Nondiscrimination Protections for LGBT Employees in Health Plans

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This paper addresses access to employer-sponsored medical benefits for two categories of LGBT employees: employees who are transgender, and employees in same-sex marriages or partnerships. While these two groups may overlap – for example, where a transgender individual is in a same-sex relationship, the issues presented for each group are distinct. For example, with respect to transgender employees, a health plan might categorically bar coverage for gender-affirming medical procedures. Or a health plan might deny coverage for a medication prescribed for a transgender employee, but provide coverage for the same medication when prescribed for a non-transgender employee. For employees with same-sex spouses, an employer might provide spousal benefits to employees in different-sex marriages, but not to employees in same-sex marriages or partnerships.

Numerous and sometimes overlapping sources of federal and state law implicate access to benefits in employer health plans for transgender employees and employees in same-sex marriages or partnerships: Title VII of the Civil Rights Act of 1964 and other federal employment discrimination laws, the non-discrimination provisions of Affordable Care Act, federal employee benefits law (ERISA), state regulation of insurance, state employment discrimination law, and others. This paper addresses the evolving legal framework protecting LGBT employees whose employers provide health benefits and highlights the different type of claims that such employees may have.

I. Background.

A. Transgender Employees: Medical Care Related to Gender Transition.

The term "transgender" refers to people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Gender identity refers to a person's internal sense of being male, female, or something else.[1] A transgender woman, for example, is someone who was assigned male at birth and who identifies as a woman.

Many, but not all, transgender people access medical care in connection with their gender transition. Such care may include hormone therapy or and/or sex reassignment surgery (also called "gender affirming surgery"). Just as not all

[1] National Center for Transgender Equality, "Transgender Terminology" (Jan. 15, 2014), at http://www.transequality.org/issues/resources/transgender-terminology.

transgender people undergo medical care in connection with gender transition, those who do seek care do not all undergo an identical program of health services or procedures.[2] Rather, a transgender person will typically have individualized discussions with treating medical processionals about the care that is necessary and appropriate for that individual. Though not all medical procedures are appropriate for every individual, as a general matter medical care related to gender transition is accepted as medically necessary by the American Medical Association, and is not considered experimental.[3]

In addition to medical care related to gender transition, medical care for transgender people includes access to sex-specific primary care: for example, a transgender woman may require a prostate exam or a transgender man may require a pap smear.

B. Employees in Same-Sex Relationships: Relationship Recognition.

The twenty-first century has seen a rapid expansion relationship recognition and access to civil marriage for same-sex couples, culminating in *Obergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015), which eliminated state-law barriers to civil marriage. *Obergefell* came two years after *United States v. Windsor*, 133 S. Ct. 2675 (2013), which struck down as unconstitutional Section 3 of the Defense of Marriage Act, which limited the terms "spouse" and "marriage" as used in federal statutes and regulations to opposite-sex spouses and marriages. *Windsor* resulted in federal recognition of same-sex marriages for most purposes under federal law, regardless of whether a couple lived in a state that recognized their marriage. *Obergefell* requires that all states license and recognize same-sex marriages.

While same-sex marriage is available in all 50 states, some states continue to make spousal-equivalent statuses – such as civil unions or registered domestic partnerships – available to same-sex couples (and some opposite-sex couples under certain circumstances). Currently, California, Hawai'i, Illinois, New Jersey, Colorado Nevada, and Oregon continue to make these statuses available.[4]

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[2] *See generally* World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Nonconforming People* (Version 7, 2012).

[3] American Medical Association House of Delegates Resolution 122, H185.950, "Removing Financial Barriers to Care for Transgender Patients" (2008).

[4] Other states that formerly provided civil unions or domestic partnerships no

These statuses carry the same rights and obligations as marriages under state law.[5]

II. ACA Section 1557.

Section 1557 of the Affordable Care Act, which went into effect in 2010, prohibits discrimination in healthcare on the basis of sex and other classifications protected by federal civil rights laws, which are incorporated by reference into the ACA. 42 USC § 18116. *See Rumble v. Fairview Health Servs.*, 2015 WL 1197415 (D. Minn. 2015). The Department of Health and Human Services ("HHS"), which is charged with enforcing § 1557, has issued a proposed regulation stating that this prohibition on sex discrimination includes discrimination on the basis of gender identity, and requesting comment on whether under the current state of the law also protects against discrimination on the basis of sexual orientation. 80 FR 54172-01 (Sept. 8, 2015). The comment period ended in November 2015, and a final regulation is expected in 2016.

