



**ACA NONDISCRIMINATION
& GENDER-AFFIRMING CARE
ERISA ADVANCED SEMINAR
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HOW DID WE GET HERE?

ACA NONDISCRIMINATION
2010-2024

BACKGROUND ON ACA NONDISCRIMINATION

- Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities
- Applies to insured plans and self-insured funds that receive federal assistance, e.g., retiree drug subsidies or an Employer Group Waiver Plan (EGWP)
- Title VII of the Civil Rights Act applies to state and local government employers with 15 or more employees.

MULTIPLE RULES AND LITIGATION

- 2016 Proposed Rule (Obama) defined sex discrimination to include discrimination on the basis of sexual orientation, gender identity and termination of pregnancy.
- 2020 (Trump) Final Rule removes these provisions, but courts in several states enjoin enforcement.
- 2020 Final Rule appeared to be in conflict with the 2020 Supreme Court decision in *Bostock v. Clayton County* and was subject to numerous legal challenges.
- HHS issued guidance stating that it will interpret Section 1557 to prohibit discrimination based on both gender identity and sexual orientation.
- Biden administration proposed to reinstate the 2016 rule

IMPACT OF BOSTOCK

- In *Bostock v. Clayton County, GA* (2020), the Supreme Court held that Title VII prohibits discrimination on the basis of sexual orientation or transgender status.
- Builds on a series of EEOC rulings holding that discrimination because of sex includes sexual orientation, gender identity.
- Under Title VII, which prohibits workplace discrimination based on sex, religion, race, national origin
- Court rules 6-3 that discrimination based on gender identity or sexual orientation is necessarily also discrimination “because of sex”
- Employers accept a certain conduct (e.g., attraction to women, wearing a skirt to work) in one sex but not the other
- Opinion by Gorsuch rooted in the statutory text of Title VII
 - Some courts and agencies have interpreted the ruling broadly to apply to any discrimination based on sexual orientation or gender identity
 - But it is unclear how the reasoning would apply to a facially neutral law—e.g., a state law banning all gender surgery below a certain age



WHAT IS THE LAW NOW?

2024 BIDEN FINAL RULE
AND LITIGATION

2024 RULE- EFFECTIVE DATES

- On May 6, 2024, HHS issued new final regulations under Section 1557 revising the implementing regulations for Section 1557.
- The newly updated regulations (“2024 Rule”) generally took effect on July 5, 2024, but certain provisions are subject to a later effective date, as described in the 2024 Rule.

2024 RULE- EXPANSION

- The 2024 Rule significantly expands the scope and application of the nondiscrimination protections:
- by adding to the scope of programs subject to the 2024 Rule
 - Previously the Rule applied only to those programs that receive federal money (e.g. the prescription drug benefit of the plan that receives RDS)
 - The 2024 Rule applies to all programs of a covered plan
 - Unclear how this applies in the case of an insured arrangement such as an insured EGWP—insurer responsible for compliance?
- by applying nondiscrimination protections to sexual orientation, gender identity, and pregnancy and related conditions
- by requiring covered entities to provide affirmative notices of language and accessibility services
- by affirming the application of nondiscrimination requirements to telehealth services (effective July 5, 2024) and patient care decision support tools, including those utilizing artificial intelligence (effective May 1, 2025)

2024 RULE- GENDER-AFFIRMING CARE

- Additional examples of scenarios where gender-affirming procedures or services likely would need to be covered under the 2024 Rule:
 - A plan provides coverage for medically necessary reconstruction of congenital defects (eg, vaginoplasty) for a cisgender woman but not a transgender woman
 - A plan covers medically necessary breast reconstruction or mastectomy for cis women but not transgender women
 - A plan covers hysterectomy for a cis woman with ovarian cancer or pre-cancerous cells but not for a trans woman
 - A plan covers medically necessary orchiectomy (removal of the testes) for cis men with testicular cancer but not transgender women
- It is unclear, however, whether other surgical procedures must be covered where those procedures generally are not covered for cis participants or have not historically been covered
 - For example, whether the plan covers phalloplasty (creation of a phallus using tissue, blood vessels, and nerves from another part of the body) in the event of a cis male's congenital condition or accident may determine whether it must cover a trans man's metoidioplasty (creation of a new phallus using a hormonally enlarged clitoris)
 - If the plan has not covered such a procedure (even if there is no explicit exclusion), there would be an argument that it is not required to cover it under the Rule

