

Transgender Inclusive Employer Health Benefits for Employees and Dependents

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Introduction

In 2015, Reid Olson received a medical diagnosis and was prescribed well-known drugs¹ and surgery for treatment.² Reid was a dependent on his mother's employer-provided insurance plan, but when she sought coverage for the drugs and preauthorization for the surgery, coverage was denied.³ Coverage for Reid's treatments was denied because Reid is transgender. Reid's diagnosis was gender dysphoria. He was prescribed well-known drugs for hormonal therapy and gender alignment surgery.⁴ His mother's insurance plan categorically excluded coverage of "[s]ervices and/or surgery for gender reassignment."⁵ Currently, there is no explicit employment-related statutory requirement to offer transgender-inclusive health plans. Even in the absence of an explicit federal statutory requirement to offer trans-inclusive health plans though, employers should review their current health plans for exclusions or denials that adversely affect transgender employees in the wake of the Supreme Court's *Bostock v. Clayton County*⁶ decision and the Final Rule on Section 1557 of the Affordable Care Act⁷ and strive towards offering trans-inclusive health plans to support transgender employees and employees with transgender dependents. Offering trans-inclusive health plans ahead of an explicit federal statutory

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1. *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 951 (D. Minn. 2018) (Lupron, a drug recommended to suspend menstruation, and Androderm, a form of testosterone used to treat gender dysphoria).

2. *Tovar*, 342 F. Supp. 3d at 950–51.

3. *Id.* at 951.

4. *Id.*

5. *Id.*

6. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

7. Nondiscrimination in Health and Health Education Programs or Activities Delegation of Authority Action Final Rule, 85 Fed. Reg. 37160, 37162 (June 19, 2020) (to be codified at 45 C.F.R. § 92), <https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-11758.pdf>; see 42 U.S.C. § 18116(a); 45 C.F.R. § 92.4 (2019) (effective until Aug. 17, 2020).

requirement will help employers to prepare for a future requirement, maintain a competitive workforce, and support diversity and inclusion initiatives.

The term *transgender* is an umbrella term to describe anyone whose gender identity expression or behavior is different from the gender assigned at birth, which was based on the individual's externally apparent sex characteristics.⁸ Some people who are transgender experience gender dysphoria, a condition recognized by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.⁹ Individuals diagnosed and suffering from gender dysphoria suffer because of incongruence between their experienced and assigned gender.¹⁰ The symptoms of gender dysphoria include clinically significant distress or impairment in social, occupational, or other important areas of functioning.¹¹ Gender dysphoria may be transient or persistent, and the process for diagnosing gender dysphoria is not the same across children, adolescents, and adults.¹² Transgender people who suffer from a gender-identity disorder may benefit from changing their bodies and find relief from gender dysphoria, a transgender-related diagnosis.¹³ Medical treatments such as mental health counseling, hormone therapy, and gender reassignment surgery have been shown to relieve the symptoms of gender dysphoria.¹⁴ For transgender people, whether diagnosed with gender dysphoria or not, the decision to change one's gender is a personal one.¹⁵

The absence of a federal statutory requirement to offer transgender-inclusive employer health benefits affects transgender employees and transgender dependents equally. Together, Title VII and the Affordable Care Act may require all employers to offer health plans that do not exclude or deny coverage for transgender employees on the basis of sex. But neither Title VII nor the Affordable Care Act requires

8. Jon Arcelus & Walter Pierre Bouman, *Language and Terminology*, in THE TRANSGENDER HANDBOOK: A GUIDE FOR TRANSGENDER PEOPLE, THEIR FAMILIES, AND PROFESSIONALS 1, 9 (Walter Pierre Bouman & Jon Arcelus eds., 2017).

9. Thomas D. Steensma & Jiska Ristori, *Gender Dysphoria and Gender Incongruence in Children*, in THE TRANSGENDER HANDBOOK, *supra* note 8, at 51, 52.

10. Titia F. Beek, Peggy T. Cohen-Kettenis & Baudewijntje P.C. Kreukels, *Diagnostic Classification for Gender Identity-Related Phenomena over the Years*, in THE TRANSGENDER HANDBOOK, *supra* note 8, at 37, 44.