A. Covered Plans and Providers.

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longer do so now that civil marriage is available to same-sex couples, however. *See, e.g.*, State of Delaware, Delaware Marriage (noting that no new civil union will be created); Rhode Island Dep't of Health, Rhode Island's Marriage Equality Law (noting that civil unions are not available after August 1, 2013). Some states also provide for the conversion of domestic partnerships to marriages, either by operation of law or by action of the couple. In Delaware, for example, same-sex couples in civil unions were permitted to convert their civil unions to marriages, and for those who did not act, on July 1, 2014, all civil unions were automatically converted to marriages. See 13 Del. C. § 218. The effective date of each marriage was deemed to be the date of the original civil union. *See id*. By contrast, in Washington, domestic partnerships for same-sex couples under age 62 were dissolved and converted to marriages, either by action of the parties or by operation of law, effective on the date of the conversion or June 30, 2014, not the date of the original domestic partnership. See Rev. Code of Wash. Ann. § 26.60.100.

[5] In these states, state law specifically provides that civil union parties/domestic partners will be treated as spouses for all purposes under state law, including for purposes of marital property, taxation, intestacy, and parentage. See, e.g., Cal. Fam. Code § 297.5; Colo. Rev. Stat. 14-15-107. Legislative history is often clear that the intent of these state laws is to treat civil union parties/domestic partners as married spouses. See, e.g., Colo. Rev. Stat. 14-15-102 (stating that purpose of Colorado Civil Union Act is "to provide eligible couples the opportunities to obtain the benefits, protections, and responsibilities afforded by Colorado law to spouses").

The proposed regulation explains that § 1557 applies to all health programs and activities, any part of which receives federal financial assistance from HHS. A health program or activity includes health services, health coverage, and all operations of an entity principally engaged in health services or health insurance coverage, such as a hospital or insurance company. Federal financial assistance includes grants, tax credits, cost-sharing subsidies under ACA Title I, and Medicare Part D payments. Thus, for example, § 1557 would apply to both an employer-sponsored plan that is funded by the purchase of insurance from an insurer that participates in the ACA Marketplace, and a self-funded plan that is administered by an insurer that participates in the Marketplace. The application of § 1557 flows from the involvement of an entity that receives federal funding, even if the plan itself is not sold on an exchange and receives no federal funding.

B. Prohibited Discrimination.

The proposed regulation defines "on the basis of sex" to include discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom; childbirth or related medical conditions; and sex stereotyping and gender identity. It further defines "gender identity" and related terms, defining "gender identity" to mean an individual's internal sense of gender, which may be different from an individual's sex assigned at birth. The regulation recognizes that the way an individual expresses gender identity may or may not conform to social stereotypes associated with a particular gender. For purposes of Section 1557, an individual has a transgender identity when the individual's gender identity is different from the sex assigned to that person at birth.

The regulation specifies that covered entities must provide individuals equal access to health programs and activities without discrimination on the basis of sex; covered entities must treat individuals consistent with their gender identity, including with respect to access to facilities; and sex-specific care cannot be denied or limited based on the fact that the individual seeking such services identifies as belonging to a different gender than the individual's assigned sex at birth, gender identity, or recorded gender. Thus, for example, a plan or provider presumably would violate § 1557 if it denied coverage for or refused to provide a pap smear or mammogram where medically necessary for a participant who identified as or was perceived as male.

With regard to coverage exclusions, the regulation prohibits explicit, categorical, or automatic exclusion from coverage for health services related to

gender transition, but does not affirmatively require covered entities to cover any particular procedure or treatment for transition-related care. Instead, where coverage is denied for a specific service related to gender transition, HHS will consider whether coverage is provided in other circumstances. Thus, it appears that at least those services and supplies that are routinely covered where medically necessary outside the context of gender transition would be required to be covered, such as hormone supplementation, psychotherapy, mastectomy, or hysterectomy.

If the final regulation addresses sexual orientation discrimination as a form of sex discrimination, it may provide specific guidance on discrimination against LGB people and same-sex couples in health care and health insurance settings. Even absent regulatory guidance on these issues, however, there are a growing number of cases under other federal statutes barring sex discrimination that recognize that sexual orientation discrimination and discrimination against same-sex couples is a form of sex discrimination. These cases are discussed further in the section on Title VII below.

C. Section 1557 Enforcement.

The Department of Health and Human Services is the agency charged with enforcing § 1557, and it reports that its Office of Civil Rights has been pursuing charges of discrimination since enactment of the ACA in 2010. For example, OCR investigated a complaint that a program in Colorado providing funding to health care facilities to provide mammograms and gynecological screenings for low-income women denied a mammogram to a transgender woman because she was not "genetically female." As a result of the complaint and investigation, the program adopted guidelines to clarify that grant recipients must provide mammogram services for transgender women who have taken or are taking hormones.[6]

Section 1557 is also enforceable by private action. Unlike with Title VII, exhaustion of administrative remedies is not required prior to a private plaintiff filing suit.

