

# TRANSGENDER LAW IN EMPLOYMENT

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## AND EMPLOYEE BENEFITS

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# Overview

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- ***Employment Current State of the Law***
- ***Benefits for Transgender Employees***
- ***Employer Best Practices***

# Gender Transition

## □ **Medical Transition**

- Contrary to popular belief, there is no one “transgender surgery.”
- Can include a variety of treatments such as:
  - Hormone therapy
  - Mental health services
  - Electrolysis and laser hair removal
  - Surgeries

## □ **Social Transition**

- Coming out to family, friends, and co-workers
- New name and/or pronouns
- Clothing, hairstyle, and mannerisms
- Changing name and/or sex on ID documents

# State of the Law

- Federal Law
  - Title VII prohibits sex discrimination
    - Trend in courts recognizes that this prohibits discrimination based on transgender status
    - Mixed case law on applying to sexual orientation discrimination
- 18 states + D.C. have nondiscrimination laws that cover sexual orientation and gender identity/expression
- 3 states have law banning discrimination based on sexual orientation alone: Wisconsin, New Hampshire, New York
- ENDA v Equality Act

# Employment Discrimination

- ***Federal Circuit Split:*** Federal Courts currently disagree on whether or not discrimination against transgender people on the basis of transgender status is prohibited.
- ***EEOC:*** The Equal Employment Opportunity Commission currently believes that discrimination on the basis of transgender status is itself discrimination on the basis of gender under Title VII.

# Title VII Developments

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- “We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”  
*Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1998).
- Gender identity discrimination as sex stereotyping:
  - EEOC
  - Circuit courts
    - *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII)
    - *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection Clause)
  - Many district courts
- Gender identity discrimination as sex discrimination *per se*: *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008)

# Healthcare and Transgender Employees

- **Plans:** Many health plans and providers are still working to incorporate trans-inclusive health care options.
- **Affordable Care Act**
  - Section 1557 prohibits discrimination based on sex by any health program receiving federal financial assistance
  - HHS confirmed this prohibition extends to prohibitions on discrimination based on gender identity

# Healthcare and Transgender Employees

- ***Affordable Care Act***

- Requires non-grandfathered employer group health plans to cover 100% of cost of preventive care
- DOL, IRS and HHS guidance
  - Cannot limit preventive services based on individual's sex assigned at birth
  - Determination made by individual's attending provider



# Gender Transition

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# Medical Necessity in the Courts

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- Courts and administrative bodies recognizing that transition-related medical care is the accepted treatment for gender dysphoria.
  - *O'Donnabhain v. CIR*, 134 T.C. 4 (2010) (collecting cases)
  - *M.K. v. Division of Medical Assistance and Health Services*, 92 N.J.A.R.2d (DMA) 38, 1992 WL 280789 (N.J. Adm. May 7, 1992)
  - *Norsworthy v. Beard*, No. 14-CV-00695-JST, 2015 WL 1478264 (N.D. Cal. Mar. 31, 2015)
  - May 2014 decision from HHS Appeals Board: categorical exclusions not valid under “reasonableness standard” governing Medicare coverage.
    - DHHS Medicare NHD 140.3 re: Transsexual Surgery (Docket No. A-13-87, Dec’n No. 2576, May 30, 2014).
- But see *Mario v. P&C Markets, Inc.*, 313 F.3d 758 (2d Cir. 2003) (plaintiff failed to show medical necessity - plaintiff in Mario apparently presented little evidence going to medical necessity)

# Health Plan Issues for Transgender Employees

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- Coverage Exclusions
  - Blanket exclusions for benefits for services or supplies related to gender transition, such as psychological services, hormone therapy, and surgery.
  - Potential for broad application of blanket exclusion to non-transition related care.

# Health Plan Issues for Transgender Employees

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- Medical Necessity Denials
  - Benefits for a medical service or supply are denied as not medically necessary for a person of the employee's gender as reflected in the plan administrator's records.
  - Benefits for a medical service or supply are denied as not medically necessary because related to gender transition.

