TRANSGENDER LAW IN EMPLOYMENT

AND EMPLOYEE BENEFITS

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Overview

- Employment Current State of the Law
- Benefits for Transgender Employees
- Employer Best Practices
Gender Transition

- **Medical Transition**
  - Contrary to popular belief, there is no one “transgender surgery.”
  - Can include a variety of treatments such as:
    - Hormone therapy
    - Mental health services
    - Electrolysis and laser hair removal
    - Surgeries

- **Social Transition**
  - Coming out to family, friends, and co-workers
  - New name and/or pronouns
  - Clothing, hairstyle, and mannerisms
  - Changing name and/or sex on ID documents
State of the Law

- Federal Law
  - Title VII prohibits sex discrimination
    - Trend in courts recognizes that this prohibits discrimination based on transgender status
    - Mixed case law on applying to sexual orientation discrimination
  - 18 states + D.C. have nondiscrimination laws that cover sexual orientation and gender identity/expression
  - 3 states have law banning discrimination based on sexual orientation alone: Wisconsin, New Hampshire, New York
  - ENDA v Equality Act
Employment Discrimination

- **Federal Circuit Split**: Federal Courts currently disagree on whether or not discrimination against transgender people on the basis of transgender status is prohibited.

- **EEOC**: The Equal Employment Opportunity Commission currently believes that discrimination on the basis of transgender status is itself discrimination on the basis of gender under Title VII.
Title VII Developments

- “We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1998).

- Gender identity discrimination as sex stereotyping:
  - EEOC
  - Circuit courts
    - *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII)
    - *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection Clause)
  - Many district courts

Healthcare and Transgender Employees

• **Plans**: Many health plans and providers are still working to incorporate trans-inclusive health care options.

• **Affordable Care Act**
  • Section 1557 prohibits discrimination based on sex by any health program receiving federal financial assistance
  • HHS confirmed this prohibition extends to prohibitions on discrimination based on gender identity
Healthcare and Transgender Employees

- **Affordable Care Act**
  - Requires non-grandfathered employer group health plans to cover 100% of cost of preventive care
  - DOL, IRS and HHS guidance
    - Cannot limit preventive services based on individual’s sex assigned at birth
    - Determination made by individual’s attending provider
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Medical Necessity in the Courts

- Courts and administrative bodies recognizing that transition-related medical care is the accepted treatment for gender dysphoria.
  - May 2014 decision from HHS Appeals Board: categorical exclusions not valid under “reasonableness standard” governing Medicare coverage.

- But see *Mario v. P&C Markets, Inc.*, 313 F.3d 758 (2d Cir. 2003) (plaintiff failed to show medical necessity - plaintiff in Mario apparently presented little evidence going to medical necessity)
Coverage Exclusions

- Blanket exclusions for benefits for services or supplies related to gender transition, such as psychological services, hormone therapy, and surgery.

- Potential for broad application of blanket exclusion to non-transition related care.
Medical Necessity Denials

- Benefits for a medical service or supply are denied as not medically necessary for a person of the employee’s gender as reflected in the plan administrator’s records.

- Benefits for a medical service or supply are denied as not medically necessary because related to gender transition.
Affordable Care Act Section 1557

- Civil rights provision of the ACA
- Prohibits discrimination based on race, color, national origin, sex, age, or disability
- Applies to any health program or activity that receives federal funding from HHS
- First Federal civil rights law to prohibit sex discrimination in health care
- Extends nondiscrimination protections to Marketplaces
Section 1557 Proposed Regulation

- Codifies and clarifies the application and enforcement of Section 1557
- Explains nondiscrimination on the basis of sex in health programs or activities
- Provides detail on the rights of individuals with limited English proficiency and individuals with disabilities
- Applies to any health program or activity that receives federal funding from HHS
- Applies Section 1557 to HHS Federally conducted health programs and activities
- Comment period ended November 2015
- Final regulation expected in 2016
Section 1557 Proposed Regulation

- 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.
- 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.
Section 1557 Proposed Regulation

- Prohibits explicit, categorical, or automatic exclusion from coverage for *all* health services related to gender transition.

- Where coverage is denied for a *specific* service related to gender transition, HHS will consider whether coverage is provided in other circumstances.

- Does not affirmatively require covered entities to cover any particular procedure or treatment for transition-related care.
NPRM applies to:

- All health programs and activities, any part of which receives federal financial assistance from HHS
- All health programs and activities administered by HHS
- Health programs and activities administered by Title I entities
Section 1557 Proposed Regulation

- Definition of federal financial assistance (FFA):
  - Includes grants, tax credits, and cost-sharing subsidies under ACA Title I, Medicare Part D payments, and other forms of FFA
  - Excludes Medicare Part B payments

- Definition of health program or activity:
  - Includes health services and health coverage
  - Includes all operations of an entity principally engaged in health services or health insurance coverage, such as a hospital or insurance company
Section 1557 Proposed Regulation

Definition of “on the basis of sex”

- Includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping and gender identity

- NPRM requested comment on whether sexual orientation is a covered basis under existing federal laws that prohibit discrimination
Section 1557 Proposed Regulation

Definition of “gender identity”:

- Means an individual's internal sense of gender, which may be different from an individual's sex assigned at birth.