For example, in *Rumble v. Fairview Health Services,* 2015 WL 1197415 (D. Minn. 2015), a transgender man sued a hospital and physician group, alleging

[6] HHS OCR, OCR Enforcement under Section 1557 of the Affordable Care Act Sex Discrimination Cases, at http://www.hhs.gov/civil-rights/for-individuals/section-1557/ocr-enforcement-section-1557-aca-sex-discrimination/index.html (accessed April 25, 2016).

violations of § 1557 and the Minnesota Human Rights Act based on discriminatory treatment during an emergency room admission and hospital stay. The court denied a motion to dismiss, holding that private enforcement of § 1557 was available, that § 1557 protects individuals who allege discrimination based on gender identity, and that § 1557 applied even though the hospital did not receive federal funding in connection with the plaintiff's treatment – it was sufficient that some operations of the hospital received federal funding. Similarly, in *Taylor v. Lystila,* No. 14-cv-02072 (C.D. Ill. 2014), a transgender woman alleged that a medical provider discriminated against her in violation of § 1557 by refusing to provide hormone monitoring and treatment that it provided outside the context of gender transition.[7]

Several pending cases raise Section 1557 claims involving employer-sponsored health plans and medical benefits for transgender people. For example, *Tovar v. Essentia Health et al.*, No. 16-cv-00100-RJH-LB (D. Minn.), filed in January 2016, brings claims under Section 1557, Title VII, and the Minnesota Human Rights Act. The plaintiff and her transgender son participate in the employee health plan sponsored by the plaintiff's employer, Essentia Health, and administered by HealthPartners. The plaintiff's Section 1557 claim alleges that HealthPartners violated Section 1557 by denying the plaintiff's son medically necessary care by enforcing an unlawful categorical exclusion in the plan barring coverage for "[s]services and/or surgery for gender reassignment." The defendants have moved to dismiss, and the court has not yet resolved the motions.

Another pending case, *Baker v. Aetna Life Insurance Co.*, No. 15-cv-03679-D (N.D. Tex.), filed in November 2015, brings claims under Section 1557, Title VII, and ERISA. The Plaintiff in *Baker* is a transgender woman seeking medically necessary breast reconstruction surgery whose employer-sponsored plan, administered by Aetna, does not cover the surgery. The plaintiff was also denied short-term disability benefits to have the surgery on the basis that her gender dysphoria was not considered an "illness" or "disease" for purposes of the short-term disability plan. Various motions are pending, including Aetna's motion to dismiss the Section 1557 claim (and other claims against it).

III. Title VII.

A. Discrimination Against Transgender People Under Title VII.

[7] The *Taylor* complaint was dismissed without prejudice because the plaintiff died shortly after the filing.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment "because of sex." 42 U.S.C. § 2000e(2)(a). While early cases classified discrimination claims brought by transgender (and lesbian, gay, and bisexual) people as not cognizable as sex discrimination under Title VII, a growing number of federal courts, as well as the Equal Employment Opportunity Commission (EEOC), have taken a different view. Following the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which recognized sex stereotyping as a form of sex discrimination, many courts have recognized that transgender employees could bring Title VII claims when they experienced discrimination based on an employer's perception that they did not comport with stereotyped notions of how men or women ought to look and act. For example, in *Smith v. City of Salem*, the court found that the plaintiff could bring a Title VII sex stereotyping claim when, after announcing that she would be transitioning to female, she had faced harassment from co-workers because they felt that her "appearance and mannerisms were not 'masculine enough.'" 378 F.3d 566, 568 (6th Cir. 2004).

Following this rationale, courts in the majority of circuits have recognized that transgender people could bring viable sex discrimination claims under Title VII or other federal statutes barring sex discrimination. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000); *EEOC c. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594 (E.D. Mich. 2015); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Creed v. Family Express Corp.,* No. 306-CV-465RM, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007); *Mitchell v. Axcan Scandipharm, Inc.*, No. CIV.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

In addition to the sex stereotyping theory recognized in *Smith*, some courts have recognized that discrimination based on a person's transgender status is per se sex discrimination, as the discrimination stems from the transgender person's change of sex. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008); *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012). As one district court recently observed, "[d]iscrimination 'because of sex' . . . is not only discrimination because of maleness and discrimination because of femaleness, but also discrimination because of the *distinction* between male and female or discrimination because of the *properties or characteristics* by which individuals may be classified as male or female." *Fabian v. Hosp. of Cent. Connecticut*, No. 3:12-CV-1154 (SRU), 2016 WL 1089178, at *12 (D. Conn. Mar.

