

What risks do employers face by excluding coverage for gender affirming care in their health plans?

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In recent years, courts have ruled upon a growing number of cases arising from delivery of and payment for gender affirming care. At the same time, state legislatures have passed a variety of laws aimed at such services. Some states enacted affirmative legal protections for patients and providers (e.g., Colorado, Illinois, and Minnesota) while others sought to restrict or prohibit services available in their states (e.g., Alabama, Arkansas, and Florida). Within the past two years alone, more than 30 states have enacted legislation regarding gender affirming care. Litigants continue to challenge many of these laws in court.

The law governing restrictions placed on the delivery of gender affirming care will continue to develop as litigants' challenges work their way through the legal system. But even now, federal courts have provided guidance for the prudent employer and third-party administrator to evaluate their own policies regarding health care plan coverage for gender affirming care. Because a number of courts have held that a health care benefit plan's denial of coverage for gender affirming care discriminates against individuals on the basis of sex when physicians opine that those treatments are medically necessary, health plan sponsors should consider whether to prophylactically eliminate plan provisions that unconditionally exclude coverage for transgender benefits.

In this article, we provide an overview of the law governing the availability of gender affirming care, we discuss how the law affects benefit plans, and we offer practical suggestions for employers as they evaluate how to structure their health care benefit plans.

Terms

Gender affirming care means the provision of health care to transgender people in an effort to align their gender expression (external characteristics and behaviors) with their gender identity (innate, psychological sense of gender). Gender affirming care may include mental health counseling and additional medical interventions such as puberty

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blockers, cross-sex hormones, or surgery. Gender affirming care treats gender dysphoria, i.e., the distress caused by the discrepancy between a person's gender expression and their gender identity.

The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, recognizes gender dysphoria as a mental health condition. Gender dysphoria can cause anxiety, depression, and suicidal ideation. Accordingly, the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American College of Physicians, American Medical Association, and American Psychiatric Association have expressed support for treatment of gender dysphoria with gender affirming care.

Legislative Background

Although many in the medical community have expressed support for gender affirming care, a number of states have sought to restrict the practice, particularly for minors. In 2021, Arkansas became the first state in the country to ban gender affirming care for transgender minors. Since then, at least 12 other states have restricted gender affirming care for minors and/or adults, and at least 30 states have introduced similar legislation in 2023. Should they become law, states may enforce these restrictions through a variety of means, including criminal, civil, and/or professional penalties for clinicians who provide services, and in some instances, penalties for parents of children who support their children's access to services.

Patients, parents, and physicians have challenged these recent legislative efforts in court. Plaintiffs commonly argue that governmental bans on gender affirming care discriminate on the basis of sex and therefore violate their equal protection and due process rights. The federal courts have generally treated these arguments favorably by either partially or permanently blocking state laws in Alabama, Arkansas, Florida, Indiana, and Kentucky. *But see L.W. v. Skrmetti*, 2023 U.S. App. LEXIS 17234 (6th Cir. July 8, 2023) (refusing to block Tennessee's ban on gender affirming care while Sixth Circuit considers an expedited appeal).

For example, in *Doe v. Ladapo*, plaintiffs challenged Florida's statute and rules that sought to prohibit transgender minors from receiving puberty blockers and cross-sex hormones. 2023 U.S. Dist. LEXIS 99603 (N.D. Fla. June 6, 2023). Plaintiffs argued that the laws discriminated on the basis of sex because the same treatments were legal in other contexts, e.g., treating a natal male adolescent with testosterone. The court agreed with plaintiffs' arguments, reasoning "[g]ender identity is real," "[t]he widely accepted standard of care calls for evaluation and treatment [of gender dysphoria]," and Florida's purported justifications for the challenged legislation "are largely pretextual."

Insurance Background

Lawsuits involving gender affirming care extend beyond the recent challenges to state legislation. A number of transgender individuals and/or their parents/guardians have sued employers and third-party administrators related to health insurance policies that exclude coverage for transgender benefits, either categorically or by excluding specific

treatments for gender dysphoria (e.g., limiting or excluding surgical benefits). Plaintiffs commonly allege violations of the Affordable Care Act and Title VII of the Civil Rights Act of 1964.

The Affordable Care Act (Section 1557) includes broad civil rights protections in health care, barring discrimination based on race, color, national origin, sex, age, or disability. The Obama administration interpreted Section 1557's ban on sex discrimination to bar discrimination based on gender identity. In 2020, the Trump administration reversed course. But in 2021, the Biden administration restored the Obama administration's interpretation in Executive Order 13988, bolstered by the U.S. Supreme Court decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), in which the Court recognized that Title VII's prohibition of discrimination in employment on the basis of sex includes discrimination on the basis of gender identity.

Like Title VII, Section 1557 prohibits discrimination on the basis of sex and extends that prohibition to health programs or activities that receive federal funding. The phrase "health program or activity" includes federally funded contracts of insurance; Section 1557 therefore prohibits sex discrimination in certain health insurance contracts. *Schmitt v. Kaiser Found. Health Plan of Washington*, 965 F.3d 945, 951 (9th Cir. 2020); *but see Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1136 (D.N.D. 2021) (holding that health insurers are subject to Section 1557 only for the parts of their operations that receive federal funding).