- The way an individual expresses gender identity may or may not conform to social stereotypes associated with a particular gender.

- Gender may be expressed through, for example, dress, grooming, mannerisms, speech patterns, and social interactions.

- 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.
Section 1557: Enforcement

- HHS OCR has been accepting cases since ACA enactment of in 2010 and continues to process cases during the rulemaking period
- OCR reports insurance discrimination complaints are on the rise
- Majority of sex discrimination cases (treatment and insurance) are gender identity discrimination cases
Section 1557: Enforcement

*Rumble v. Fairview Health Servs.*, 2015 WL 1197415 (D. Minn. 2015) (pre-NPRM)

- Motion to dismiss denied
- Section 1557 is enforceable by private action
- Section 1557’s prohibition on sex discrimination protects plaintiffs who allege discrimination based on gender identity
- Section 1557 applies to organization if any part receives federal funding; plaintiff need not allege that he sought care from part of organization that receives federal funding
Eleven states plus D.C. prohibit categorical exclusions of transition-related care.

- CA, CO, CT, IL, MA, MN, NY, NV, OR, RI, VT, WA (more limited guidance in MD)
- For example, CT’s bulletin 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.”

Based on state non-discrimination laws. Some also rely on ACA non-discrimination provisions, federal and state mental health parity laws.

Applies to insured plans within those states.
Other Regulation of Health Benefits for Transgender Employees

- **Federal Employees Health Benefits Program**
  - Before 2015, OPM mandated that carriers exclude transition-related coverage.
  - For 2015, OPM allowed carriers to retain or excise the exclusion.
  - For 2016, OPM prohibits carriers from having the exclusion:
    - FEHB Program Carrier Letter No. 2015-12, June 23, 2015
    - Effective 1/1/16, no carrier participating in FEHB Program may have a general exclusion of services, drugs or supplies related to gender transition or “sex transformations”

- **Executive Order 13672** prohibits federal contractors from discriminating on the basis of gender identity. Enforced by Department of Labor (OFCCP).
Other Regulation of Health Benefits for Transgender Employees

- **ACA Essential Health Benefits**
  - “An issuer does not provide EHB if its benefit design, or the implementation of its benefit design, discriminates based on an individual’s ... other health conditions.” 45 CFR 156.125(a).
  - Prohibition on sex and gender identity discrimination. 45 CFR 156.125(b); 45 CFR 156.200(e).

- **Federal and State Mental Health Parity laws**
Potential Title VII/Section 1557 Claims

Possible Title VII claims where health plan:

- Contains coverage exclusions for gender transition-related care, particularly where supplies or services such as hormone therapy are excluded for transgender employees, but covered for non-transgender employees; or

- Denies coverage on medical necessity grounds due to gender.
Potential Title VII/Section 1557 Claims

  - Title VII claim based in part on insurance exclusion survives MTD (no discussion of insurance allegations)

  - Title VII claims against employer
  - Section 1557 claims against TPA
Potential RFRA Claims?

- **Burwell v. Hobby Lobby Stores, Inc.** (2014): ACA’s mandate that plans cover certain contraceptives at no cost to employees impermissibly burdens religious exercise of closely-held, for-profit corporations

- To date, no RFRA or First Amendment free exercise challenges to state or federal requirements to cover transition-related care or enroll same-sex spouses
Many employers are looking for ways to expand their trans coverage

Cost impact of trans-inclusive health coverage

Diversity/Inclusion
Cost of Transgender Inclusive Coverage

- CA Dep’t of Insurance 2012 Economic Impact Assessment for Insurance Gender Nondiscrimination Act
  - Regulations prohibiting categorical exclusions of transition-related care would have “an insignificant and immaterial economic impact”
  - Very small transgender population (high estimate was 0.0173% of population)
  - Low utilization rates
  - Some plans had minimal premium increases
How To Accommodate An Employee Transition

• **Foster Inclusive Environments**: By having discrimination, HR, and insurance policies in place that include transgender persons.

• **Create a Transition Plan**: Because each transgender person experiences their transition in a unique way, and on their own timeline, an individualized transition plan charting out milestones is helpful for both the employee and the workplace.
Creating An Inclusive Work Environment

- Beware privacy/confidentiality issues of your co-workers
- Avoid gender based comments
- Do not assume anything about any co-workers sexual orientation or gender identity — regardless, most of the time, it is irrelevant to the workplace!
- Be mindful that what you perceive as harmless and/or funny could be perceived differently by another individual
- Be respectful of your co-workers
- Immediately report suspected acts of discrimination, harassment, and retaliation
Transition Plans

- **Milestones**: Informal Name Change, Official Name Change, Pronoun Change, Restroom Use, Medical Intervention, Surgical Intervention

- Milestones may change as transition goes on. Checking in with a transitioning employee can keep everyone on the right track, and prevent harassment before it happens.
FMLA Leave and Transgender Employees

- **FMLA:** Leave under the federal Family and Medical Leave Act requires “a serious health condition that makes the employee unable to perform the functions of his or her job.”

- Courts have not indicated whether or not transition-related medical intervention qualifies for FMLA.

- However, refusing to provide leave may expose an employer to lawsuits under the FMLA and Title VII.