11. *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 950 (D. Minn. 2018).

12. Beek, Cohen-Kettenis & Kreukels, *supra* note 10, at 43–44.

13. Arcelus & Bouman, *supra* note 8, at 6.

14. *Tovar*, 342 F. Supp. 3d at 950.

15. NAT'L CTR. FOR TRANSGENDER EQUAL., FREQUENTLY ASKED QUESTIONS ABOUT TRANSGENDER PEOPLE 4 (2016), https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf [<https://perma.cc/XH3K-WBQ5>]; Liam Knox, *Media's "Detransition" Narrative Is Fueling Misconceptions, Trans Advocates Say*, NBC (Dec. 19, 2019, 7:23 AM), <https://www.nbcnews.com/feature/nbc-out/media-s-detransition-narrative-fueling-misconceptions-trans-advocates-say-n1102686> [<https://perma.cc/PZ5N-E6CF>].

private employers to offer health plans that specifically include coverage for transgender-related health treatments. Although the United States Supreme Court has interpreted Title VII's prohibition on sex discrimination to prohibit discrimination on the basis of transgender status,¹⁶ the Affordable Care Act prohibits plan exclusions and denials based on sex,¹⁷ and several states have recognized discrimination against transgender individuals as undesirable and have started to include coverage for transgender-related treatments in their Medicaid plans, the United States is still behind other countries in recognizing protections for transgender individuals.¹⁸ Globally, twenty countries are ahead of the United States and have passed legislation recognizing the rights of transgender individuals including the rights to access needed care.¹⁹

This note argues that, even in the absence of a federal statutory requirement, employers should offer health plans that are nondiscriminatory under Title VII and the Affordable Care Act and trans-inclusive. Employer sponsored transgender-inclusive health benefits support and attract a competitive, diverse workplace, as these benefits are sought by transgender individuals and individuals supporting transgender dependents. Parents and partners of transgender dependents suffer economic stress due to the out-of-pocket costs of treating gender-identity-based disorders, and emotional stress related to supporting their transgender loved ones through gender identity disorders in the midst of specific exclusions and denials of treatment coverage. Additionally, transgender-inclusive health plans may also attract sought-after candidates who may choose another employer based on the alternative employer's overall commitment to diversity and inclusivity, even when the candidate does not identify as transgender or support transgender loved ones.²⁰ Part I provides an overview of transgender health care. Part II discusses the current laws including Title VII, the Affordable

16. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740, 1754 (2020).

17. 42 U.S.C. § 18116 (a) (2010); 45 C.F.R. § 92.4 (2020).

18. The following states prohibit gender identity discrimination in Medicaid coverage: California, Colorado, Connecticut, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. Michael Ollove, *States Diverge on Transgender Health Care*, PEW (July 17, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/07/17/states-diverge-on-transgender-health-care> [https://perma.cc/8J7G-G9NS].

19. Azadeh Ansari, *Transgender Rights: These Countries Are Ahead of the U.S.*, CNN HEALTH (Feb. 23, 2017, 12:28 PM), <https://www.cnn.com/2017/02/23/health/transgender-laws-around-the-world/index.html> [https://perma.cc/64TV-MWE3].

20. See, e.g., *70% of Job Seekers Value a Company's Commitment to Diversity When Evaluating Potential Employers*, PR NEWswire ASS'N (June 18, 2020, 08:44 PM), <https://www.prnewswire.com/news-releases/70-of-job-seekers-value-a-companys-commitment-to-diversity-when-evaluating-potential-employers-301079330.html> [https://perma.cc/ZTX2-F87Q] (noting that most people seeking employment want to work for a company that demonstrates a commitment to diversity and inclusion such that job seekers want employers to promote their dedication to such causes).

Care Act, and the Public Health Services Act, as well as the cases that have interpreted applicable Federal legislation. Finally, Part III discusses the way the states, companies, universities, and other countries have included or required coverage for transgender health services and treatments.

