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Bostock, Section 1557, and Transgender Benefits in Self-Funded Health Plans

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Historically, many benefit plans contained exclusions for gender dysphoria treatments, including gender affirmation surgery. The reasons for this exclusion may have been the result of a number of considerations, including, at a basic level, managing the costs of the plan. However, in recent years, as more attention has been paid to transgender considerations, an increasing number of plans have removed these exclusions and provided different levels of coverage.

Recent legislation and court decisions mean that all employers that sponsor self-funded health plans should review their plan documents and determine whether any changes are warranted in regard to these coverage issues. Because the law in this area is changing at a rapid pace, many plan sponsors may not have revisited this issue recently, but now is a good time to do so.

In general, any plan or plan sponsor that is subject to Section 1557 of the Patient Protection and Affordable Care Act (the "ACA") will need to ensure that benefits for gender dysphoria satisfy all legal requirements. Moreover, even if not explicitly required to cover these services under Section 1557, the U.S. Supreme Court's recent decision in *Bostock*

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v. Clayton County means that plans that do not cover transgender benefits are likely to face increased litigation risk. This article discusses some of the recent legal developments and considerations for plan sponsors of self-funded health plans.

Bostock *and Title VII*

On June 15, 2020, the U.S. Supreme Court issued its decision in *Bostock v. Clayton County*.[1] Two of the three plaintiffs in *Bostock* alleged that they were fired for being gay, and the third alleged that she was fired after telling her employer that she was transgender. The court held that Title VII of the Civil Rights Act of 1964 protects employees from employment discrimination as a result of their sexual orientation or gender identity.

Title VII primarily deals with employment considerations, and generally prohibits employers with 15 or more employees from making discriminatory employment decisions as a result of certain protected characteristics.

Specifically, Title VII provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[2] In reaching its decision in *Bostock*, the court noted that the words "sexual orientation" and "gender identity" do not appear in Title VII, but reasoned that it is impossible to discriminate against someone because of their sexual orientation or gender identity without discriminating against that individual on the basis of sex. Thus, any "employer who fires an individual merely for being gay or transgender defies the law."[3]

While Title VII centers on employment discrimination, and the *Bostock* decision dealt with the ability to terminate employees as a result of their sexual orientation or gender identity, plan sponsors should also consider the implications the decision has on sex-based discrimination issues for benefit plans.

Importantly, Title VII also prohibits treating employees differently "with respect to [their] compensation, terms, conditions, or privileges of employment," which implicates employee benefit plans.[4]

Recent years have seen an increase in the number of lawsuits against benefit plans and plan sponsors alleging Title VII discrimination where plans do not cover transgender benefits.[5] Employees are now likely to rely on the *Bostock* decision to argue that employee benefit plans should cover transgender medical benefits, and increased litigation is likely if plans are not updated.

An important caveat is that the Supreme Court declined to address how the decision would impact companies with sincerely held religious beliefs, which is likely to lead to additional litigation on this point. Any plan sponsor that wishes not to cover transgender benefits as a result of sincerely held religious beliefs should discuss this position with counsel.

Section 1557

Section 1557 of the ACA prohibits discrimination in the provision of health care on the basis of an individual's race, color, national origin, sex, age, or disability. However, its application is limited. It applies to any entity that has a health program or activity that receives federal financial assistance from the Department of Health and Human Services ("HHS"), any program or activity administered by HHS under Title I of the ACA (such as the federal marketplace), or health insurance marketplaces and plans offered under those marketplaces.

The preamble to the final rules published in the Federal Register on June 19, 2020 (the "2020 Rules") suggests that these requirements also apply to self-funded plans.[6] Thus, most plan sponsors, outside of certain industries, are not subject to its requirements. However, the discussion around Section 1557 is important for all plan sponsors to consider as, at the very least, it provides insight for potential enforcement in other areas, including under Title VII.

On May 18, 2016, the Office of Civil Rights ("OCR") at HHS issued a final rule implementing Section 1557 (the "2016 Rule"). The 2016 Rule provides that discrimination "on the basis of sex" includes gender identity.[7]

Moreover, the 2016 Rule provides that explicit categorical exclusions or limitations in coverage for all health services related to gender transition are treated as facially discriminatory.[8] The 2016 Rule was to go into effect on January 1, 2017.

However, on December 31, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide preliminary injunction blocking enforcement of the 2016 Rule's inclusion of gender identity in the definition of discrimination on the basis of sex.[9] The same court subsequently vacated the 2016 Rule's modified definition of discrimination on the basis of sex in 2019.[10]

As a result, HHS issued the 2020 Rules, which substantially modify the 2016 Rule.

