Gender Affirming Care Exclusions in Group Health Plans

A hot topic for employers these days is the potential exclusion of gender-affirming care in employer-sponsored group health plans.

Gender-affirming care typically refers to care that helps a person transition from one gender to another, which can cover a wide array of services and many times is considered medically necessary for persons diagnosed with gender dysphoria. The services can include surgical or nonsurgical solutions; the patient diagnosed with gender dysphoria typically has the option of choosing the type of care that fits their needs to help them transition.

The fact that many of the gender-affirming care options seem to be voluntary or cosmetic to nonmedical professionals has employers sponsoring group health plans asking whether they can exclude gender-affirming care from the list of covered services.

This area has become heavily litigated in the last few years. These lawsuits bring claims under a multitude of laws, including the Employee Retirement Income Security Act of 1974 (ERISA), Section 1557 of the Affordable Care Act, Titles VII and IX of the Civil Rights Act of 1964, and the Equal Protection Clause of the 14th Amendment.

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While the style of these lawsuits can change depending on the types of employers and circumstances of the specific group health plans, courts have consistently ruled that employers cannot carve out gender-affirming care as a non-covered service. This paper will discuss some of these cases in depth, as well as potential pitfalls for employers who may want to exclude gender-affirming care, and why it is so difficult to do while remaining compliant with federal law.

Section 1557 of the Affordable Care Act

Section 1557 of the Affordable Care Act states that individuals shall not be excluded from participation, denied the benefits of or be subjected to discrimination based on race, color, national origin, sex, age or disability under any health program or activity that receives federal financial assistance from Health and Human Service (HHS). In 2021, the Office of Civil Rights (OCR) announced that it interprets Section 1557's prohibition on discrimination to include discrimination on the basis of both sexual orientation and gender identity. Notably, the Section 1557 nondiscrimination requirements only apply to health insurance issuers that receive federal financial assistance.

Civil Rights Act of 1964

Title VII of the Civil Rights Act prohibits employment discrimination on the basis of sex. In 2020, the Supreme Court ruled in the case of *Bostock v. Clayton* that Title VII's prohibition encompassed discrimination on the basis of sexual orientation and gender identity.

Title IX of the Civil Rights Act has a similar prohibition of discrimination on the basis of sex by entities that receive federal financial assistance. Since *Bostock*, a few federal courts have held that Title VII's definition of discrimination on the basis of sex should also apply to Title IX cases. This would mean that discrimination in educational programs or activities on the basis of sexual orientation and gender identity is also prohibited.

Equal Protection Clause of the 14th Amendment

The 14th Amendment's Equal Protection clause prohibits any state from denying due process to any individual or from not affording equal protection of the laws to all people. The Equal Protection Clause therefore prohibits discrimination, which can include discrimination on the basis of sexual orientation. Depending on the type of discrimination alleged, there can be heightened scrutiny, which requires the defendant (the government) to prove that the exclusions for gender reassignment surgery serve a legitimate government interest and that the exclusion is tailored to achieve that interest. Some courts have found that the heightened scrutiny applies to cases of transgender exclusions in government group health plans, but this is still a developing area of law.

Relevant Case Law

Plaintiffs filing lawsuits asserting claims for gender affirmation surgery often bring claims under some or all of the federal avenues listed above. Following is a summary table of the cases we have seen and which federal law/statute/constitutional amendment the claims were brought under. All of the cases summarized below are federal district court cases.[1]

CLAIMS	NUMBER OF CASES	JURISDICTIONS
Section 1557 of ACA	4	Arizona Georgia North Carolina
Civil Rights Act (Titles VII and IX)	7	Pennsylvania Texas Washington
Equal Protection Clause	5	West Virginia Wisconsin

1 The summary of cases does not include all cases. Some courts have not had the opportunity to rule on the issues in filed cases, or the court opinions do not actively engage with the issues discussed in this paper.

Toomey v. Arizona

NO. CV1900035TUCRMLAB, 2019 WL 7172144 (D. ARIZ. DEC. 23, 2019)

This lawsuit was brought by an Arizona state employee, an associate professor at the University of Arizona. He is a transgender man who had been diagnosed with gender dysphoria and had been receiving treatment such as hormone replacement therapy and chest reconstruction surgery. The plaintiff's doctor recommended a total hysterectomy as further treatment, and the plaintiff sought prior authorization from his insurance carrier. The carrier denied the preauthorization because of his group health plan's exclusion of "gender reassignment surgery." The plaintiff filed suit against the plan, bringing claims under Title VII of the Civil Rights Act, as well as claims under the Equal Protection Clause.

