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GRIST



Justices' Title VII ruling on LGBTQ bias has health benefit impacts

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Federal protections against workplace sex discrimination extend to gender identity and sexual orientation, the Supreme Court today ruled in a ground-breaking decision on Title VII of the 1964 Civil Rights Act (CRA) (*Bostock v. Clayton Cty., Ga.*, No. 17-1618 (U.S. June 15, 2020)). The ruling will have an immediate impact on human resource policies — including employers' efforts to advance diversity and inclusion — and employee benefits. While Title VII governs day-to-day workplace issues like hiring, firing, compensation, promotions and harassment, the law's benefit implications sometimes get overlooked. This GRIST focuses on the impact of today's decision for employer-sponsored health plans and other healthcare mandates.

Scope of Title VII protections at issue

For employers with 15 or more employees, Title VII bans discrimination on the basis of race, color, religion, sex and national origin in hiring, firing, compensation, and other terms, conditions or privileges of employment. Employment terms and conditions include employer-sponsored healthcare benefits. Historically, not all authorities have agreed that Title VII protects LGBTQ workers against discrimination.

Evolving legal interpretations

Many federal courts and the Equal Employment Opportunity Commission (EEOC) — the primary federal agency enforcing Title VII — have taken the position that [LGBTQ discrimination](#) is sex discrimination prohibited by Title VII. They have reasoned that gender identity, transgender status and sexual

orientation discrimination is sex discrimination because it involves sex-based considerations about nonconformance with gender norms and sex stereotypes.

In 2014, the Department of Justice (DOJ) concluded that a straightforward reading of Title VII's ban on discrimination "because of sex" includes discrimination because of an employee's gender identity as a member of a particular sex or as someone who is transitioning or has transitioned to another sex.

The current administration has taken a different approach, rolling back or rescinding prior agency guidance recognizing gender identity as a protected class under federal civil rights laws. In briefs filed with the Supreme Court, the DOJ and the EEOC argued that Title VII does not prohibit discrimination based on sexual orientation or gender identity, including transgender status. Instead, Title VII's ban on discrimination "because of sex" only bars employers from treating members of one sex — biologically male or female — differently from members of the opposite sex. Discrimination against gay or transgender people because they don't conform to sex-based stereotypes does not by itself violate Title VII. A LGBTQ worker would have to demonstrate that an employer treated members of one sex less favorably than members of the opposite sex in the same position.

Today's Supreme Court decision

Whether Title VII prohibits employment discrimination based on sexual orientation and gender identity, or sex stereotyping were the questions before the Supreme Court this term in three cases (Bostock v. Clayton Cty., Ga., No. 17-1618; Altitude Express Inc. v. Zarda, No. 17-1623; R.G. & G.R. Harris Funeral Homes v. EEOC, No. 18-107):

- **Sexual orientation discrimination.** In two consolidated cases, Donald Zarda, a sky diving instructor, and Gerald Bostock, a child welfare services coordinator, each sued their employer for firing them because of their homosexuality. In Zarda's case, the 2nd US Circuit Court of Appeals held that discrimination based on sexual orientation violates Title VII's ban on sex discrimination (Zarda v. Altitude Express Inc., 883 F.3d 100 (2d Cir. 2018)). However, the 11th Circuit in Bostock's case came to a different conclusion, finding Title VII does not prohibit discrimination based on sexual orientation (Bostock v. Clayton Cty., Ga., 894 F.3d 1335 (11th Cir. 2018)).
- **Transgender bias.** In the third case, Aimee Stephens alleged that she was fired from her position as funeral director because she is transgender. The 6th Circuit in Stephens's case found that Title VII's protections can apply to transgender employees (EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018)).

In the cases before the Supreme Court this term, the workers argued that discrimination based on sexual orientation or transgender status is discrimination based on sex in violation of Title VII. In each case, the workers argued they were fired because they did not conform to sex-based stereotypes.

Justices' Title VII ruling on LGBTQ bias has health benefit impacts

Until now, the Supreme Court had never explicitly addressed the application of Title VII to LGBTQ workers. However, the justices have found that employment discrimination based on sexual stereotypes — such as assumptions or expectations about how a person of a certain sex should dress and behave — violates Title VII (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). The Supreme Court has also found that an individual can file a claim of same-sex sexual harassment under Title VII (*Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998)).

Addressing all three cases in one opinion today, the Supreme Court held:

[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.