The 2020 Rules repealed the definition of discrimination on the basis of sex under the 2016 Rule and do not include gender identity as a protected category. Furthermore, the 2020 Rules do not prohibit a categorical exclusion of gender transition services.[11]

The preamble to the 2020 Rules, which were written right before the U.S. Supreme Court's decision in *Bostock*, acknowledged that the *Bostock* decision could have a direct impact on the 2020 Rules, noting that:

> The Department continues to expect that a holding by the U.S. Supreme Court on the meaning of "on the basis of sex" under Title VII will likely have ramifications for the definition of "on the basis of sex" under Title IX. Title VII case law has often informed Title IX case law with respect to the meaning of discrimination "on the

> basis of sex . . . At the same time, . . . the binary biological character of sex (which is ultimately grounded in genetics) takes on special importance in the health context. Those implications might not be fully addressed by future Title VII rulings even if courts were to deem the categories of sexual orientation or gender identity to be encompassed by the prohibition on sex discrimination in Title VII.[12]

Almost immediately after its release, the 2020 Rules were challenged in court. As a result of the potential impact of the *Bostock* decision, on August 17, 2020 the U.S. District Court for the Eastern District of New York issued a preliminary injunction enjoining HHS from enforcing the repeal of the 2016 Rule's definition of discrimination on the basis of sex.[13]

Separately, the U.S. District Court for the District of Columbia found that in promulgating the 2020 Rules, HHS acted arbitrarily and capriciously by not considering the *Bostock* decision when it repealed the definition of sex discrimination, at least with respect to sex stereotyping.[14]

However, the court found that HHS had not acted arbitrarily and capriciously by removing the 2016 Rules' prohibition on categorical exclusions for health services related to gender transition. Moreover, the court found that because the Texas decision specifically vacated the 2016 Rule's provision that gender identity be included in the definition of sex discrimination, the plaintiffs lacked standing on that point. However, the decision was limited to gender identity and therefore the court could review the request for an injunction with respect to sex stereotyping.

Ultimately, the court granted a preliminary injunction preventing the 2020 Rules' repeal of the definition of sex discrimination with respect to sex stereotyping ("HHS will be preliminarily enjoined from enforcing the repeal of the 2016 Rule's definition of discrimination '[o]n the basis of sex' insofar as it includes 'discrimination on the basis of . . . sex stereotyping.'")[15]

Although the court could not review the repeal of the gender identity requirements, granting an injunction with respect to sex stereotyping would serve much the same purpose since it would be difficult to discriminate on the basis of gender identity without engaging in sex stereotyping.

As a result of the injunctions, any plan or plan sponsor that is subject to Section 1557 is required to cover treatments for gender dysphoria. To the extent that Section 1557 does not apply, plan sponsors should nevertheless carefully consider the risk of potential discrimination claims.

The fact that two courts issued preliminary injunctions enjoining enforcement of aspects of the 2020 Rules, and that both noted the applicability of *Bostock* to the issue at hand, shows that courts are likely to apply the reasoning from *Bostock* to employee benefit cases. Thus, plan sponsors would be wise to review their benefit offerings to determine whether any changes would be prudent.

Considerations for Plan Sponsors

Some of the actions plan sponsors should consider taking with respect to transgender benefits in light of the above include:

- Reviewing coverage terms for gender dysphoria, including gender affirmation surgery, to determine what, if any, exclusions apply and, if so, whether those exclusions remain prudent.

- Discussing provider networks with third party administrators to ensure reasonable access to providers that are experienced with gender dysphoria.

- Evaluating whether any short-term and/or long-term disability plans cover disability due to gender dysphoria, including gender affirmation surgery.

Conclusion

The trend in recent years has been to remove exclusions for gender dysphoria. Recent case law suggests that this trend is likely to accelerate and that plan sponsors that choose to retain these exclusions face an increased threat of litigation. While plan sponsors that are not subject to Section 1557 are not explicitly prohibited from maintaining these exclusions, the *Bostock* decision suggests that by doing so they open themselves up to potential discrimination claims. Plan sponsors should discuss their alternatives with counsel.

Notes

1. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

2. 42 U.S.C. §2000e-2(a)(1).

3. *Bostock* at 1754.

4. 42 U.S.C. §2000e-2(a)(1).

5. *See, e.g.*, *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024 (D. Alaska 2020).

6. 85 Fed. Reg. 37160, 37173 (June 19, 2020).

7. 81 Fed. Reg. 31376, 31467 (May 18, 2016).

8. *Id.* at 31429.

9. *Franciscan Alliance v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

10. *Franciscan Alliance v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

11. 85 Fed. Reg. 37160, 37188. ("The Department does not and need not take a definitive view on any of the medical questions . . . about treatments for gender dysphoria. The question is whether Title IX and Section 1557 require healthcare professionals, as a matter of nondiscrimination, to perform such procedures or provide such treatments. The answer is that they do not.").

12. *Id.* at 37,168.

13. *Walker v. Azar*, 2020 U.S. Dist. LEXIS 148141 (E.D.N.Y. 2020).

14. *Whitman-Walker Clinic, Inc. v. United States HHS*, 2020 WL 5232076 (D.D.C. 2020).

15. *Id.*