18, 2016) (denying employer's motion for summary judgment and holding that discrimination on the basis of transgender identity is cognizable under Title VII).

To date, there have been few court decisions addressing whether categorical exclusions of transition-related care constitute sex discrimination, though increased advocacy and attention around this issue will likely result in more such challenges. In 2003, the Second Circuit rejected ERISA and Title VII claims challenging a plan's denial of transition related care. *Mario v. P&C Markets, Inc.*, 313 F.3d 758 (2d Cir. 2003). The court based its holding in part on a finding that there was insufficient evidence that the care was medically necessary. As discussed below, however, recent decisions suggest an emerging scientific consensus to the contrary, calling into question the continued validity of this holding.

In the fall of 2014, a California district court considering constitutional Equal Protection claims brought by a transgender prisoner found that the plaintiff had stated a colorable claim for sex discrimination where she alleged that she was denied certain medical care that her doctors had deemed a medically necessary part of her gender transition, when the prison would have covered the same procedure for a non-transgender woman. *Norsworthy v. Beard*, No. 14CV00695JST, 2014 WL 6842935, at *11 (N.D. Cal. Nov. 18, 2014), opinion amended and superseded on other grounds, No. 14CV00695JST, 2015 WL 1478264 (N.D. Cal. Mar. 31, 2015). While a subsequent order in this case did not reach the Equal Protection issue, granting a preliminary injunction based solely on a determination that denying this care constituted deliberate indifference to a serious medical need in violation of the Eighth Amendment, this decision suggests that sex discrimination claims challenging exclusion clauses are viable.

The pending *Tovar* and *Baker* cases mentioned above raise Title VII claims against the defendant employers that sponsor the health plans at issue. In *Tovar,* according to the litigation complaint, the EEOC issued a determination letter in January 2016 finding that the defendant employer, Essentia, discriminated against the plaintiff based on sex when she was denied medical-related services for her child under the defendant's sponsored health insurance plan based on the the child's gender identity. In *Baker*, the litigation complaint brings Title VII claims against both the employer and against Aetna as the employer's agent. As noted above, motions to dismiss are pending in both cases. An additional pending case, *United States v. Southeastern Oklahoma State University*, involves Title VII claims alleged against an employer based in part on an exclusion in the employer's health plan. In that case, the employee-intervenor raised a hostile work environment claim under Title VII based in part on the plan exclusion. The court denied the employer's motion to dismiss the hostile work environment

claim, though it did not directly comment on the allegations related to the health plan. No. CIV-15-324-C, 2015 WL 4606079, at *1 (W.D. Okla. July 10, 2015).

B. Sexual Orientation Discrimination Under Title VII.

As with Title VII claims based on gender identity, the EEOC and an increasing number of federal courts have found that claims brought by lesbian and gay employees for discrimination based on sexual orientation can constitute discrimination "because of sex." Beginning with *Price Waterhouse* and continuing with *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), which unanimously held that same-sex harassment is actionable under Title VII, the Supreme Court has recognized that Title VII's prohibition on sex discrimination "must extend to [sex-based] discrimination of any kind that meets the statutory requirements." *Id.* at 80.

While the case law is less uniform in the context of sexual orientation than for gender identity, decisions explicitly protecting lesbian and gay employees go back to at least 2002, when a district court denied summary judgment to the employer where the lesbian plaintiff alleged that she was harassed (and ultimately discharged) for not conforming to the employer's stereotype of how a woman "ought to behave," since she was "attracted to and dates other women, whereas [the employer] believes that a woman should only be attracted to and date only men." *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

In July 2015, the EEOC issued a decision in *Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080, explicitly holding that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." 2015 WL 4397641, at *5 (EEOC) (July 15, 2015). The Commission also noted, among other things, that "[s]exual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex" and that "Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex." *Id.* at *5, *7. Some district courts have endorsed the reasoning of *Baldwin*. *See, e.g.*, *Isaacs v. Felder Servs., LLC*, 2015 WL 6560655 (M.D. Ala. 2015) (endorsing reasoning but dismissing on the merits); *Videckis v. Pepperdine Univ.*, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015) (Title IX sex discrimination case citing *Baldwin* with approval). EEOC decisions involving Title VII claims by gay or lesbian federal employees include *Veretto v. U.S. Postal Serv.*, 2011 WL

2663401 (EEOC) (July 1, 2011), and *Castello v. U.S. Postal Serv.*, 2011 WL 6960810 (EEOC) (Dec. 20, 2011).