I. What Is Transgender Inclusive Care?

Transgender inclusive care is more than a desire for gender confirming surgery or psychoactive treatments for the symptoms of gender dysphoria. It includes a range of treatments. For example, one Missouri family sought to relieve their son's depression and anxiety which developed after their son began puberty through the sex hormone suppressor Eligard.²¹ This medication helped their son's depression and anxiety to recede by treating the cause of the dysphoria.²²

These treatments are often expensive. In the case of the Missouri family, their son received an injection of Eligard every four months.²³ The therapy typically costs \$1,500 to \$2,000 per injection, although the family was fortunate to pay only \$500 per injection without insurance coverage; their employer insurance plan excluded gender care.²⁴

In addition to the financial costs of gender dysphoria treatments, families of transgender people pay less tangible costs. They are often confronted with feelings such as loss, shame, grief, betrayal, guilt, fear, and anger, and they can be confronted with rejection and social stigmatization in their surroundings.²⁵ Social isolation and the fear of being rejected can cause high levels of stress within transgender families.²⁶ There are also personal issues for families to consider, which include the emotional responses from the transgender person, and where the person is an adult, the partner, the children, family and friends, and questions about the well-being of the children about one's sexual orientation and about the relationship with the partners.²⁷ Not only can social adjustment, social support, and meaningful social relationships become key markers in evaluating the overall quality of life of transgender people,²⁸ but also the support that employer benefits can provide through trans-inclusive health plans.

21. Elaine Korry, *Puberty Blockers May Improve the Mental Health of Transgender Adolescents*, KAISER HEALTH NEWS (Aug. 19, 2016), <https://khn.org/news/puberty-blockers-may-improve-the-mental-health-of-transgender-adolescents> [https://perma.cc/7TEGA-RAW7].

22. *Id.*

23. *Id.*

24. *Id.*

25. Joz Motman, Myrte Dierckx & Dimitri Mortelmans, *Transgender Families*, in THE TRANSGENDER HANDBOOK, *supra* note 8, at 81, 83.

26. *Id.*

27. *Id.*

28. *Id.* at 84.

Transgender extends beyond a desire to change one's body—and not every transgender person wishes to change their body. Transgender inclusive care also includes post-transition preventative care, whether that transition is merely social or is also medical or surgical. For example, all transgender people are potentially at risk for breast cancer. Consensus-based guidelines indicate that breast cancer screening should be performed every other year for transgender women with five or more years of estrogen therapy who have achieved the age of at least fifty.²⁹ And frequency of screening for transgender men should be based on how much breast tissue remains.³⁰ Further, clinicians recommend cervical cancer screenings for anyone with a cervix. This recommendation extends to transgender men, whose results may be more likely to appear unsatisfactory due to changes in the cervical tissue resulting from testosterone.³¹ Similarly, prostate cancer screenings are important for anyone with a prostate. Transgender women usually retain their prostate and thus remain at risk for developing prostate cancer, even if they undergo gender confirming surgery.³²

Treatment for gender dysphoria can be assigned into one of three categories: reversible, partially reversible, and irreversible. There are requirements and barriers to meet before a transgender employee or dependents are allowed to pursue gender-confirming treatment. Minor dependents must receive a medical diagnosis, and many first seek a referral from a primary provider.³³ Transgender people who seek treatments are subject to other barriers to care, including long waiting lists and long distances to specialized teams, on top of difficulties with insurance reimbursement.³⁴ Transgender youth also experience higher rates of mental health challenges, which should be treated along with the physical aspects of gender dysphoria.³⁵ Supportive therapy can help transgender and non-binary adolescents build positive coping strategies and explore the complexity of gender and sexuality.³⁶ Mental health support is also important for adolescents as they experience physical changes caused by hormonal or surgical

29. Mandi L. Pratt-Chapman & Jennifer Potter, *Cancer Care Considerations for Sexual and Gender Minority Patients*, ONCOLOGY ISSUES, Nov.–Dec. 2019, at 26, 32, https://www.acc-cancer.org/docs/documents/oncology-issues/articles/nd19/nd19-cancer-care-considerations-for-sexual-and-gender-minority-patients.pdf?sfvrsn=d116445f_17.

