Compliance Bulletin

Coverage of Gender-affirming Care: Employer Considerations

In *Lange v. Houston County*, the 11th Circuit Court of Appeals ruled that it was a violation of Title VII of the Civil Rights Act of 1964 (Title VII) for an employer to deny coverage for gender-affirming care. Specifically, the court held that the exclusion constituted discrimination on the basis of sex in violation of Title VII because transgender persons are the only plan participants who would seek or qualify for gender-affirming surgery.

The decision comes on the heels of the issuance of final rules under Section 1557 of the Affordable Care Act, which prohibits discrimination in certain health programs and activities. The final rules, which are currently being challenged in court, explicitly clarify that sex discrimination includes discrimination based on gender identity.

Conflicting Court Rulings and Supreme Court Weigh-in

The 11th Circuit cited the 2020 U.S. Supreme Court decision of *Bostock v. Clayton County*, which held that discrimination based on transgender status constitutes discrimination on the basis of sex. It also cited a 2022 4th Circuit Court of Appeals case, which held that a coverage exclusion for "treatment or studies leading to or in connection with sex changes or modifications and related care" constituted unlawful discrimination.

Conversely, other federal courts have held that Title VII and Section 1557 do not require certain religious employer health plans to cover gender-transition procedures. In addition, certain states have begun to enact laws that restrict or prohibit gender-affirming care for minors, and the Supreme Court has agreed to hear a case challenging one such Tennessee law.

Important Reminders

Employers that are considering excluding gender-affirming services should keep in mind that the following did not circumvent Title VII liability in the *Lange* case:

- **Potential cost savings**—The 11th Circuit held that cost savings does not excuse discrimination.
- **Providing other transition-related care**—It did not matter that the plaintiff was able to secure other transition-related care under the health plan. According to the court, insurance coverage conditioned upon one's protected status violates Title VII. In denying gender-affirming coverage, the plaintiff was "deprived of a benefit or privilege of her employment by reason of her nonconforming traits[.]"

Section 1557 Applicability

- While most employer health plans will not be considered covered entities, to the extent a group health plan receives Federal financial assistance, it would be subject to Section 1557.
- A third-party administrator for a self-funded group health plan may be considered a covered entity where it is affiliated with a health insurance issuer that receives funding.
- Whether Section 1557 applies to a particular entity is a fact-specific analysis.

Action Steps

Employers must closely analyze their health plan documents in light of these developments and determine whether any changes are necessary to ensure full compliance. Carriers and third-party administrators may be able to provide information regarding specific plan provisions. Employers may also wish to consult with an employee benefits attorney regarding compliance as this area of law continues to evolve.

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