Most recently, on March 1, 2016, the EEOC filed two Title VII sex discrimination lawsuits against private employers on behalf of gay or lesbian individuals. The EEOC's lawsuits seek, in addition to other monetary and injunctive relief for the aggrieved individuals, damages for emotional distress and punitive damages. See *U.S. EEOC v. Pallet Companies*, No. 16-cv-00595-RDB (D. Md.) (filed Mar. 1, 2016); *U.S. EEOC v. Scott Medical Health Ctr.*, P.C., No. 16-cv-00225-CB (W.D. Pa.) (filed Mar. 1, 2016).

While results are mixed, federal district courts are increasingly recognizing discrimination claims brought by gay and lesbian employees as alleging sex discrimination under Title VII. For example, a federal court held that a gay employee sufficiently pled a claim for sex discrimination under Title VII because as a gay man, the employee's "sexual orientation was not consistent with the defendant's perception of acceptable gender roles." *Terveer v. Billington*, 34 F. Supp. 3d 100, 2014 WL 1280301, at *9 (D.D.C. Mar. 31, 2014); *see also Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (permitting plaintiff to go to trial on Title VII sex discrimination claim alleging mistreatment because he "chose to take his [male] spouse's surname – a 'traditionally' feminine practice"); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (noting that "[s]exual orientation discrimination can take the form of sex discrimination"); *but see Evans v. Georgia Reg'l Hosp.*, 2015 WL 5316694, at *3 (S.D. Ga. Sept. 10, 2015) ("[I]t is simply *not* unlawful under Title VII to discriminate against homosexuals or based on sexual orientation."), *report and recommendation adopted*, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015); *Currie v. Cleveland Metro. Sch. Dist.*, 2015 WL 4080159, at *3 (N.D. Ohio July 6, 2015).

There is a strong argument that excluding same-sex spouses from eligibility for enrollment in a medical benefit plan may violate Title VII and/or Section 1557's prohibition on sex discrimination. The Supreme Court's recent marriage decisions strengthen potential sex-discrimination claims in this context by eliminating any defense that a plan relies on a particular state's marriage law in refusing to recognize same-sex marriages.

On January 29, 2015, the EEOC issued a probable cause finding that Wal-Mart's refusal to provide spousal health benefits to the charging party's same-sex spouse constituted sex discrimination. In particular, the EEOC noted that the charging party "was subject to employment discrimination in that she was treated differently and denied benefits *because* of her sex, since such coverage

would be provided if she were a woman married to a man." *See Cote v. Wal-Mart Stores East, LP* (Jan. 29, 2015), *available at* http://www.glad.org/uploads/docs/cases/cote-v-walmart/cote-v-walmart-probable-cause-notice.pdf. Ms. Cote filed suit on July 14, 2015, alleging sex discrimination claims under Title VII, the Equal Pay Act, and the Massachusetts Fair Employment Practices Law. *Cote v. Wal-Mart Stores, Inc.*, No. 1:15-cv-12945-WGY (D. Mass.). The suit alleges claims on behalf of a national class of current and former Wal-Mart employees in same-sex marriages, as well as a Massachusetts sub-class. The suit challenges both Wal-Mart's refusal to provide spousal healthcare benefits prior to January 1, 2014, and its ongoing refusal, expressed in the EEOC investigation, to acknowledge any obligation to provide benefits on an equal basis to employees in opposite-sex and same-sex marriages.

In a similar context, a district court denied a motion to dismiss a Title VII claim brought by gay and lesbian employees against a company that provided health benefits to same-sex spouses but not to opposite-sex spouses. *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014). The court determined that the plaintiff "allege[d] disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males." *Id.* at *3.

IV. ERISA.

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most pension and health plans sponsored by private employers, to provide protection for individuals in these plans.[8] Among other things, ERISA requires plans to provide participants with plan information and to establish a grievance and appeals process for participants to get benefits from their plans, and gives participants the right to sue for benefits and breaches of fiduciary duty.[9]

A. Benefits for Transgender People.

1. Medical Necessity.

Medical benefits plans typically cover only services and supplies that are determined to be "medically necessary." Medical necessity is commonly defined

[8] *See* Dep't of Labor, Employee Retirement Income Security Act ERISA, at https://www.dol.gov/general/topic/health-plans/erisa (accessed April 25, 2016).

