THE WAGNER LAW GROUP

LAW ALERT
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1557 Rule Changes and Bostock

The Department of Health and Human Services ("HHS") announced on June 12, 2020, as part of a new final regulation (the "Final Rule"), that it had eliminated Obama-era nondiscrimination rules under Section 1557 of the Affordable Care Act ("ACA") that defined the term "on the basis of sex" to include gender identity, sex stereotyping, and pregnancy, reasoning that this interpretation was an impermissible expansion of federal nondiscrimination laws. Three days later, on June 15, 2020, the Supreme Court ruled that the Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination based on homosexuality and transgender status because these characteristics are inextricably intertwined with a person's sex, rejecting the legal analysis cited to support the HHS rule changes. These seemingly contradictory developments give mixed messages to sponsors of health benefit plans seeking to maintain plans in compliance with nondiscrimination standards on the basis of sex, and set the new final regulation up for a legal challenge.

The Supreme Court also noted that an employee does not need to show that discrimination based on sex, sexual orientation, or transgender status was the only or primary reason for an adverse action in order to prevail. An employment action that is in part motivated by a prohibited characteristic, or that treats employees differently because of it, will support employer liability, providing further caution for employers seeking to avoid vulnerability under employment discrimination law.

Affordable Care Act Nondiscrimination Rule

Section 1557 of the ACA prohibits health programs or activities that receive federal financial assistance from excluding from participation, denying benefits, or discriminating against any individual on the grounds of race, color, national origin, sex, age, or disability. *42 U.S.C. §18116*. The ACA language expressly relies on and mirrors federal civil rights statutes prohibiting discrimination on the basis of these characteristics.

The 2016 implementing regulations defined "on the basis of sex" to include pregnancy, sex stereotyping, and gender identity, and included definitions of "gender identity" and "sex stereotypes" (the "2016 Rule"). *81 Fed. Reg. 31,375 (May 18, 2016) adding 45 C.F.R. Part 92*. Some covered employee health plans (not all health plans are subject to the ACA nondiscrimination rule as many employer plans do not receive federal financial assistance) removed exclusions for gender transition benefits, added treatment for gender dysphoria, or loosened restrictions on pregnancy-related benefits pursuant to the 2016 Rule. At the end of 2016, a Federal district court issued a nationwide temporary injunction prohibiting HHS enforcement of nondiscrimination rules on the basis of gender identity and termination of pregnancy. *Franciscan All., Inc. v. Burwell, 227 F.Supp. 3d 660 (N.D.Tex. 2016)*.

The Final Rule, published on June 19, 2020, substantially repeals the 2016 Rule, removes all definitions, including the definition of "on the basis of sex," and eliminates both ACA- and non-ACA-related regulations prohibiting discrimination on the basis of sexual orientation, gender identity, or sex stereotyping. *85 Fed. Reg. 37,160 (June 19, 2020)*. As explained in the lengthy Preamble, HHS also removed language that prohibited discrimination on the basis of sexual orientation and gender identity from ten different regulations in order to "return to the plain meaning of 'on the basis of sex'" in Federal civil rights statutes, *85 Fed. Reg. at 37,162*, which HHS asserted in the Final Rule is limited to "discrimination on the basis of the fact that an individual is biologically male or female." *Id. at 37,178*.

Supreme Court: Title VII Bars Discrimination on the Basis of Being Homosexual or Transgender

Three days after HHS's announcement, the Supreme Court rejected this interpretation of the meaning of "sex" in federal civil rights statutes, finding that the plain meaning of "because of sex," as used in Title VII, prohibits an employer from discriminating against an individual for being homosexual or transgender. *Bostock v. Clayton County, -- S.Ct.--, 2020 WL 3146686 (June 15, 2020)*. The Court closely analyzed and examined the use of the term "sex" in Title VII, concluding that treating a person differently because of a characteristic that is necessarily related to a person's sex qualifies as discrimination based on sex and is prohibited under Title VII.

What Do These Developments Mean for Employee Health Care Benefit Plans Seeking to Comply With Nondiscrimination Requirements?

Sponsors of employee health benefit plans should be wary of relying on the new HHS regulations in making changes to health care benefits that could be challenged as discriminatory on the basis of sex under the *Bostock* standard. The Supreme Court's decision in *Bostock* did not automatically invalidate the new HHS regulations. Still, the Supreme Court dealt a significant blow to HHS's legal analysis in support of the rule changes. HHS cited to the government's position before the Supreme Court in *Bostock* seven times to support its interpretation of federal civil rights laws to only prohibit discrimination on the basis of biological sex at birth, which the Court squarely rejected. Legal challenges to HHS's rulemaking are already being filed.

The Supreme Court's decision in *Bostock* arguably provides clearer guidance for sponsors of employee health benefit plans on prohibitions on sex discrimination than the ACA ever did. Recall that the ACA nondiscrimination standard only applies to the subset of plans that receive federal funding, that ACA requirements for maternity benefits only apply to the subset of plans that are required to offer Essential Health Benefits, and that ACA has different standards for fully-insured and self-funded health plans. In contrast, Title VII prohibits employment discrimination broadly, and the Supreme Court just clarified that the prohibition extends to sexual orientation, gender identity, and any characteristic intertwined with a person's sex, including pregnancy. In other words, an employee benefit plan subject to Title VII is prohibited from offering benefits that discriminate based on characteristics related to a participant's sex, whether or not it is also subject to the ACA nondiscrimination standard or state insurance law, or provides ACA-required benefits.

Sponsors of employee health benefit plans, particularly self-funded ERISA plans not subject to state insurance laws and exempt from certain ACA requirements, should consider a review of their health plan benefit designs to ensure that benefit offerings do not discriminate on the basis of gender identity, sexual orientation, or any characteristic tied to a participant's sex.

Interaction With Other Federal Laws

Health plan sponsors may also consider reviewing benefit plan design in light of other federal laws that could apply. For example, treating gender dysphoria often has a mental health component implicating requirements under the Mental Health Parity and Addiction Equity Act.

Employers resistant to modifying benefits to comply with *Bostock* can explore ways of providing benefits that do not discriminate on the basis of sex, recognizing that benefit changes would affect all covered employees. The Supreme Court also invited employers to consider challenging the application of Title VII nondiscrimination prohibitions based on the Religious Freedom Restoration Act of 1993, implying that there could be circumstances under which an employer's religious liberties could be impacted by being required not to discriminate against employees on the basis of gender identity, sexual orientation, or pregnancy status. It will likely be years, however, before such a challenge works its way through the courts, and employers considering this avenue should recognize that it would be risky and could leave an employer exposed to potential liability.

Sex Discrimination Does Not Have to be the Sole or Primary Cause in Order to Support a Claim

Employers should also be aware that the *Bostock* opinion clarifying that Title VII covers gay and transgendered workers' rights in the context of employment discrimination and employment bias also clarified the type of proof needed to support a disparate treatment claim under the "but-for" causation standard. Such claims include those brought under the Americans with Disabilities Act and the Age Discrimination in Employment Act, among other federal statutes. Employees must show that "but-for" their protected trait they would not have been treated differently. The Supreme Court explained that the "but-for" factor does not need to be the sole or primary factor for an adverse employment action, it just has to be a contributing factor. This standard sets up a fact-intensive inquiry that may make it more likely that employment discrimination cases will proceed to trial, posing increased risks and costs for the litigating parties.

Should you wish to discuss the specific implications of either the Final Rule or the *Bostock* case, please contact your benefits or employment law attorney at The Wagner Law Group.

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