The State of Arizona as the defendant filed a motion to dismiss the suit. In analyzing the motion, the court found that the plaintiff sufficiently pleaded a claim under Title VII of the Civil Rights Act. Discrimination based on transgender status is based on sex. The plan's ban on "gender reassignment surgeries" was discriminatory because it only applied to transgender individuals — a cisgender person would never seek gender reassignment surgery. The plan's exclusion as written therefore created disparate treatment of cisgender individuals and transgender individuals.

The court also analyzed the claims as brought under the Equal Protection Clause. The court found that disparate treatment on the basis of transgender status could necessitate a heightened "intermediate" scrutiny, and the defendant could need to prove that the transgender disparate treatment was "substantially related to an important government interest." The court therefore held that at this stage of the lawsuit, the plaintiff had sufficiently alleged a claim under the Equal Protection Clause.

Boyden v. Conlin

341 F. SUPP. 3D 979, 997 (W.D. WIS. 2018)

A transgender employee of the State of Wisconsin brought suit against the state for the state's exclusion of "(p)rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" from its group health plan. The plaintiff was diagnosed with gender dysphoria, and

the plaintiff's doctors concluded that hormone replacement therapy and gender confirming surgery (defined as surgery to alter primary or secondary sex characteristics to align with one's gender identity) were medically necessary. Plaintiff brought claims under Title VII of the Civil Rights Act, Section 1557 of the ACA, and the Equal Protection Clause (the latter being against individual defendants).

The court first analyzed whether the plan's exclusionary language triggered the protections under Title VII and under the ACA's nondiscrimination requirement, and concluded that it did. The exclusion treated transgender individuals differently on the basis of their natal sex and on the basis of their transgender identity, both of which would trigger the protections on their own.

The court also addressed the Equal Protection claim and said that the exclusion triggered the Equal Protection Clause's heightened scrutiny standard because it was discriminatory on the basis of sex. This means that the state had to prove that the gender exclusion served an important government interest, and that the exclusion was "substantially related to the achievement of those objectives." The state argued that it excluded the gender reassignment procedures because of the (1) cost and (2) efficacy of the treatments. The court rejected both arguments based on evidence submitted by the parties. The claims under Title VII, the ACA and the Equal Protection Clause therefore all survived the motion for summary judgment to the court.

Doe v. Independence Blue Cross

23-1530 (E.D. PA. NOV. 21, 2023)

Plaintiff suffers from gender dysphoria and sued her claims administrator for failure to pay claims related to her gender dysphoria. The plan covers "medically necessary" healthcare expenses but excludes "cosmetic surgeries." The plan defined "cosmetic surgeries" as procedures "which are done to improve the appearance of any portion of the body" and "from which no improvement in physiologic function can be expected." Expenses for cosmetic procedures resulting from disease, injury or birth defect are not excluded. It is also important to note that the plan covered some gender-affirming care, such as hormone replacement and genital reconstructive surgeries, as medically necessary. However, the plaintiff sought to have expenses for facial feminization surgery, hair transplants and "related expenses" covered.

Plaintiff brought claims under the ACA as well as Title IX of the Civil Rights Act, arguing that the exclusion of facial feminization surgery from the covered procedures list was considered sex stereotyping. Title IX of the Civil Rights Act prohibits an entity receiving federal financial assistance from denying benefits to any person on the basis of sex. To state a claim for damages under Title IX, a plaintiff must allege facts showing that the defendant's discrimination was intentional. In its analysis, the court used case law on sex stereotyping from Title VII cases and applied them to Title IX. The court held that discrimination against an individual with gender dysphoria constituted discrimination on the basis of sex and transgender status. The court determined that the plaintiff alleged facts showing that the exclusion for cosmetic procedures was applied in a discriminatory manner, because the denial of coverage for the facial feminization surgery "was based, at least in part, on considerations of gender stereotypes and gender conformity or nonconformity." The court ruled in favor of the plaintiff, and the case survived a motion to dismiss based on her Title IX claim.

Kadel v. Folwell

1:19-CV-00272 (M.D.N.C. JUN. 10, 2022) (ON APPEAL IN 4TH CIRCUIT WITH *FAIN*)

The lead plaintiff is a transgender man diagnosed with gender dysphoria. The plaintiff has health insurance through the University of North Carolina state health plan. Plaintiff sought coverage for "medically necessary" hormone treatments and for a double mastectomy, but coverage for those services was denied. The plan only covers "medically necessary" services that are not for "cosmetic purposes." The plan specifically excluded psychological treatments in combination with gender reassignment or treatment related to gender reassignment care.

Plaintiffs brought claims under the Equal Protection Clause, Section 1557 of the ACA and Title VII of the Civil Rights Act. In analyzing the Equal Protection Clause claim, the court held that the plan's exclusions facially and implicitly discriminated against participants on the basis of sex, and also said that even if the plan only discriminated against participants diagnosed with gender dysphoria, the claim would be subjected to the heightened intermediate scrutiny. The state's defenses to exclusions based on cost and efficacy of treatment did not sway the court, and the court granted summary judgment to the plaintiffs on their Equal Protection claim.