[9] *See id.*

with reference to generally accepted medical standards. For example, a plan may define "medically necessary" as "the frequency, extent, and the types of medical services or supplies that represent appropriate medical care and that are generally accepted by qualified professionals to be reasonable and adequate for the diagnosis and treatment of illness, injury, or pregnancy."

Courts have held in a variety of contexts that transition-related services and supplies are the accepted medical treatment for gender dysphoria or gender identity disorder ("GID"). For example, in *O'Donnabhain v. Commissioner of Internal Revenue*, 134 T.C. 34 (2010), the United States Tax Court held that amounts paid for hormone therapy and sex reassignment surgery for treatment of GID were deductible medical care expenses under IRC § 213. The majority opinion cited the DSM-IV diagnostic criteria for GID, World Professional Association for Transgender Health Standards of Care, and expert testimony in concluding that the petitioner's expenses were for deductible "medical care" under the Code, not nondeductible "cosmetic surgery." The majority concluded that GID is a "disease" for purposes of section 213 and that "cross gender hormone therapy and sex reassignment surgery are well recognized and accepted treatments for severe GID." The court recognized that breast reconstruction surgery was at least sometimes considered medically necessary treatment for GIG, but found that the petitioner had not provided sufficient evidence of necessity in her case to demonstrate that this surgery did not fall within the Code's exclusion for "cosmetic surgery." Finally, the majority held that the petitioner's sex reassignment surgery was medically necessary. Concurring judges would have held that sex reassignment surgery is a "good faith treatment," without reaching the question of medical necessity, while dissenting judges would not have allowed the deduction.

The *O'Donnabhain* majority cited circuit court decisions holding that severe GID or transsexualism constitutes a "serious medical need" for purposes of the Eighth Amendment. *See O'Donnabhain*, 134 T.C. at 62; *De'lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003); *Allard v. Gomez*, 9 Fed. Appx. 793, 794 (9th Cir. 2001); *Phillips v. Mich. Dep't of Corr.*, 932 F.2d 969 (6th Cir. 1991); *Meriwether v. Faulkner*, 821 F.2d 408, 411-13 (7th Cir. 1987). The majority also cited cases holding that sex reassignment surgery is not "cosmetic surgery" for purposes of state Medicaid statutes. *See O'Donnabhain*, 134 T.C. at 71.[10]

[10] More recently, an en banc court of appeals, with two judges dissenting, held in the Eighth Amendment context that while GID is a serious medical need that mandates treatment, sex reassignment surgery was not the only appropriate treatment, and therefore denial of sex reassignment surgery did not rise to the

In contrast, in an ERISA case, the Second Circuit upheld a medical plan administrator's decision to deny coverage for hormone therapy and mastectomy as not medically necessary. *Mario v. P&C Food Markets, Inc.*, 313 F.3d 758 (2d Cir. 2002). The court held that the plaintiff had failed to rebut the plan administrator's conclusion that "there was substantial disagreement in the medical community about whether gender dysphoria was a legitimate illness and uncertainty as to the efficacy of reassignment surgery."

As *Mario* illustrates, plan participants and beneficiaries challenging medical necessity denials should understand that in ERISA cases, the requirement to exhaust the plan's claim process makes it particularly important for the plan participant to make a complete record in front of the plan administrator. ERISA benefit claims are generally subject to a requirement to exhaust the claim process provided for by ERISA § 503, 29 U.S.C. § 1133, and the Department of Labor's regulation thereunder, 29 C.F.R. § 2560.503-1. A decision to deny benefits challenged under § 502(a)(1)(B) will sometimes be reviewed by a court only for abuse of discretion, and the record on judicial review is generally limited to that before the plan administrator. *See Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (en banc). Likewise, for plans that are subject to the ACA's internal and external review requirements, plan participants and beneficiaries should be familiar with the rights and responsibilities under 29 C.F.R. § 2590.715-2719, and ensure that a complete record is compiled during these proceedings.

2. Categorical Exclusions.

For health plans with categorical exclusions for transition-related care, transgender employees (or transgender dependents of employees) likely do not have strong claims under ERISA to enforce the terms of the benefit plan, as such a plan by its terms does not provide the benefit sought. There is also a strong argument that a transgender plan participant does not need to exhaust a plan's administrative claim process, if the specific benefit sought is not provided by the plan terms. That said, these questions are unsettled, and the law is likely to develop as more cases are litigated. In addition, some plans may have exclusion clauses that on their face exclude only some transition-related care. An exclusion for "sex change surgery," for example, would not exclude coverage for hormone

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level of a deprivation of constitutional rights. *Kosilek v. Spencer*, 774 F.3d 63, 106 (1st Cir. 2014) (en banc), *cert. denied sub nom. Kosilek v. O'Brien*, 135 S. Ct. 2059, 191 L. Ed. 2d 958 (2015).

therapy.