Increasing Litigation

Since 2017, several federal courts have found that blanket exclusions for gender affirming care violate federal law. One such case is *C.P. v. Blue Cross Blue Shield*, 2022 U.S. Dist. LEXIS 227832 (W.D. Wash. Dec. 19, 2022).

In *C.P. v. Blue Cross Blue Shield*, plaintiffs—a transgender boy of 17 and his mother—argued that Blue Cross violated Section 1557 when it administered a self-funded health care plan, governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., that categorically excluded from coverage transgender benefits. Plaintiff C.P. had gender dysphoria and sought hormone therapy treatment, and later, chest reconstruction surgery. Blue Cross initially covered the hormone therapy by mistake; it later notified plaintiff C.P. that subsequent treatment would not be covered. The relevant exclusionary language provided: "Transgender Reassignment Surgery Not Covered: Benefits shall not be provided for treatment, drugs, therapy, counseling services and supplies for, or leading to, gender reassignment surgery." Importantly, the plan at issue generally covered care for hormone therapy, mastectomies, and chest reconstruction if that care was considered medically necessary for diagnoses other than for gender affirming care.

In granting plaintiffs' motion for summary judgment, the court relied on *Bostock* and Ninth Circuit precedent to conclude that the plan discriminated on the basis of sex in violation of Section 1557. The trigger for denial of coverage was a diagnosis of gender dysphoria; according to the court, gender dysphoria cannot be understood without reference to sex.¹

The court also determined that Blue Cross's arguments regarding the purported lack of medical consensus for gender affirming care were "immaterial" because (1) "[Blue Cross] did not base the decision to deny care on medical necessity but on [plaintiff] C.P.'s . . . transgender status," and (2) the treatment at issue would be considered medically necessary under Blue Cross' own medical necessity policy.

In *Fain v. Crouch*, 618 F. Supp. 3d 313 (S.D. Va. 2022), plaintiffs—transgender individuals who received healthcare through the West Virginia Medicaid Program—also challenged the plan's exclusion of surgical treatment for gender dysphoria. Unlike the plan in *C.P. v. Blue Cross Blue Shield*, the plan here covered some treatments for gender affirming care, such as mental health counseling and hormone therapy. Plaintiffs brought equal protection and Section 1557 claims.

The court granted plaintiffs' motion for summary judgment because the challenged exclusion denied medically necessary surgeries for transgender people that the same plan covered for reasons other than gender dysphoria. The court was not persuaded that the plan's coverage of some transgender benefits, like hormone therapy, was a defense to plaintiffs' claims. Relying on *Bostock*, the court stated: "Simply because the [plan] does not discriminate in all aspects does not permit it to discriminate narrowly against transgender surgical care." *Id.* at 326.

Practice Pointers

Although the rules applicable to the provision of and payment for gender affirming care continue to develop, employers should assess how recent cases may be instructive to them. As noted above, a number of federal courts have recognized that categorical denial of coverage for transgender benefits constitutes discrimination on the basis of sex that triggers the protections of Section 1557 and federal anti-discrimination laws. Employers, therefore, should consider on a prophylactic basis whether to eliminate from their group health plans categorical exclusions of transgender benefits.

Similarly, employers should think carefully about policies that label gender affirming care as "cosmetic" or "elective," descriptions of the medical treatments which result in exclusion of the care from coverage. In particular factual circumstances where the care was considered medically necessary, some courts have considered such practices discriminatory. *See, e.g., Hicklin v. Precynthe*, 2018 U.S. Dist. LEXIS 21516 (E.D. Mo. Feb. 9, 2018) (summarizing case law in which courts determined transgender benefits were not merely cosmetic treatments, but, instead, medically necessary treatments to address serious medical disease).

Employers also should think carefully about excluding coverage for specific services to treat gender dysphoria if those same services are covered in other contexts, e.g., if a plan excludes coverage for medically necessary mastectomies to treat gender dysphoria while covering the same procedure for non-gender dysphoria related diagnoses. *See, e.g., Fain v. Crouch*, 618 F. Supp. 3d at 326.

Finally, employers should monitor developments in the state laws. In stark contrast to

recent federal jurisprudence, states such as Indiana, Kentucky, Missouri, and Oklahoma have pending bills that affirmatively bar insurers from offering coverage for gender affirming care. Texas, Wyoming, and New Hampshire have pending bills that categorize gender affirming care as child abuse under state law.

¹The plan at issue was the Catholic Health Initiatives Medical Plan. Accordingly, Blue Cross also argued that it was protected by the Religious Freedom Restoration Act (“RFRA”) because the plan was based on sincerely-held religious beliefs. The court rejected Blue Cross’s defense on the ground that the RFRA is inapplicable in cases where the government is not a party. *But see Religious Sisters of Mercy*, 513 F. Supp. 3d at 1122 (granting coalition of Catholic entities permanent injunctive relief pursuant to RFRA from provision or coverage of gender affirming care).

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