30. *Id.*

31. *Id.*

32. *Prostate Cancer in the Transgender Community*, CAN. CANCER SOC'Y, <https://www.prostatecancer.ca/Prostate-Cancer/Care-and-Support-Post-Treatment/Prostate-Cancer-in-the-Transgender-Community> [<https://perma.cc/5NG7-QWXJ>].

33. Annelou L.C. de Vries & Scott Liebowitz, *Transgender Youth*, in THE TRANSGENDER HANDBOOK, *supra* note 8, at 65, 72, 75.

34. *Id.*

35. *Id.* at 73.

36. *Id.*

intervention.³⁷ Psychologists working with transgender, gender non-conforming, and gender-questioning youth are encouraged to regularly review the most current literature in this area, because research regarding the potential benefits and risks of different treatment approaches for children and adolescents is currently limited and ongoing.³⁸

Mental health support can also be important as adults transition. While an employer may offer health plans that cover mental-health services, transgender people may require new and more specialized care to determine whether to transition to treat a gender-dysphoria diagnosis or to confirm their experienced gender.

A. *Reversible Hormonal Treatment*

Pubertal suppression is a reversible hormonal treatment for youth and adolescents.³⁹ This treatment prevents the development of unwanted secondary sex characteristics.⁴⁰ Suppressing pubertal development can assist a transgender adolescent by giving the young person time to live as the gender that one experiences without maturing physically and giving the young person time to develop psychologically and understand the future consequences of potential hormone and surgical treatments that have irreversible effects.⁴¹ Puberty suppression does not inevitably lead to social transition or to sex reassignment.⁴² Supporting transgender dependents during reversible hormonal treatment, therefore, can help to avoid future health care costs if the transgender dependent decides not to surgically confirm their gender. Further, these treatments are not ordered lightly. For adolescents to receive puberty suppressing hormones, the following criteria must be met: the adolescent has to have demonstrated a long-lasting and intense pattern of gender nonconformity or gender dysphoria; gender dysphoria has to have emerged or worsened with the onset of puberty; any co-existing psychological, medical, or social problems that could interfere with treatment have to have been addressed; and the adolescent has to have given informed consent, and, when the adolescent has

37. *Id.*

38. Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 843 (2015), <https://www.apa.org/practice/guidelines/transgender.pdf> [<https://perma.cc/B4G9-XL2K>].

39. de Vries & Liebowitz, *supra* note 33, at 73; Am. Psych. Ass'n, *supra* note 38, at 842.

40. de Vries & Liebowitz, *supra* note 33, at 73.

41. *Id.*; see also WORLD PRO. ASS'N FOR TRANSGENDER HEALTH (WPATH), STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 19 (7th ed. 2011), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf [<https://perma.cc/J852-9EWQ>] (“Two goals justify intervention with puberty suppressing hormones: (i) their use gives adolescents more time to explore their gender nonconformity . . . and (ii) their use may facilitate transition by preventing the development of sex characteristics that are difficult or impossible to reverse if adolescents continue on to pursue sex reassignment.”).

42. WPATH, *supra* note 41, at 19.

not reached the age of medical consent, the parents or other caretakers or guardians have to have consented to the treatment and be involved in supporting the adolescent throughout the treatment process.⁴³

B. Partially Reversible Interventions

Partially reversible interventions, like cross-sex hormone therapy, are used to promote the development of physical characteristics of the sex most compatible with the individual's declared gender identity and suppress the effects of an individual's natal sex hormones.⁴⁴ These treatments usually begin when the transgender adolescent is around sixteen years old.⁴⁵ Before starting cross-sex hormone therapy, transgender adolescents must meet requirements similar to those listed for reversible interventions. Four general criteria should be present.⁴⁶

Partially reversible interventions cause the body to change and appear more like the transgender person's experienced sex. Transgender women undergo estrogen treatment, and transgender men undergo testosterone treatment.⁴⁷ The physical effects of estrogen treatment are breast development, finer skin, the reduction in the growth of facial hair, and increase in body fat.⁴⁸ The physical effects of testosterone treatment include an increase in facial and body hair, an increase in lean body mass, an increase in aggression and general drive, and a deepened voice.⁴⁹ Like reversible interventions, partially reversible interventions allow the transgender person to experience life in their experienced gender before surgically conforming.