2024 RULE- GENDER-AFFIRMING CARE

- It is unclear, but there appears to be a reasonable argument that plans are not required to cover gender-affirming treatments that would be considered “cosmetic” as applied to cis participants
 - For example, jawline reduction or chondrolaryngoplasty (Adam’s apple shaving) may not be required to be covered for a trans woman if such services are not covered and under no circumstance would be considered medically necessary for a cis man or woman
 - Other gender-affirming procedures or services that are likely considered cosmetic and are unlikely to be covered for cis participants include vocal lessons, eyebrow threading or removal, laser hair removal, and facial feminization surgery (though a trans participant could argue that if facial reconstruction is covered for accidents [eg facial burns in a car accident] under the Rule it also should be covered as a treatment for gender dysphoria)
- In any case, the Rule does not appear to prohibit covered plans from continuing to use a medically necessary standard
 - It appears, for example, that plans can require a diagnosis of gender dysphoria to qualify for gender-affirming coverage
 - In crafting prior authorization requirements, plans should be mindful of the MHPAEA implications, including under the recent MHPAEA final rule:
 - since GD is generally considered a mental condition, any more stringent restrictions on gender-affirming treatment than on equivalent physical conditions could trigger a violation of MHPAEA
 - for example, if vaginoplasty is covered for both cis women and trans women, but cis women require only a doctor’s certification of medical necessity, while trans women must show evidence of gender dysphoria plus a year of talk therapy, this rule could be viewed as a violation of MHPAEA or Section 1557
 - Plans should keep both in mind when crafting eligibility or PA rules for gender-affirming procedures

2024 RULE- LITIGATION AND INJUNCTION

- Before the 2024 Rule's effective date, several states sued HHS seeking to block it from enforcing the Rule, arguing that the regulations' redefinition of sex discrimination was exceeded its authority under the Administrative Procedure Act (APA).
- Currently there is a nationwide injunction on enforcement of the 2024 Rule, which the federal government is expected to appeal in the immediate future.
- Under *Loper Bright*, courts declined to defer to the HHS interpretation
 - *Tennessee v. Becerra*, 2024 WL 3283887 (S.D. Miss. 2024)
 - *Texas v. Becerra*, 2024 WL 3297147 (E.D. Tex. 2024)
- Since there is some likelihood that the injunction will eventually be lifted, plans should explore any steps necessary to implement the requirements of the final rule now, so that they are prepared to comply if the injunction is lifted.



WHERE ARE WE HEADED?

TRANS HEALTH LITIGATION

LITIGATION OVER TRANS HEALTH COVERAGE

- *Fletcher v. Alaska*, 443 F. Supp. 3d 1024 (D. Alaska 2020)—District Court rules that denial of coverage for gender affirmation surgery of a state employee violates Title VII
- *Toomey v. Arizona* (D. Ariz. 2023)—Class action against state of Arizona for its exclusion of “gender reassignment surgery”
 - Ended with settlement and consent decree permanently prohibiting Arizona from excluding gender-affirming care from its employee health plan
 - In June 2023, Arizona Governor Katie Hobbs issued an executive order removing the ban on gender-affirming surgery for transgender state employees
- *Lange v. Houston Cnty.* (11th Cir. 2024) – court vacates and agrees to rehear panel’s holding that an employer violated Title VII because its plan excluded coverage for gender-affirming surgery