# Affordable Care Act Section 1557

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- Civil rights provision of the ACA
- Prohibits discrimination based on race, color, national origin, sex, age, or disability
- Applies to any health program or activity that receives federal funding from HHS
- First Federal civil rights law to prohibit sex discrimination in health care
- Extends nondiscrimination protections to Marketplaces

# Section 1557 Proposed Regulation

- Codifies and clarifies the application and enforcement of Section 1557
- Explains nondiscrimination on the basis of sex in health programs or activities
- Provides detail on the rights of individuals with limited English proficiency and individuals with disabilities
- Applies to any health program or activity that receives federal funding from HHS
- Applies Section 1557 to HHS Federally conducted health programs and activities
- Comment period ended November 2015
- Final regulation expected in 2016

# Section 1557 Proposed Regulation

- ❑ Covered entities must provide individuals equal access to health programs and activities without discrimination on the basis of sex.
- ❑ Covered entities must treat individuals consistent with their gender identity, including with respect to access to facilities.
- ❑ Sex-specific care cannot be denied or limited based on the fact that the individual seeking such services identifies as belonging to a different gender than the individual's assigned sex at birth, gender identity, or recorded gender.

# Section 1557 Proposed Regulation

- ❑ Prohibits explicit, categorical, or automatic exclusion from coverage for *all* health services related to gender transition.
- ❑ Where coverage is denied for a *specific* service related to gender transition, HHS will consider whether coverage is provided in other circumstances.
- ❑ Does not affirmatively require covered entities to cover any particular procedure or treatment for transition-related care.



# Section 1557 Proposed Regulation

- NPRM applies to:
  - ▣ All health programs and activities, any part of which receives federal financial assistance from HHS
  - ▣ All health programs and activities administered by HHS
  - ▣ Health programs and activities administered by Title I entities

# Section 1557 Proposed Regulation

- Definition of federal financial assistance (FFA):
  - ▣ Includes grants, tax credits, and cost-sharing subsidies under ACA Title I, Medicare Part D payments, and other forms of FFA
  - ▣ Excludes Medicare Part B payments
- Definition of health program or activity:
  - ▣ Includes health services and health coverage
  - ▣ Includes all operations of an entity principally engaged in health services or health insurance coverage, such as a hospital or insurance company

# Section 1557 Proposed Regulation

## Definition of “on the basis of sex”

- Includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, *sex stereotyping and gender identity*
- NPRM requested comment on whether sexual orientation is a covered basis under existing federal laws that prohibit discrimination

# Section 1557 Proposed Regulation

## Definition of “gender identity”:

- Means an individual's internal sense of gender, which may be different from an individual's sex assigned at birth.
- The way an individual expresses gender identity may or may not conform to social stereotypes associated with a particular gender.
- Gender may be expressed through, for example, dress, grooming, mannerisms, speech patterns, and social interactions.
- For purposes of Section 1557, an individual has a transgender identity when the individual's gender identity is different from the sex assigned to that person at birth.

# Section 1557: Enforcement

- HHS OCR has been accepting cases since ACA enactment of in 2010 and continues to process cases during the rulemaking period
- OCR reports insurance discrimination complaints are on the rise
- Majority of sex discrimination cases (treatment and insurance) are gender identity discrimination cases
- Illustrations of OCR sex discrimination cases are at <http://www.hhs.gov/civil-rights/for-individuals/section-1557/ocr-enforcement-section-1557-aca-sex-discrimination/index.html>

# Section 1557: Enforcement

*Rumble v. Fairview Health Servs.*, 2015 WL 1197415 (D. Minn. 2015) (pre-NPRM)

- Motion to dismiss denied
- Section 1557 is enforceable by private action
- Section 1557's prohibition on sex discrimination protects plaintiffs who allege discrimination based on gender identity
- Section 1557 applies to organization if any part receives federal funding; plaintiff need not allege that he sought care from part of organization that receives federal funding

# Other Regulation of Health Benefits for Transgender Employees

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- Eleven states plus D.C. prohibit categorical exclusions of transition-related care.
  - ▣ CA, CO, CT, IL, MA, MN, NY, NV, OR, RI, VT, WA (more limited guidance in MD)
  - ▣ For example, CT's bulletin requires that “medically necessary services related to gender dysphoria should not be handled differently from medically necessary services for other medical and behavioral health conditions.”
- Based on state non-discrimination laws. Some also rely on ACA non-discrimination provisions, federal and state mental health parity laws.
- Applies to insured plans within those states.