C. Irreversible Surgical Interventions

Irreversible surgical interventions, including gender confirming surgeries, are typically performed on individuals over the age of majority, although some young people ask for surgical intervention at younger ages.⁵⁰ Gender reassignment or gender affirmation surgery is a set of procedures by which the physical appearance and function of primary sex characteristics are surgically altered to resemble that of the opposite sex.⁵¹ Surgical interventions include chest surgery and

43. *Id.*; Am. Psych. Ass'n, *supra* note 38, at 843.

44. de Vries & Liebowitz, *supra* note 33, at 75 (referring to natal sex, which is sex at birth); Am. Psych. Ass'n, *supra* note 38, at 842.

45. de Vries & Liebowitz, *supra* note 33, at 75.

46. *Id.* These criteria include "(1) persistent, well documented gender dysphoria; (2) capacity to make a fully informed decision and consent to treatment; (3) legal age of majority in a given country; and (4) reasonably well-controlled significant medical or mental health concerns, if present."

47. *Id.*

48. Leighton J. Seal, *Hormone Treatment for Transgender Adults*, in THE TRANSGENDER HANDBOOK, *supra* note 8, at 227, 230–31.

49. *Id.* at 228–29.

50. de Vries & Liebowitz, *supra* note 33, at 75–76.

51. CAN. AGENCY FOR DRUGS & TECHS. IN HEALTH, RAPID RESPONSE REPORT: SUMMARY WITH CRITICAL APPRAISAL, GENDER REASSIGNMENT SURGERY: A REVIEW OF THE CLINICAL

breast augmentation, genital reconstructive surgery, and facial reconstruction surgery. Refusing timely medical interventions for adolescents might prolong gender dysphoria and contribute to an appearance that could provoke abuse and stigmatization.⁵²

D. *Ineffectiveness of Transition or Detransition*

Following gender confirmation surgery, a confirmed transgender person may decide after completing their transition, that the gender dysphoria symptoms did not improve because of surgery.⁵³ However, in a 2015 survey of nearly 28,000 conducted by the U.S.-based National Center for Transgender Equality, only eight percent of respondents reported detransitioning and sixty-two percent of those who reported detransitioning said they only detransitioned temporarily.⁵⁴

As this section demonstrates, medical treatment for transgender individuals is essential to their well-being, and can be effective and financially prudent. If transgender employees and dependents are supported and encouraged through a private employer's offering of trans-inclusive employer health benefits, transgender employees and dependents can make more informed decisions about their healthcare with less stress due to financial hardship.

II. Laws Governing Transgender Inclusive Healthcare

The U.S. Supreme Court has held that transgender status is protected under the prohibition on sex discrimination in employment.⁵⁵ Yet no federal legislation explicitly requires employers to offer trans-inclusive health benefit plans for employees and their dependents. Still, the recent holding *Bostock v. Clayton County* may spur more employers to offer trans-inclusive health benefits in support of transgender employees and their families to ensure compliance with Title VII. Additionally, in the absence of an explicit requirement, the Patient Protection and Affordable Care Act of 2010 and the Public Health Act work together and separately to prohibited sex-based denials or exclusions

EVIDENCE AND GUIDELINES 1 (2014), https://www.cadth.ca/sites/default/files/pdf/htis/jul-2014/RC0568_Gender%20reassignment%20surgery_Final%20-%20For%20Posting.pdf [<https://perma.cc/WK8W-9RR8>]. *Gender confirmation surgery* is the more inclusive term for this type of surgery. See Arcelus & Bouman, *supra* note 8, at 6, 9.

52. WPATH, *supra* note 41, at 21.

53. Walter Heyer, *Hormones, Surgery Regret: I Was a Transgender Woman for 8 Years – Time I Can't Get Back*, USA TODAY (Feb. 11, 2019, 4:00 AM), <https://www.usatoday.com/story/opinion/voices/2019/02/11/transgender-debate-transitioning-sex-gender-column/1894076002> [<https://perma.cc/3AD9-LGE6>]. Walt Heyer transitioned at the age of forty-two and completely de-transitioned by fifty-five.

54. SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 111 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>; Knox, *supra* note 15.

55. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

of treatments for gender dysphoria, which should extend to access to trans-inclusive health insurance.

Transgender employees themselves are most protected, and they are most protected from actions that treat them differently from cisgender employees. Health insurance coverage and coverage for dependents may be more complicated.⁵⁶ While transgender employees are protected from sex-based employment discrimination under Title VII, there is no explicit protection for dependents who experience sex-based discrimination under employer-sponsored health plans. However, precedent suggests that such protection exists. More helpfully, protection for transgender dependents under employer-sponsored health plans is available under the Patient Protection and Affordable Care Act of 2010 and the Public Health Act. Under both acts, employers may face liability for offering health plans that do not cover or specifically deny dependents coverage for gender dysphoria when recommended treatments are available for cisgender dependents and employees.

A. *Title VII of the Civil Rights Act of 1964*

Title VII provides that it is unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual’s . . . sex”⁵⁷ Health insurance and other fringe benefits are “compensation, terms, or privileges of employment.”⁵⁸ Thus, sex discrimination in the provision of health insurance should be covered by Title VII. But, because transgender employees were not explicitly protected under Title VII, it seemed unlikely that they could look to Title VII to bring claims against an employer, insurer, or third-party administrators for absent or denied coverage of treatments for a transgender related diagnosis. That changed with the United States Supreme Court holding in *Bostock v. Clayton County*.⁵⁹

56. See *Tovar v. Essentia Health*, 857 F.3d 771, 775–76 (8th Cir. 2017) (holding that employee had no Title VII cause of action for lack of coverage for transgender dependent).

57. 42 U.S.C. § 2000e-2(a)(1).

58. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983) (quoting Title VII 42 U.S.C. § 2000e-2(a)(1)).

[The employer’s] plan provide[d] limited pregnancy-related benefits for employees’ wives, and afford[ed] more extensive coverage for employees’ spouses for all other medical conditions requiring hospitalization. Thus the husbands of female employees receive[d] a specified level of hospitalization coverage for all conditions; the wives of male employees receive[d] such coverage except for pregnancy-related conditions. . . . Thus petitioner’s plan unlawfully gav[e] married male employees a benefit package for their dependents that is less inclusive than dependency coverage provided to married female employees.

Id. at 683–84.

59. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

Three cases were consolidated in *Bostock v. Clayton County, Georgia*, to resolve the disagreement among the courts of appeals over the scope of Title VII's protections for gay and transgender persons.⁶⁰ In each of the three cases, the plaintiff employees brought suit under Title VII alleging unlawful discrimination on the basis of sex.⁶¹ Of the three cases consolidated under *Bostock* only one, *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*,⁶² involved an adverse employment action because of the plaintiff employee's transgender status.⁶³

In that case, decided in 2018, the Sixth Circuit held that firing a transgender woman based on her transgender or transsexual status violated Title VII, even though transgender or transsexual status was not explicitly listed as a protected class under Title VII.⁶⁴ The Sixth Circuit reasoned:

It is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated at least in part, by the employee's sex. . . . [D]iscrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping. . . . [A] transgender person is someone who "fails to act and/or identify with his or her gender" Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align.⁶⁵

The facts of that case illustrate this reasoning. Aimee Stephens, the *Harris Funeral Homes* plaintiff, was fired by her employer after she provided her employer with a personal letter stating that she struggled with a gender-identity disorder and intended to have gender-confirming surgery.⁶⁶ The letter explained that the first step she must take before having gender confirming surgery was to live and work full-time as a woman for one year.⁶⁷ In response, Harris Funeral Homes

60. *Id.* at 1738. The three cases were *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), and *Bostock v. Clayton County Board of Commissioners*, 894 F.3d 1335 (11th Cir. 2018).

61. *Bostock*, 140 S. Ct. at 1738.

62. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 560.

63. *Bostock*, 140 S. Ct. at 1738.

64. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 574–76.

65. *Id.* at 575.

66. *See id.* at 568.