Implications for employer group health plans

Discrimination on the basis of sex in employment, including benefits, has been prohibited for over 55 years by Title VII. In 1978, the Pregnancy Discrimination Act (PDA) amended Title VII to include pregnancy discrimination as prohibited sex discrimination. As a result, employer-sponsored health plans must cover pregnancy, childbirth and related medical conditions in the same way and to the same extent as other medical conditions. In 1983, the Supreme Court ruled that Title VII requires an employer-sponsored group health plan to extend equally comprehensive coverage to both sexes and cannot discriminate on sex-based characteristics (*Newport News Shipbuilding Co. v. EEOC*, 462 U.S. 669 (1983)).

While today's ruling is about wrongful employment termination, the decision has implications for employer-sponsored health plans and other benefits. For example, employers may want to adjust group health plan coverage of gender dysphoria and related services, including gender-affirmation surgeries; review and compare benefits for same-sex and opposite-sex spouses; and review the need for gender assignment as an identifier in benefit plan administration. Regardless of today's decision, however, employers can always maintain more expansive benefit and nondiscrimination policies and practices than what federal or state law requires.

Same-sex spousal coverage issues

In *Obergefell v. Hodges* (576 U.S. 644 (2015)), the Supreme Court held that all states must issue same-sex marriage licenses and recognize same-sex marriages validly established elsewhere. The ruling essentially extended marital rights under state laws to same-sex couples in all states. But beyond the state-law implications, *Obergefell* didn't directly address private-sector employment practices. Employers with self-funded group health plans could still offer coverage only to opposite-sex spouses and exclude same-sex spouses from coverage. Nonetheless, a 2018 Kaiser Family Foundation [study](#) found that nearly two-thirds (63%) of employers offering health insurance to opposite-sex spouses also offered coverage to same-sex spouses, with large employers almost uniformly offering this benefit.

Before today's ruling, federal legal challenges to an employer's group health plan exclusion of same-sex spouses have asserted a Title VII claim, alleging the exclusion is prohibited sexual orientation discrimination. With today's decision, these challenges now have clear legitimacy under Title VII.

Transgender coverage issues

The term transgender describes a person whose gender identity does not match the gender assigned at birth or does not align with traditional notions of expression of masculinity and femininity. Not all people who identify as transgender have gender dysphoria — a behavioral health diagnosis contained in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) — that requires treatment. Nor do all individuals with gender dysphoria want or need surgical interventions. The process of transitioning is different for each person; what is medically necessary for one person might not be for another. For some, transitioning might only involve changing a name or gender designation. Others may rely on hormones to change features. Some people may require a change to primary sex characteristics, known as gender-affirmation surgery.

Federal challenges to denied benefits for gender dysphoria and gender-affirmation surgery have often come under Title VII of the CRA and Section 1557 of the Affordable Care Act (ACA). Plan beneficiaries argue that Title VII's sex discrimination protections bar employers from discriminating based on gender identity in benefits. Relying on ACA Section 1557, beneficiaries argue that gender identity discrimination — specifically an exclusion of transgender-related services — in health programs and activities receiving federal funds is prohibited. Today's decision will bolster Title VII challenges to transgender benefit exclusions and make reliance on Section 1557 less important for employment discrimination claims.

The cases decided by the Supreme Court today don't specifically address group health plan coverage, but they do create a heightened compliance risk for plans that cover and treat individuals differently based on sexual orientation and/or gender identity. For example, denial of gender-affirmation services deemed medically necessary for an individual diagnosed with gender dysphoria, even though the same services would be covered if deemed medically necessary for a different condition, raises Title VII risks.

Access to transgender care

Treatment for gender dysphoria can involve multiple practitioners over a course of years, with mental health therapy, psychotherapy, hormone therapy and a range of possible surgeries. Mercer's 2019 [National Survey of Employer-Sponsored Health Plans](#) found that only 33% of employers with 500 or more employees provided coverage for gender-affirmation surgery, although this figure rose to 69% of employers with 20,000 or more workers. Among employers covering this surgery, many also offer benefits for behavioral health/counseling (80%), hormone therapy (66%) and other associated services (50%).

State insurance mandates. Although state insurance laws don't apply to self-insured ERISA plans, these mandates continue to apply to fully insured plans. The [Movement Advancement Project](#) reports that nearly half of all states prohibit insurers from imposing blanket coverage exclusions for items and services related to gender transition. These laws reflect the principle that medically necessary services, including gender-affirmation surgery to treat gender dysphoria, should qualify for the same coverage as medically necessary services for other medical and behavioral health conditions. Along with Washington, DC, states that prohibit blanket coverage exclusions are shown in the following table.

