

## Publications

# Circuit Courts Extend Non-Discrimination Protections for Transgender Individuals

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On May 13, 2024, the Eleventh Circuit Court of Appeals held that certain federal non-discrimination protections apply to transgender individuals in the group health plan (insured and self-insured) context. In particular, the decision creates a significant new pathway for plan participants to challenge a plan's limitations on coverage for gender-affirming care. This decision follows a similar April 29, 2024 decision in the Fourth Circuit. Plan sponsors, insurers, and third-party administrators should consider evaluating plans' coverage exclusions and restrictions in light of these decisions.

## Background

Group health plans, plan sponsors, third party administrators, and health insurance issuers face increasing non-discrimination requirements. In 2024 alone, there have been many notable legal developments in these rules. Specifically, in May, the Department of Health and Human Services ("HHS") released regulations under Affordable Care Act ("ACA") section 1557 and Rehabilitation Act of 1973 section 504. Together, these rules prohibit entities that receive federal financial assistance from discriminating against individuals who are members of a recognized protected class (i.e., race, color, national origin, sex, disability, and age). Notably, the section 1557 final rule added the term "gender identity" to its description of sex discrimination. HHS explained in the preamble that "gender identity" is intended to "encompass 'transgender status.'" [See our prior alert on section 1557 [here](#) and section 504 [here](#).]

Most group health plans and health insurance policies in the group and individual markets are also subject to MHPAEA, which requires that plans offer mental health or substance use disorder benefits ("MH/SUD") comparably with medical/surgical ("M/S") benefits, meaning the plan cannot impose less favorable benefit limitations on MH/SUD benefits. Thus, under MHPAEA, plans that cover care related to gender dysphoria, a recognized mental health diagnosis in the Diagnostic and Statistical Manual of Mental Disorders ("DSM") V, must offer such benefits in parity with M/S benefits.

**GROOM INSIGHT:** The cases in the Eleventh and Fourth Circuits are some of the first cases addressing the interplay of federal non-discrimination rules and coverage of gender affirming care, with numerous cases pending in both district and appellate courts.<sup>[1]</sup> As a result, there exists a material potential for a circuit split, which over time could be considered by the Supreme Court. As part of this larger trend around the offer and provision of gender-affirming care, the Supreme Court agreed on June 24, 2024 to consider whether state-level prohibitions on the provision of gender-affirming care to minors are permissible. See *U.S. v. Jonathan Skrametti et al.*, case number 23-477, in the Supreme Court of the United States. Thus, these cases represent an initial set of authority on the scope of federal nondiscrimination provisions that could impact the coverage of gender-affirming care for employers, the group health plans they sponsor, third-party administrators, and health insurance issuers.

## The Eleventh Circuit Decision’s Implications

In *Lange v. Houston County, Georgia*, the Eleventh Circuit found that the county’s group health plan’s exclusion for gender-affirming care caused the county to violate Title VII of the Civil Rights Act of 1964 as the sponsor of the plan.<sup>[2]</sup>

A transgender individual was employed by Houston County, in Georgia, and covered under its group health plan. She brought suit against the plan for its failure to cover gender-affirmation surgery. The plaintiff argued that the plan’s coverage exclusion for “sex change surgery” violated Title VII, the Americans with Disabilities Act (“ADA”), the Equal Protection Clause of the Fourteenth Amendment, and the equal protection guarantee under the Georgia Constitution. At summary judgment, the district court agreed as to the plaintiff’s Title VII claim, finding the group health plan’s coverage exclusion discriminated against plaintiff by limiting her “compensation, terms, conditions, or privileges of employment” on account of sex. In doing so, the court applied the Supreme Court’s 2020 decision in *Bostock v. Clayton County*, which held that discrimination based on sexual orientation or gender identity is prohibited under Title VII. The court determined, however, that the plaintiff alleged insufficient evidence to support the ADA claim. The court did not issue a decision on the merits as to her equal protection claims, but noted these claims may proceed to trial to the extent plaintiff seeks prospective relief. The district court explained, “the implication of [the U.S. Supreme Court’s] *Bostock* [decision] is clear. . . [a]n individual’s . . . transgender status is not relevant to employment decisions . . . discrimination on the basis of transgender status is discrimination on the basis of sex and is a violation of Title VII.” The district court also issued a permanent injunction preventing the county from enforcing its gender-affirmation surgery exclusion and directed the group health plan to process the plaintiff’s previously denied claim related to gender-affirming care.

On review, the Eleventh Circuit agreed that the plan violated Title VII but did not consider the ADA or equal protection claims. The court reasoned that plan violated Title VII because it denied the appellee’s healthcare claim “because the employee is transgender.” The court explained that the district court properly applied precedent from *Bostock v. Clayton County*, finding the plan’s denial of coverage for gender affirming care “deprived [plaintiff] of a benefit or privilege of her employment by reason of her nonconforming traits, thereby unlawfully punishing her for her gender nonconformity.” The court further explained that discriminating against transgender healthcare services equates to discriminating against a transgender individual since “sex is inextricably tied to the denial of coverage for gender-affirming surgery.” The court additionally cited the Equal Employment Opportunity Commission’s (“EEOC”) Title VII guidance and placed weight on the fact that the agency exercised its expertise by including protections for gender identity.