# Other Regulation of Health Benefits for Transgender Employees

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- Federal Employees Health Benefits Program
  - Before 2015, OPM mandated that carriers exclude transition-related coverage.
  - For 2015, OPM allowed carriers to retain or excise the exclusion
  - For 2016, OPM prohibits carriers from having the exclusion:
    - FEHB Program Carrier Letter No. 2015-12, June 23, 2015
    - Effective 1/1/16, no carrier participating in FEHB Program may have a general exclusion of services, drugs or supplies related to gender transition or “sex transformations”
- Executive Order 13672 prohibits federal contractors from discriminating on the basis of gender identity. Enforced by Department of Labor (OFCCP).



# Other Regulation of Health Benefits for Transgender Employees

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- ACA Essential Health Benefits
  - “An issuer does not provide EHB if its benefit design, or the implementation of its benefit design, discriminates based on an individual’s ... other health conditions.” 45 CFR 156.125(a).
  - Prohibition on sex and gender identity discrimination. 45 CFR 156.125(b); 45 CFR 156.200(e).
- Federal and State Mental Health Parity laws

# Potential Title VII/ Section 1557 Claims

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- Possible Title VII claims where health plan:
  - Contains coverage exclusions for gender transition-related care, particularly where supplies or services such as hormone therapy are excluded for transgender employees, but covered for non-transgender employees; or
  - Denies coverage on medical necessity grounds due to gender.

# Potential Title VII/ Section 1557 Claims

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- *United States v. Se. Oklahoma State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015)
  - Title VII claim based in part on insurance exclusion survives MTD (no discussion of insurance allegations)
- *Tovar v. Essentia Health*, 16-cv-00100 (D. Minn.) (filed Jan. 2016)
  - Title VII claims against employer
  - Section 1557 claims against TPA

# Potential RFRA Claims?

- *Burwell v. Hobby Lobby Stores, Inc.* (2014): ACA's mandate that plans cover certain contraceptives at no cost to employees impermissibly burdens religious exercise of closely-held, for-profit corporations
- To date, no RFRA or First Amendment free exercise challenges to state or federal requirements to cover transition-related care or enroll same-sex spouses

# Employer Trends On Trans-Inclusive Medical Coverage

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- Many employers are looking for ways to expand their trans coverage
- Cost impact of trans-inclusive health coverage
- Diversity/Inclusion

# Cost of Transgender Inclusive Coverage

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- CA Dep't of Insurance 2012 Economic Impact Assessment for Insurance Gender Nondiscrimination Act
  - Regulations prohibiting categorical exclusions of transition-related care would have “an insignificant and immaterial economic impact”
  - Very small transgender population (high estimate was 0.0173% of population)
  - Low utilization rates
  - Some plans had minimal premium increases

# How To Accommodate An Employee Transition

- ***Foster Inclusive Environments:*** By having discrimination, HR, and insurance policies in place that include transgender persons.
- ***Create a Transition Plan:*** Because each transgender person experiences their transition in a unique way, and on their own timeline, an individualized transition plan charting out milestones is helpful for both the employee and the workplace.

# Creating An Inclusive Work Environment

- Beware privacy/confidentiality issues of your co-workers
- Avoid gender based comments
- Do not assume anything about any co-workers sexual orientation or gender identity – regardless, most of the time, it is irrelevant to the workplace!
- Be mindful that what you perceive as harmless and/or funny could be perceived differently by another individual
- Be respectful of your co-workers
- Immediately report suspected acts of discrimination, harassment, and retaliation



# Transition Plans

- ***Milestones:*** Informal Name Change, Official Name Change, Pronoun Change, Restroom Use, Medical Intervention, Surgical Intervention
- Milestones may change as transition goes on. Checking in with a transitioning employee can keep everyone on the right track, and prevent harassment before it happens.

# FMLA Leave and Transgender Employees

- **FMLA:** Leave under the federal Family and Medical Leave Act requires “a serious health condition that makes the employee unable to perform the functions of his or her job.”
- Courts have not indicated whether or not transition-related medical intervention qualifies for FMLA.
- However, refusing to provide leave may expose an employer to lawsuits under the FMLA and Title VII.