67. *Id.* The World Professional Association for Transgender Health (WPATH) provides that patients seeking to confirm their experienced gender meet four criteria before transitioning. For individuals seeking care for gender dysphoria, a variety of options can be considered including changing one's gender expression or role to one consistent with the individual's gender identity. WPATH, *supra* note 41, at 9, 19. Gender dysphoria and care is discussed in more detail *infra* Part III.

fired her explicitly because her appearance would not conform to the sex her employer believed her to be.⁶⁸

The Supreme Court, in *Bostock*, affirmed the Sixth Circuit and held that Title VII forbids the firing of an individual for being transgender because sex plays a necessary and undisguisable role in the decision.⁶⁹ When an employer fires a transgender person, the employer fires that person for traits or actions that it would not have questioned in members of a different sex.⁷⁰ While the Supreme Court in *Bostock* involved the termination of transgender and gay employees, the Court's holding also applies to employer-offered health plans. It follows that when an employer sponsors health plans that specifically exclude or deny treatments for transgender-related diagnoses, the plan discriminates against transgender employees suffering because of incongruence between their experienced and assigned gender or biological sex.⁷¹

Following *Bostock*, a private employer's sponsored health plan that provides more or less coverage on the basis of sex, including coverage denials or exclusions for treatments of transgender-related diagnoses for both employees and their dependents, may violate Title VII. Earlier interpretations of sex and discrimination under Title VII also support coverage of gender-related treatments, since many health plans offered by private employers treat cisgender employees and transgender employees differently.⁷² In 1983, the Supreme Court held that exclusion of sex-linked conditions from health-insurance coverage for the dependents constituted sex discrimination that would violate VII.⁷³ Following this reasoning, an employer-sponsored health plan that provides coverage for male employees born male but not male employees born female, or when it provides coverage for male dependents born male, but not male dependents born female, the employer violates Title VII. In other words, an employer's failure to offer trans-inclusive health coverage is arguably discriminatory under Title VII, *Bostock*, and *Newport News*, because sex is undoubtedly considered when an

68. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 569 (“[The owner of the funeral home] testified that he fired Stephens because ‘he was no longer going to represent himself as a man. He wanted to dress as a woman.’”). Stephens’s employer appealed the Sixth Circuit’s decision, and the Supreme Court granted certiorari in April 2019. *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm’n*, 139 S. Ct. 1599 (2019).

69. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

70. *Id.*

71. Beek, Cohen-Kettenis & Kreukels, *supra* note 10, at 39.

72. *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp. Opportunity Comm’n*, 462 U.S. 669, 682 (1983).

73. *Id.* In *Newport News*, the employer’s health insurance plan fully covered delivery and hospital stays for female employees who delivered babies, but did not fully cover those things for the wives of male employees. *Id.* at 672–73. The Court reasoned that this exclusion effectively provided full coverage for the male spouses of female employees but not for the female spouses of male employees such that female employees received a benefit that male employees were denied. *Id.* at 683–84.

employer offers health benefits to cisgender male and female employees and cisgender dependents but does not offer inclusive coverage for transgender employees or dependents.⁷⁴

Although *Newport News* would appear to support transgender-inclusive coverage for both employees and their dependents, dependents are not themselves employees, and their protection might be considered a step too far for Title VII's reach.⁷⁵ It was this type of issue that the Court left open for future cases in *Bostock*.⁷⁶ But even if Title VII protections do not currently extend to transgender dependents, transgender dependents may bring a claim against a private employer or plan administrator under the Patient Protection and Affordable Care Act of 2010 or the Patient Health Services Act.

B. The Patient Protection and Affordable Care Act of 2010 and the Patient Health Services Act

Like Title VII, the Patient Protection and Affordable Care Act of 2010 (ACA) prohibit sex-based denials and exclusions of coverage of transgender-specific care in employee benefit plans. Courts have held that the sex-based protections in the Patient Protection and Affordable Care Act of 2010 (ACA) reach transgender employees and transgender dependents.⁷⁷ The ACA mandates that covered entities provide individuals equal access to health programs and activities without discrimination on the basis of sex, which includes gender identity discrimination.⁷⁸ Section 1557 of the ACA specifically provides that

an individual shall not, on the grounds prohibited under Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title.⁷⁹

The ACA covers all health programs and activities, any part of which receives federal financial assistance.⁸⁰ This includes employer-sponsored plans that are funded through insurance by an insurer who participates in the ACA marketplace and employers that sponsor

74. See *Bostock*, 140 S. Ct. at 1737.

75. See *Tovar v. Essentia Health*, 857 F.3d 771, 775–76 (8th Cir. 2017) (holding that employee had no Title VII cause of action for lack of coverage for transgender dependent).

