AssuredPartners

Gender Nondiscrimination Considerations

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Coverage for gender-related treatment and services is an evolving issue. Over the past decade, however, legislation, regulations, and court decisions all suggest that failure to provide equal access to coverage based on gender or sexual orientation may violate various nondiscrimination laws. Group health plans that exclude or limit coverage for gender affirming care (e.g., care related to gender identity or gender dysphoria) risk discrimination claims on the basis of sex and transgender status in violation of the Constitution's Equal Protection Clause, Title VII of the Civil Rights Act of 1964, and the Affordable Care Act's §1557 nondiscrimination rules. In addition, coverage exclusions or limitations may violate requirements under the Mental Health Parity and Addiction Equity Act (MHPAEA) and the Americans with Disabilities Act (ADA).

Court Decisions

The Supreme Court of the United States (SCOTUS) decision in 2020 (*Bostock v. Clayton County*) interpreted Title VII protection against employment discrimination based on sex to extend to an individual's sexual orientation or gender identity. While the case was not specifically related to benefit offerings, employer-sponsored health and welfare benefits are part of the employment package and therefore fall under the broad protection of Title VII.

Since the SCOTUS decision in 2020, there has been no specific guidance indicating what type of coverage must be available, but several additional federal court cases have found in favor of individual claims of discrimination for failure to provide equal or medically necessary coverage related to gender identity or gender dysphoria. The courts have found that benefit exclusions or limitations based on sex or transgender status violated the Equal Protection Clause, Title VII and §1557. The following court cases are two more recent examples:

- *Kadel v. Folwell* (M.D.N.C. 2022)
- *Lange v. Houston County* (M.D. Ga. 2022)

ACA §1557

"Covered entities" are required to comply with §1557 nondiscrimination rules which, amongst other things, prohibit denying or limiting coverage, or imposing additional cost-sharing for health coverage based on race, color, national origin, sex, age, or disability. Proposed rules issued in 2022 interpret "covered entities" to include those entities that receive federal funding and that are principally engaged in providing health programs or activities. Insurance carriers, third party administrators (TPAs), and employers in the medical field may be

considered covered entities. Most employers are not covered entities (and most employer-sponsored group health plans do not receive federal funding), however, the insurance carriers and TPAs may only be permitted to issue and administer plans that comply with §1557 nondiscrimination rules.

The definition of "sex" for purposes of applying §1557 nondiscrimination rules has been in flux since the first rules implementing §1557 were released in 2016. In accordance with the SCOTUS decision in Bostock, the recently proposed rules interpret the term "sex" to include sexual orientation and gender identity. However, court decisions since that time have gone both ways.

- *Neese v. Becerra* (N.D. Tex. 2022) – Court set aside the agencies' broader interpretation of sex for purposes of applying §1557 nondiscrimination rules.
- *Doe v. Independence Blue Cross* (E.D. Penn. Nov. 21, 2023) – Court allowed a claim to proceed for denied coverage for gender dysphoria (facial feminization surgery) under §1557.
- *Hammons v. University of Maryland Medical System Corporation* (D. Md. Jan. 6, 2023) – Court concluded that hospital's refusal to perform a hysterectomy as part of gender transition violated §1557.
- *C.P. et al., v. Blue Cross Blue Shield of Illinois* (W.D. Wash. 2023) – Court forbid BCBS IL as the third-party administrator from applying discriminatory exclusions based on sex (or gender identity) even when requested to do so by an employer and provides no exception for religious employers.

For those plans subject to §1557, it's not perfectly clear what coverage is required, but certainly there is risk of claims of discrimination for any limits or exclusions tied to gender identity or gender dysphoria.

Mental Health Parity Rules

Under MHPAEA, a plan may exclude coverage for a particular condition (e.g., gender dysphoria), but if the plan provides any coverage for the condition, the plan must provide coverage for the condition "in parity" with medical/surgical benefits provided under the plan. The plan may be required to provide at least some level of coverage for gender dysphoria and other related conditions to avoid discrimination claims under the Equal Protections Clause, Title VII, and §1557, in which case the plan would then have to also provide mental health coverage for the condition in parity with medical/surgical benefits available in each classification. So, for example, the plan may not be available to exclude coverage for mental health therapy or prescription drugs needed to treat gender dysphoria without violating MHPAEA.

ADA Rules

Similar to the other issues raised above, the application of ADA to issues of gender identity and coverage for gender dysphoria is evolving. However, a 4th Circuit Court of Appeals (*Williams v. Kincaid*, 2022) rules that the ADA's protections extend to individuals with gender dysphoria. When treated as a disability, in addition to broader employment protections and accommodations, there may also be risk of an ADA claim for an employer's benefit exclusions or limitations tied to gender dysphoria.

Summary

At this time, our recommendation is that group health plans exclude or limit coverage related to gender identity or gender dysphoria only after careful consideration of the various compliance components that may apply. It would be extremely helpful if further clarification was provided indicating what type of coverage must be offered to avoid potential discrimination claims, but for now, we can only suggest that employers consider providing the following:

- Identical coverage for same-sex and opposite-sex spouses or domestic partners;
- Preventive coverage as determined to be medically appropriate by the provider, regardless of sex at birth;
- Coverage for both medical/surgical benefits and mental health benefits related to gender dysphoria, gender reassignment surgery, hormone therapy, etc.; and
- Broad family planning coverage.

For fully-insured plans, it seems likely that most major carriers will adjust plan designs to decrease the risk of any discrimination claims, but there is room for interpretation as to exactly what coverage is required. While employers have very little control over carrier plan design, employers could consider changing carriers if their current plan(s) seem risky.

For self-funded plans, it may be necessary to do a more thorough review of plan definitions, exclusions, and limitations to understand if there is a discrimination risk. It may be helpful to look at what is being provided by insured plans in this regard. Some TPAs may make recommendations regarding coverage exclusions or limitations on such coverage, but leave the final design decisions up to the employer as plan sponsor, while others may place restrictions on plan design to the extent the TPA may be subject to §1557 nondiscrimination rules.