B. Same-Sex Marriages and Partnerships.

ERISA does not require that health plans cover any spouses, opposite-sex or same-sex. Thus, a participant in a private-employer health plan that explicitly states it provides coverage for opposite-sex spouses, and not same-sex spouses or domestic partners, does not have an ERISA claim. *See Roe v. Empire Blue Cross Blue Shield*, No. 12-cv-04788 (NSR), 2014 WL 1760343 (S.D.N.Y. May 1, 2014) (dismissing ERISA case, noting that ERISA does not require a health plan to provide benefits to spouses at all, that the plan at issue did not violate ERISA, and that Section 510 of ERISA, which prohibits employers from discriminating against participants for exercising rights to which they are entitled under an employee benefit plan), *aff'd*, 589 Fed. App'x 8 (Dec. 23, 2014). In *Roe*, the district court noted that the plaintiffs in that case did not raise, and the court did not address, "whether the [e]xclusion is lawful under other federal laws." *Id.* at *8. As noted above, a participant in a same-sex marriage whose employer-sponsored plan explicitly excludes same-sex spouses from enrolling in the plan will likely have a strong discrimination claim under other laws such as Title VII.

V. Federal and State Mental Health Parity Acts.

The federal Mental Health Parity and Addiction Act of 2008 prohibits health plans from imposing more restrictive financial requirements or treatment limitations on mental health and substance abuse benefits than are imposed on substantially all medical and surgical benefits. Many states have similar mental health parity laws. While being transgender itself is not considered a mental illness, many transgender people are diagnosed with gender dysphoria (formerly gender identity disorder, or GID), a mental health diagnosis that refers to the psychological discomfort or distress that is caused by a discrepancy between a person's gender identity and the sex they are assigned at birth. While there has been little to no litigation under mental health parity laws related to coverage for transition-related medical care, several state insurance agencies have prohibited categorical coverage exclusions based in part on state and federal mental health parity laws.[11]

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[11] *See, e.g.*, State of Connecticut Insurance Department, Bulletin IC34, "Gender Identity Nondiscrimination Requirements," (Dec. 19, 2013) (prohibiting categorical exclusions of transition-related medical care based in part on Connecticut stature requiring insurance coverage for treatment of mental health conditions).

VI. State Insurance Law.

ERISA contains a wide-reaching preemption clause providing that it supersedes "any and all state laws" that relate to employee benefit plans, except state laws that regulate insurance. 29 U.S.C. § 1144. This "insurance savings clause" allows states to regulate insured ERISA plans indirectly by regulating the terms of insurance policies, as discussed below.

Not all ERISA-governed health plans are funded by the purchase of insurance: some are "self-funded," meaning that the plan provides health benefits to employees and dependents using its own funds (funds of the employer or trust fund) rather than through the purchase of insurance. These plans sometimes hire third-party administrators to decide claims and issue payments, and many large insurance companies provide plan administration services (but assume no risk for claims payment) for these self-funded plans. State insurance laws and regulations generally do not apply to "self-funded" plans.

A. State-Law Guidance on Transition-Related-Care Coverage.

In addition to potentially violating federal law, exclusions for transition-related care and gender-based benefit denials in insured medical benefit plans may violate state insurance law gender nondiscrimination provisions. For example, Cal. Ins. Code § 10140, the Insurance Gender Nondiscrimination Act, prohibits discrimination on the basis of "sex," defined as "includ[ing] a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with a person's assigned sex at birth." As another example, Washington, D.C.'s Department of Insurance, Securities and Banking issued a bulletin clarifying Washington, D.C.'s statute prohibiting discrimination in health insurance based on gender identity or expression.[12] Connecticut similarly requires that "medically necessary services related to gender dysphoria should not be handled differently from medically necessary services for other medical and behavioral health conditions."[13] States with similar prohibitions include Colorado, Delaware, Illinois, Massachusetts, Minnesota, New York, Nevada, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.

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[12] *See* Bulletin 13-IB-01-30/15 (Revised) (Feb. 27, 2014), at http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin-ProhibitionDiscriminationBasedonGenderIdentityorExpressionv022714.pdf.

[13] State of Conn. Ins. Dep't, Bulletin IC-34, "Gender Identity Nondiscrimination Requirements," (Dec. 19, 2013).