Notably, the Eleventh Circuit addressed the appellant’s argument that the cost of coverage of gender-affirming care would be burdensome to the group health plan. The court explicitly noted that, when a plaintiff establishes an injury resulting from a facially discriminatory practice, a group health plan cannot rely upon cost savings to justify its policy. The court concluded that after consideration of the balance of hardships, it was appropriate to find that appellee had established that the balance weighs in her favor.

On June 4, 2024, the defendants in *Lange* requested a rehearing before the entire Eleventh Circuit, which may be filed by a petition for a writ of certiorari before the Supreme Court.

**GROOM INSIGHT:** The *Lange* case presents a notable development in non-discrimination law under Title VII for employers offering group health plans. The liability in these cases is based on employment discrimination, not on group health plan compliance, so employers should assess their benefit designs to determine whether or not any plan limitations or exclusions facially discriminate against transgender individuals under Title VII – or could act as a subterfuge for otherwise prohibited discrimination.

**GROOM INSIGHT:** The EEOC recently issued an opinion prohibiting OPM from categorically excluding gender-affirming services from coverage under its group health plan. The EEOC found that the denial of gender-affirming care constitutes disparate treatment discrimination under Title VII. The EEOC further noted that, while Title VII does not necessarily require coverage of all gender-affirming care, the statute prohibits healthcare coverage decisions that are based on protected characteristics. While this decision does not directly impact private employers, the EEOC’s reasoning will almost certainly extend to the private sector.

## The Fourth Circuit Decision’s Implications

In *Maxwell Kadel v. Dale*, a decision decided by the full panel of judges on the Fourth Circuit, the court affirmed two district court decisions and ordered West Virginia and North Carolina to terminate coverage exclusions for gender-affirming care, explaining these exclusions constitute sex discrimination against transgender enrollees.<sup>[3]</sup>

West Virginia’s Medicaid Program covered some gender-affirming care, but excluded gender-affirming surgery. Similarly, North Carolina offered health coverage to its state employees but excluded “[t]reatment or studies leading to or in connection with sex changes or modifications and related care.” Transgender individuals whose plans denied health care related to their gender dysphoria brought suit. Both sets of plaintiffs sued under the Equal Protection Clause. The West Virginia plaintiffs additionally brought discrimination claims under the Medicaid Act and ACA section 1557. The district courts granted summary judgement in the plaintiffs’ favor and enjoined the states from enforcing these coverage exclusions.

The Fourth Circuit affirmed the district courts’ decisions and reasoned that plans that exclude treatments for a “diagnosis unique to transgender patients” yet cover those same treatments for individuals with other medical conditions violate the Equal Protection Clause, and, with regard to the West Virginia plaintiffs, also ACA section 1557 and the Medicaid Act. The court explained that differing medical coverage on the basis of diagnosis (where the diagnosis is as intertwined with the patient’s gender identity as gender dysphoria is) effectively discriminates on the basis of an individual’s gender identity and sex. The court determined the coverage exclusions were facially discriminatory and were not substantially related to an important government interest.

**GROOM INSIGHT:** The equal protection issues the plaintiffs raised do not apply to private employers because the Fourteenth Amendment only prohibits certain activities by state actors. Non-federal governmental plans, however, assess their plans to determine whether any exclusions related to gender dysphoria expose the plan to potential liability.

**GROOM INSIGHT:** Of note, in its discussion of the section 1557 claim, the Fourth Circuit applied *Bostock* and relied on caselaw interpreting Title VII to evaluate a claim arising under Title IX for purposes of determining whether the West Virginia Medicaid exclusions violated section 1557. The Fourth Circuit did not reach the merits of the appellant’s argument that “gender identity” is a distinct concept under Title IX from “sex.” But, the court did determine that West Virginia’s Medicaid policy violates even binary conceptions of sex discrimination (*i.e.*, male or female biological differences, and not “gender identity”) under section 1557. The court’s reliance on *Bostock* in evaluating claims of sex discrimination under section 1557 could have repercussions for group health plans sponsored by private and public employers, their third-party administrators, and health insurers because of stronger arguments available to plaintiffs that limitations on gender-affirming care create per se liability for a plan subject to section 1557.

## Next Steps

In the wake of both decisions, plan sponsors, third party administrators, and insurers should consider actively reviewing and updating their policies, perform internal audits to ensure compliance, and train or re-train personnel to reduce potential exposure under Title VII and related non-discrimination laws, such as section 1557. Risks for regulated entities under section 1557 will remain even if the implementing regulations are invalidated by courts or revised under future administrations, as many courts could construe the ACA itself to cover gender-affirming healthcare services. Importantly, neither case addressed any protections available to private employers under a variety of religious freedom laws, which could materially alter the application of these decisions to some private employers and potentially their third-party administrators. Moreover, plan sponsors should assess their benefit designs to ensure that limitations applicable to care related to gender dysphoria do not violate the MHPAEA parity requirements. Plan sponsors can minimize risk by

maintaining up-to-date nonquantitative treatment limitations (“NQTL”) analyses and carefully evaluating limitations on care related to gender dysphoria, if appropriate.