States banning transgender exclusions in health insurance				
California	Colorado	Connecticut	Delaware	Hawaii
Illinois	Maine	Maryland	Massachusetts	Michigan
Minnesota	Montana	Nevada	New Hampshire	New Jersey
New Mexico	New York	Oregon	Pennsylvania	Rhode Island
Vermont	Virginia	Washington		

Several states have also issued insurance guidance on how treatment for gender dysphoria, including medically necessary transgender surgery, applies under the ACA, the Mental Health Parity and Addiction Equity Act (MHPAEA), and related state laws.

Potential federal barrier. Even when a group health plan covers transgender services, access to care can be a challenge. Lack of knowledge about the health needs and concerns of transgender individuals, as well as discrimination in healthcare services, can make it difficult to find compassionate, well-informed practitioners. Under a [2019 final rule](#) from the Department of Health and Human Services (HHS), healthcare workers can refuse to provide services on religious and moral grounds. Although three different district courts have put the final rule on hold, the cases are on appeal. Nevertheless, the Office of Civil Rights (OCR) has used its enforcement authority on at least one occasion to [demand changes](#) to a state insurance mandate related to abortion services. Critics are concerned the rule exacerbates access to care barriers for the LGBTQ community and others.

ACA Section 1557 nondiscrimination issues

With the Supreme Court confirming Title VII protections for LGBTQ employees, the ACA's Section 1557 nondiscrimination provision takes on less importance for employees seeking health plan coverage for medical care related to gender dysphoria. Although none of the cases decided today raised Section 1557 issues, the Supreme Court's opinion could influence how lower courts and HHS interpret the scope of this provision's protections.

Section 1557 statutory protections. ACA Section 1557 bans discrimination based on sex (as well as race, age, disability, color and national origin) in health programs and activities receiving federal funds, including providers, hospitals and medical systems. The nondiscrimination provision derives from a number of federal statutes including the Title VI and Title IX of the CRA, the Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973. Title VI of the CRA bars race, color and national origin discrimination in federally funded programs and activities. Title IX, added to the CRA by the Education Amendments of 1972, extends Title VII's sex nondiscrimination standards to federally funded educational programs and activities. The ACA states that the enforcement mechanisms under these other federal laws apply to address violations of Section 1557. The statute also gives HHS authority to create implementing regulations.

Initial Section 1557 regulations. [Final 2016 regulations](#) interpreted Section 1557 to prohibit discrimination based on gender identity, gender expression and transgender status in healthcare, including insurers and even some group health plans. Examples of group health plans subject to Section 1557 include retiree medical plans receiving federal funds, employee plans of hospitals receiving Medicare funding and any plan of an insurer participating on the public exchanges. The regulations also confirmed a private right to sue and seek damages for Section 1557 violations to the same extent as provided under the federal statutes on which Section 1557 is based.

Under these rules, a group health plan subject to Section 1557 couldn't categorically exclude or limit coverage for all health services related to gender-affirmation surgery. Plans covered by Section 1557 also could not impose additional cost sharing or other discriminatory restrictions on health services related to gender dysphoria. Healthcare providers likewise couldn't discriminate against or deny care to transgender individuals. While a federal district court invalidated parts of the nondiscrimination regulations, the matter is on appeal, and individuals have continued to bring lawsuits alleging Section 1557 discrimination when a plan categorically excludes gender-affirmation services.

New Section 1557 regulations. [Revised regulations](#), slated for publication in the June 19 *Federal Register*, remove the healthcare and health coverage protections for transgender individuals and limit the entities subject to Section 1557. Among other significant departures from the 2016 rules, the new final rule:

- Removes language recognizing individuals' right to sue and obtain monetary damages for violations (although this right may exist in the statute)
- Eliminates the gender-identity and sex-stereotyping nondiscrimination requirements for healthcare providers
- Expands healthcare providers' ability to refuse to provide care they find objectionable on religious or moral grounds

- States that Section 1557 does not apply to employer-sponsored group health plans that do not receive federal financial assistance and are not principally engaged in the business of providing healthcare

Future of Section 1557 regulations. The 2020 final rule will undoubtedly face an immediate court challenge seeking a nationwide injunction and eventual invalidation. After today's Supreme Court decision, HHS may have difficulty justifying the removal of transgender protections from the Section 1557 regulations. Today's ruling will also influence the outcome of Section 1557 discrimination claims in federal courts. A number of lower courts have found that a health plan's exclusion of procedures and services related to gender-affirming surgery can constitute sex discrimination prohibited by Section 1557. Today's ruling on Title VII's scope may support similar ACA Section 1557 claims. However, now that the Supreme Court has said Title VII protects transgender individuals from discrimination, reliance on Section 1557 may become less important for disputes involving employment-based coverage.

