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EMPLOYEE BENEFITS LAW

Recent Litigation on Exclusions of Gender Affirming Care

Title VII of the Civil Rights Act prohibits employment discrimination on the basis of sex, and in June 2020, the Supreme Court ruled that this includes discrimination based on sexual orientation and gender identity.[1] The Court did not address sex discrimination in a health plan.

Increasingly over the past few years, plaintiffs have filed lawsuits arguing that health coverage exclusions of gender affirming care (sometimes also called "gender transition" or "sex change" services or referred to by the clinical diagnosis, "gender dysphoria") improperly discriminate on the basis of sex. Although no appellate court has yet ruled on this issue, nearly a dozen lower court decisions have sided with plaintiffs in these cases, ruling such exclusions violate Title VII or another statute similarly prohibiting sex discrimination.[2]

In one representative example, the court reasoned that a hysterectomy is covered for any medically necessary reason, so the exclusion of the same procedure for medically necessary "gender reassignment surgery" results in disparate treatment "directly connected to the incongruence between Plaintiff's natal sex and his gender identity."[3] Some courts have reasoned that transition-specific exclusions also implicate case law prohibiting sex stereotyping, because these exclusions "entrench" the belief that transgender individuals must preserve the genitalia and other physical attributes of their natal sex over not just personal preference, but specific medical and psychological recommendations to the contrary."[4]

These rulings generally have not addressed how such exclusions would fare if founded on a genuinely held religious belief. Courts also have not addressed whether other plan exclusions that are sometimes invoked with respect to gender affirming procedures (e.g., exclusions for cosmetic procedures) might be affected by Title VII.

Based on the increasing litigation in this area and growing consensus in these court decisions, plans excluding gender affirming care may wish to consult with legal counsel.

From all of us here at MMPL, your employee benefits law firm.

Not intended as legal advice.

[1] *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
[2] In cases involving governmental or non-employer-sponsored coverage, courts have used similar reasoning and Title VII precedent to reach the same conclusion under Section 1557 of the Affordable Care Act.
[3] *Toomey v. Arizona*, No. CV1900035TUCRMLAB, 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019).
[4] *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018).

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