The court also granted plaintiffs' motion for summary judgment on their Title VII claims against certain defendants but declined to rule on the ACA claims. The state then appealed the decision to the Fourth Circuit Court of Appeals, and the case will be heard along with the *Fain* case on appeal from a West Virginia district court. A final decision from the Fourth Circuit may be forthcoming in 2024.

Fain v. Crouch

618 F. SUPP. 3D 313 (S.D. W. VA. 2022) (ON APPEAL IN FOURTH CIRCUIT WITH *KADEL*)

The plaintiffs in this case are two transgender patients diagnosed with gender dysphoria seeking care for hormone replacement therapy as well as gender affirming genital surgery. Under
West Virginia's Medicaid program, these treatments were denied to the plaintiff's as part of a blanket exclusion on "transsexual surgery." The plaintiffs brought claims under the Equal Protection Clause and Section 1557 of the ACA, and for violations under the Medicaid Comparability and Availability Requirements.

In analyzing plaintiffs' Equal Protection claims, the court found that the heightened standard of scrutiny applied and found that the exclusion of "transsexual surgery" was facially discriminatory. The court found that the exclusion did not support an important government interest, and therefore the exclusion violated the Equal Protection Clause.

The [*Fain*] court found that the heightened standard of scrutiny applied and found that the exclusion of "transsexual surgery" was facially discriminatory.

The court also held that the West Virginia exclusion violated Section 1557 ACA nondiscrimination requirements and applied the Title VII *Bostock* analysis to the Section 1557 claims. The court said that "transgender status, and thus, its exclusion, cannot be understood without a reference to sex," and therefore the exclusion of gender affirming surgery violated the ACA.

The state is appealing the decision, along with the *Kadel* case, in the Fourth Circuit Court of Appeals. One portion of the state's argument on appeal is that the *Bostock* analysis should not apply to Title IX claims, which is incorporated by reference as part of the ACA.

C.P. v. Blue Cross Blue Shield of Illinois

NO. 20-CV-6145, 2022 WL 17788148 (W.D. WASH. DEC. 19, 2022)

The plaintiff in this case is a 17-year-old transgender male, diagnosed with gender dysphoria, who sought treatment for medically necessary hormone replacement therapy and chest reconstruction surgery. Other plaintiffs in this case include a class of similarly-situated transgender individuals. The group health plan in question had a blanket exclusion for "transgender reassignment surgery." The plaintiff brought claims against Blue Cross Blue Shield of Illinois (BCBS-IL), the third-party administrator of the self-funded group health plan under Section 1557 of the ACA. As previously mentioned, Section 1557 only applies to programs that receive federal financial assistance. While BCBS-IL does not receive federal financial assistance for the administration of its self-funded programs, it receives federal financial assistance for the administration of other products, such as its Medicaid services.

The court held that BCBS-IL violated Section 1557 of the ACA when administering a self-insured health plan that excluded gender-affirming care. BCBS-IL administered the plan as it was written, as required under ERISA. BCBS-IL argued it was not liable because: (1) it was not a covered entity under Section 1557; (2) it was merely administering another organization's self-insured plan, as it was required to do under ERISA; (3) there was no medical consensus regarding gender-affirming care; and (4) the Religious Freedom Restoration Act protected the plan because the employer was a religious organization, and the exclusion was based on sincerely held religious beliefs. The court rejected these arguments. Plaintiff's motion for summary judgment was granted, finding BCBS-IL is a covered entity under 1557 and it discriminated against the plaintiffs and the class of plaintiffs for denying them gender affirming care.

In December 2023, the same court enjoined BCBS-IL from denying claims for gender affirming care. BCBS-IL at this time cannot enforce gender-affirming care exclusions in its contracts. BCBS-IL is expected to appeal this decision, but at this time, gender affirming care exclusions in BCBS-IL's contracts cannot be enforced.

What's Next?

The legal landscape for group health plans covering gender affirming care can be expected to change, but the overarching theme of all cases heard thus far is that at this time, **a group health plan cannot explicitly exclude gender affirming care from coverage without discriminating against participants on the basis of sex**. As the *Kadel* court discussed, having an exclusion for non-medically necessary gender affirming care would be a proper exclusion under the Equal Protection Clause and the ACA, but it would still require plans to cover some gender affirming care services. Medically necessary gender affirming services can include services traditionally seen as "cosmetic," such as facial feminization surgery and breast augmentation surgery.

It is also important for employers to realize that the percentage of the population that identifies as transgender is estimated to be around .5% and that each individual's transition services may look different. Not all gender affirming care will be medically necessary for all transitioning individuals, and based on the case law available, the cost of the gender affirming care is not expected to be high in relation to other care typically covered by employer health plans.