Mental health parity issues

MHPAEA, which applies to group health benefits for most employers, doesn't mandate coverage of gender dysphoria or gender-affirmation surgery or require employers to provide a particular set of benefits. However, certain limits on behavioral health treatments for gender dysphoria could violate the law if they are not on par with the limits on medical/surgical benefits.

Examples of unlawful limits include a blanket exclusion for gender transition services or financial limits on coverage. Lifetime or annual dollar limits on the services may be problematic under MHPAEA. In addition, medical-management standards — like medically necessary criteria — for gender dysphoria treatments and related services can't be more stringent than the standards for other covered medical conditions. This means a blanket exclusion of gender-affirmation surgery as cosmetic would be impermissible.

Today's decision doesn't change these MHPAEA requirements. Employers reviewing a group health plan's coverage of gender dysphoria in light of today's decision should keep federal parity requirements in mind.

ACA preventive care provision

An interagency FAQ in 2015 ([Q5](#) of ACA Implementation FAQs, Part XXVI) clarified that health plans can't limit sex-specific recommended preventive care based on an individual's sex assigned at birth, gender identity or recorded gender. This guidance is unaffected by today's decision. Employer-sponsored group health plans should continue to comply with the ACA's preventive care requirements.

Discrimination prohibited in federal contracts

Since 2014, Executive Order [11246](#) has barred federal contractors and subcontractors from discriminating against LGBTQ workers. The order — which historically prohibited discrimination on the basis of race, color, religion, sex and national origin — was amended in 2014 by Executive Order [13672](#), which added gender identity and sexual orientation to the list. The executive order is unaffected by today's decision. Entities seeking federal contracts must confirm compliance with the order in the contracting process.

State nondiscrimination laws

Today's Title VII decision is particularly impactful for LGBTQ individuals working in states without statutory protections against sexual orientation and gender identity discrimination. Of the estimated 8.1 million LGBTQ workers in the United States, nearly half live in states without statutory protections against sexual orientation and gender identity discrimination in employment, according to a [report](#) from the Williams Institute, part of the University of California at Los Angeles School of Law. Those individuals can now look to Title VII for protection from employment discrimination.

State nondiscrimination laws generally apply to employers within that jurisdiction and may extend protections to LGBTQ workers beyond what federal civil rights laws provide. Twenty-two states, Puerto Rico and Washington, DC, ban employment discrimination based on sexual orientation and gender identity, while one state — Wisconsin — prohibits only sexual orientation discrimination, according to the [Human Rights Campaign](#). The following table lists jurisdictions banning both types of employment discrimination.

Jurisdictions barring sexual orientation and gender identity discrimination by employers				
California	Colorado	Connecticut	Delaware	Hawaii
Illinois	Iowa	Maine	Maryland	Massachusetts
Minnesota	Nevada	New Hampshire	New Jersey	New Mexico
New York	Oregon	Puerto Rico	Rhode Island	Utah
Vermont	Virginia	Washington state	Washington, DC	

The Williams Institute [reports](#) that agencies in three other states — Michigan, Montana and Pennsylvania — have interpreted the state's nondiscrimination laws to prohibit sexual orientation and/or gender identity discrimination in employment. In these and other states without explicit statutory protections, 12 have gubernatorial executive orders protecting LGBTQ state government employees and, in some cases, state government contractors from discrimination. These states are Alaska, Arizona, Indiana, Kansas, Kentucky, Michigan, Missouri, Montana, North Carolina, Ohio, Pennsylvania and Virginia.

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These state nondiscrimination laws may require employers to extend benefits on the same terms to same-sex and opposite-sex spouses and may prohibit a fully insured employer plan from denying or limiting health coverage for gender-transition items or services. These laws could also apply to state and local governments and church plans that are not subject to ERISA, as well as self-insured plans if ERISA's preemption of state law does not apply.

The state laws explicitly protecting LGBTQ workers from discrimination are unlikely to change as a result of today's decision. However, the ruling could influence agency or judicial interpretation of parallel state civil rights statutes that don't have explicit LGBTQ protections. In addition, state government policy is always subject to change with a change in administration.

Employer considerations

Today's Title VII decision will have far-reaching consequences for employers and the workforce that go well beyond benefits and could influence how other federal and state sex nondiscrimination laws apply to sports, schools and public accommodations. For now, employers evaluating existing limits on health coverage for same-sex spouses or gender-transition services in light of today's decision need to keep in mind not just Title VII but also other federal and state laws protecting the LGBTQ community. When designing benefits, employers should seek out clinical expertise and carrier positions and keep diversity and inclusion goals in sight. Employers can always maintain nondiscrimination policies and practices broader than what federal or state law requires.

