guidance with the administration's position on gender-affirming care; however, it also adds to the confusion and complexity surrounding how healthcare providers, facilities, insurers, systems, and other impacted entities currently meet their compliance obligations under federal and state law regarding anti-discrimination policies and the handling of PHI.

EO 14187 is currently enjoined by the United States District Courts for the District of Maryland and the Western District of Washington until at least February 28, 2025. The rescission of the GAC Guidance ensures that impacted entities will not have to choose between complying with the GAC Guidance or EO 14187.

**Potential conflicts with state laws:** Once the courts have resolved the effectiveness of EO 14187, impacted entities will still need to navigate conflicts between state laws and the EO. For example, Colorado's Department of Insurance prohibits insurers from discriminating based on gender identity by denying coverage for medically necessary services (3 CCR 702-4), and California's Transgender, Gender Diverse, and Intersex Inclusive Care Act prohibits discrimination in access to gender-affirming care. Both state discrimination laws create obligations for impacted entities that may conflict with the EO.

**How Husch Blackwell can help:** New regulatory developments in healthcare are rapidly unfolding and require careful attention to ensure that impacted entities adopt an appropriate and effective strategy that balances compliance while meeting the needs of patients. Husch Blackwell is following these developments across multiple industries and can be a valuable source of information in this time of quick change. Please subscribe for notifications.

### **Contact us**

If you have any questions about the HHS letter rescinding the GAC Guidance, changes needed to implement the EO's requirements, or other healthcare privacy issues, please contact Noreen Vergara, Natasha Sumner, Revital Beckerman, Ashton Harris, Taylor White, or your Husch Blackwell attorney.