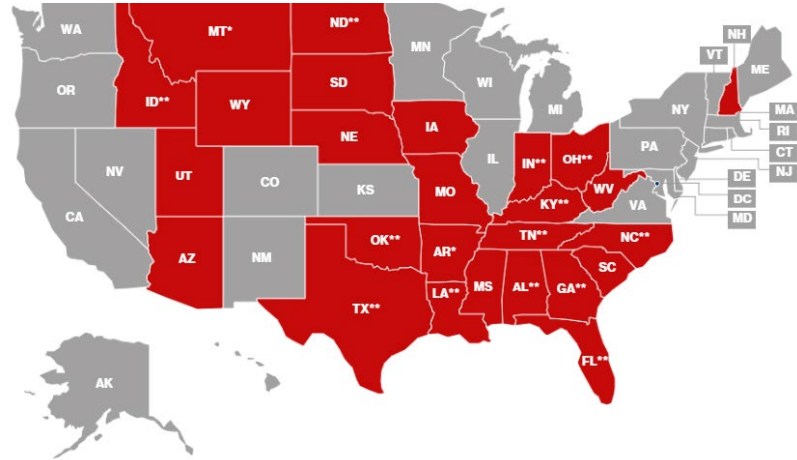
LITIGATION OVER GENDER-AFFIRMING CARE FOR MINORS

- Over the past three years, 26 states have passed laws restricting gender-affirming care for minors
- A Tennessee law enacted in 2023 bans gender-affirming care such as hormone treatments and gender-transition surgeries for patients under 18
- SCOTUS will hear challenge to the Tennessee law in Fall 2024, with a decision likely by Summer 2025
- A similar case in Alabama is stayed pending the SCOTUS ruling

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LITIGATION OVER GENDER- AFFIRMING CARE FOR MINORS



**LAW OR POLICY BANNING GENDER
AFFIRMING CARE HAS PASSED
UP TO AGE 18**

*Ben is currently blocked or on hold in Arkansas and Montana.
**Alabama, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, North Carolina, North Dakota, Ohio, Oklahoma, Tennessee, and Texas all currently have litigation proceedings challenging these bans
***Arizona and New Hampshire's bans only applies to gender-affirming surgeries for minors
****New Hampshire's ban goes into effect January 1, 2025

CONTROVERSY AND CONFUSION

The New York Times

Biden Officials Pushed to Remove Age Limits for Trans Surgery, Documents Show

Newly released emails from an influential group issuing transgender medical guidelines indicate that U.S. health officials lobbied to remove age minimums for surgery in minors because of concerns over political fallout.

Hilary Cass Says U.S. Doctors Are 'Out of Date' on Youth Gender Medicine

Dr. Hilary Cass published a landmark report that led to restrictions on youth gender care in Britain. U.S. health groups said it did not change their support of the care.

OPINION
LYDIA POLGREEN

The Strange Report Fueling the War on Trans Kids

Aug. 13, 2024

CONTROVERSY AND CONFUSION

- In December 2023, an Alabama federal judge ordered the disclosure of emails and other records from U.S. Assistant Secretary for Health Adm. Rachel Levine
 - *Boe v. Marshall*, lawsuit by five parents against the Vulnerable Child Compassion and Protection Act, in which the US DOJ intervened
 - Emails from the World Professional Association for Transgender Health (WPATH) show staff for Adm. Levine urged them to drop proposed age limits from the group's guidelines
 - The draft guidelines, released in late 2021, recommended lowering the age minimums to 14 for hormonal treatments, 15 for mastectomies, 16 for breast augmentation or facial surgeries, and 17 for genital surgeries or hysterectomies
- In April 2024, a study commissioned by the UK NHS concluded that the evidence supporting the use of puberty-blocking drugs and other hormonal medications in adolescents was “remarkably weak.”
 - The findings are in line with several European countries that have limited the treatments after scientific reviews, including Finland, Sweden and Norway
 - Some have criticized the study's methodologies

KEY TAKEAWAYS

- The 2024 Rule likely requires coverage by covered plans of gender-affirming care in many cases
- Litigation over the 2024 Rule is likely to continue through the 2024 election and beyond, and may be influenced by SCOTUS ruling in the Tennessee case or a follow-up to *Bostock*
- Although many American doctors and progressive groups say that “the science is settled,” coverage for gender-affirming care for minors remains a hotly contested political issue and there continues to be disagreement among doctors over the appropriate standards of care, particularly between European and American medical associations



QUESTIONS? |