Here are some things for employers to do in light of today's decision:

- Review anti-harassment and other workplace policies and training programs on LGBTQ issues, taking applicable federal and state laws into consideration.
- For employers that are federal contractors or subcontractors, ensure compliance with the ongoing contracting requirements prohibiting LGBTQ discrimination.
- For employers receiving federal funding for their health plans or other health activities, follow developments in the ACA Section 1557 nondiscrimination guidance.
- Review group health plan coverage for same-sex spouses, services related to gender dysphoria and gender-affirmation surgeries. Consider state coverage mandates for fully insured plans, MHPAEA compliance challenges, and risk of employment discrimination claims under state or federal laws.
- Review the group health plan's provider network for adequate access to providers supportive of and knowledgeable about LGBTQ healthcare. Consider a provider directory identifying practitioners welcoming LGBTQ patients and/or with expertise in LGBTQ health-related expertise.

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- Review benefit administration gender-assignment requirements, and consider options for more inclusive descriptors.
- Review disability plan coverage for temporary disability due to gender-affirmation surgeries.
- Review employee assistance programs or other support-service vendors (e.g., digital behavioral health) for offerings specific to the needs of LGBTQ members.
- Consider family-planning benefits within the group health plan and elsewhere that include LGBTQ employees. A 2018 [LGBTQ Family Building Survey](#) from the Family Equality Council indicated up to 3.8 million LGBTQ millennials were considering expanding their families, with many expecting to use assisted reproductive technology, foster care or adoption.
- Employers with strongly held religious beliefs should consult with legal counsel if they wish to exclude treatments for gender dysphoria, including but not limited to gender-affirmation surgeries, in the group health plan. Some federal laws, such as the Religious Freedom Restoration Act, might allow for an exemption.

Related resources

Non-Mercer resources

- [*Bostock v. Clayton Cty., Ga.*, No. 17-1618 \(U.S. June 15, 2020\)](#)
- [Final Section 1557 regulations: Nondiscrimination in health and health education programs or activities \(Federal Register prepublication draft, June 12, 2020\)](#)
- [Equality maps: Healthcare laws and policies \(Movement Advancement Project, June 2, 2020\)](#)
- [State maps of LGBTQ employment laws and policies \(Human Rights Campaign, April 15, 2020\)](#)
- [LGBTQ protections from discrimination: Employment and public accommodations \(Williams Institute, April 2020\)](#)
- [LGBTQ discrimination, subnational public policy and law in the United States \(Williams Institute, January 2020\)](#)
- [US solicitor general's amicus brief in *Bostock v. Clayton County* and *Altitude Express v. Zarda* \(US Supreme Court, Aug. 23, 2019\)](#)
- [Brief for federal respondent in *R.G. & R.G. Harris Funeral Homes v. EEOC* \(US Supreme Court, Aug. 16, 2019\)](#)

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- [Brief for respondents in *Altitude Express v. Zarda*](#) (US Supreme Court, June 26, 2019)
- [Brief for respondent Aimee Stephens in *R.G. & G.R. Harris Funeral Homes v. EEOC*](#) (US Supreme Court, June 26, 2019)
- [Proposed Section 1557 revised rule: Nondiscrimination in health and health education programs or activities](#) (June 14, 2019)
- [Final rule: Protecting statutory conscience rights in health care](#) (Federal Register, May 21, 2019)
- [Brief for petitioner in *Bostock v. Clayton County*](#) (US Supreme Court, May 25, 2018)
- [Memorandum: Revised treatment of transgender employment discrimination claims under Title VII of the Civil Rights Act of 1964](#) (Office of the US Attorney General, Oct. 4, 2017)
- [Original Section 1557 final rule: Nondiscrimination in health and health education programs or activities](#) (Federal Register, May 18, 2016)
- [FAQs about ACA implementation \(Part XXVI\)](#) (Labor Department, HHS and IRS, May 11, 2015)
- [What you should know: The EEOC and the enforcement protections for LGBT workers](#) (EEOC, May 4, 2015)
- [Memorandum: Treatment of transgender employment discrimination claims under Title VII of the Civil Rights Act of 1964](#) (Office of the US Attorney General Dec. 15, 2014)

Mercer Law & Policy resources

- [Healthcare law and policy outlook for 2020](#) (Feb. 18, 2020)

Other Mercer resources

- [Does your health plan meet the needs of transgender individuals?](#) (March 27, 2019)
- [Changes signal shift in diversity and inclusion benefits](#) (Sept. 6, 2018)

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