B. State-Law Protections for Same-Sex Couples.

Some states, through regulation of insurance, require insured plans that provide spousal coverage to provide coverage on the same basis for domestic partners or civil union parties. California's Insurance Equality Act ("IEA"), for example, requires that HMOs and insurance policies provide coverage for registered domestic partners equal to any coverage provided for married spouses. Cal. Health & Safety Code § 1374.58(a); Cal. Ins. Code §§ 381.5(a), 10121.7(a). As a result, an insured employer health plan marketed, issued, or delivered to a resident of California must provide benefits to registered domestic partners if, and to the extent that, it provides benefits for married spouses. However, an ERISA-governed health plan in California that is not funded through the purchase of insurance – that is "self-funded" – need not provide benefits to registered domestic partners.

Other states have also enacted legislation mandating that insured benefits be extended to same-sex spouses and domestic partners to the same extent as opposite-sex spouses, or mandating that insurance policies offer such benefits. Some state insurance commissioners have also mandated that insurers provide spousal benefits to same-sex spouses.[14] In June 2014, Washington state officials issued a letter to benefit plan administrators, insurance companies, and employers stating that providing health care coverage to opposite-sex spouses but not same-sex spouses violates Washington state law. *See* Letter from Wash. Atty. Gen., Wash. Ins. Comm'r, & Wash. Human Rights Comm'n (June 5, 2014). The Washington state agencies have taken the position that this applies not only to insured plans, but to self-funded plans as well, stating that "[t]he federal preemption provisions in ERISA . . . cannot be used to carve out same-sex marriages recognized in Washington state for unequal treatment by excluding them from healthcare benefits that are otherwise provided to other married couples in this state." Frequently Asked Questions, Washington State Joint Letter on Health Coverage for Same-Sex Spouses (June 5, 2014) (available at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/FAQ%20Insurance%20Equality%20FINAL.pdf).

The federal government also qualified health plans offered through Affordable Insurance Exchanges (as part of the Patient Protection and Affordable Care Act). On March 14, 2014, the Centers for Medicare & Medicaid Services (of the Department of Health & Human Services) issued guidance to clarify the regulations' prohibition against discrimination based on sexual orientation. *See* CMS, Frequently Asked Question[s] on Coverage of Same-Sex Spouses (Mar. 14,

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[14] *See* State of Conn. Ins. Dep't, Bulletin IC-21 (rev. July 10, 2009); State of New York Ins. Dep't, Circular Letter No. 27 (2008).

2014). The regulations preclude a health insurance issuer in the group or individual market that offers coverage of an opposite-sex spouse from refusing to offer coverage of a same-sex spouse. The regulations do not require a group health plan "to provide coverage that is inconsistent with the terms of eligibility for coverage under the plan, or otherwise interfere with the ability of a dependent spouse for purposes of eligibility of coverage under the plan." *See id.* at 1-2. Rather, the regulations prohibit an issuer from choosing to decline to offer to a plan sponsor (or individual in the individual market) the *option* to cover same-sex spouses under the coverage on the same terms and conditions as opposite-sex spouses. *Id.* at 2.

VII. Federal Employees and Employees of Federal Contractors.

On July 21, 2014, President Obama signed an executive order amending Executive Orders 11478 and 11246, which bans federal contractors from discrimination based on sexual orientation and gender identity. *See* Executive Order, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity. The order also makes clear that federal employees, who were already explicitly protected from discrimination on the basis of sexual orientation, are also protected from gender identity discrimination. These Executive Orders, which are enforced by the Department of Labor's Office of Federal Contract Compliance Programs, may give rise to sex discrimination claims for health benefit plans that discriminate against transgender people or same-sex couples.

Prior to 2015, the Federal Employees Health Benefits Program ("FEHB") did not offer federal employees health insurance plans that provided coverage for transition-related health care. In mid-2014, the Office of Personnel Management ("OPM") issued a carrier letter stating that coverage for such care would be optional for the plan year beginning January 1, 2015.[15] A follow up carrier letter directed that such coverage was mandatory for all FEHB plans beginning January 1, 2016.[16]

VIII. Conclusion.

Protections for LGBT people enrolled in employer-sponsored health plans are currently uneven and the subject of rapid developments under a variety of

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[15] FEHB Program Carrier Letter No. 2014-17, "Gender Identity Disorder/Gender Dysphoria," June 13, 2014.

[16] FEHB Program Carrier Letter No. 2015-12, "Covered Benefits for Gender Transition Services," June 24, 2015.

federal and state laws. While there is a trend towards prohibiting discrimination in health plans on the basis of gender identity and sexual orientation, the recognition such protections may still vary based on the type of plan and jurisdiction. Practitioners representing LGBT employees should be alert to ongoing developments in this area, and for opportunities to contribute to the further development of the law.