76. *Bostock*, 140 S. Ct. at 1753 (“Whether . . . policies and practices [other than firing] might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.”).

77. *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953–54 (D. Minn. 2018); *Flack v. Wis. Dep’t of Health*, 328 F. Supp. 3d 931, 951 (W.D. Wis. 2018).

78. *Tovar*, 342 F. Supp. 3d. at 953.

79. 42 U.S.C. § 18116 (a).

80. *Flack*, 328 F. Supp. 3d at 947.

self-funded retiree health plans that apply for a drug subsidy under Medicaid Part D.⁸¹

The U.S. Department of Health and Human Services (HHS) rules define what constitutes sex discrimination, and its rules have changed over time. In 2016, HHS promulgated a final rule defining sex discrimination to include gender identity, which it defined as “one’s internal sense of gender, which may be male, female, neither or a combination of male and female.”⁸² On June 12, 2020, the U.S. Department of Health and Human Services finalized a new rule under section 1557, eliminating language concerning gender identity.⁸³ The rule continues to prohibit any covered entity from discrimination on the basis of, among other things, sex, according to the meaning of that term in the underlying civil rights statutes that section 1557 incorporates, including Title VII and Title IX.⁸⁴ So, even though the final rule eliminates the 2016 Rule’s definition of gender identity, discrimination based on gender identity under the ACA continues to be unlawful through the incorporation of Title VII’s protection of the transgender class and the existing definition of sex under Title IX.⁸⁵ HHS’s current view is that this is the case after the *Bostock* decision.⁸⁶

Additionally, the Affordable Care Act’s protection reaches farther than Title VII. It applies not only to private insurance, but also to Medicaid programs. Medicaid, a joint federal-state program to provide medical assistance to eligible low-income individuals, generally reimburses a substantial portion of a state’s expenditures to provide medical services to people whose resources and incomes are insufficient to

81. See *id.* at 947 (“[T]here is no dispute that Wisconsin Medicaid is ‘a health program or activity’ that ‘receiv[es] Federal financial assistance.’”).

82. See Press Release, Dep’t of Health & Hum. Servs., HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs (June 12, 2020), <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html> [perma.cc/L3KG-S5AF] (quoting Nondiscrimination in Health and Health Education Programs or Activities Delegation of Authority Action Final Rule, 85 Fed. Reg. 37160, 37162 (June 19, 2020) (to be codified at 45 C.F.R. § 92), <https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-11758.pdf>); see also 45 C.F.R. § 92.4 (2019).

83. Press Release, *supra* note 82.

84. Nondiscrimination in Health and Health Education Programs or Activities Delegation of Authority Action Final Rule, 85 Fed. Reg. 37160, 37162 (June 19, 2020) (to be codified at 45 C.F.R. § 92), <https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-11758.pdf>.

85. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048–50 (7th Cir. 2017) (interpreting sex stereotypes under Title VII and Title XI); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616–17 (4th Cir. 2020) (interpreting sex under Title XI). The final rule has been enjoined by several courts. Press Release, *supra* note 82.

86. Press Release, Dep’t of Health & Hum. Servs., HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity (May 10, 2021), <https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html>.

afford necessary medical services. State Medicaid programs are health programs or activities that receive federal financial assistance.⁸⁷ The final section 1557 rule allows each state to balance for itself the various sensitive considerations relating to medical judgment and gender identity within the limits of applicable federal statutes which are to be read according to their plain reading.⁸⁸ After *Bostock*, the plain reading of a prohibition on sex discrimination also prohibits discrimination against transgender individuals.

Wisconsin is one state offering trans-inclusive coverage in its Medicaid program. Under Wisconsin's Medicaid program, ForwardHealth, offers coverage for hormone therapy, gender-confirming surgery, or any alteration of sexual anatomy, whether medically necessary or not.⁸⁹ The ForwardHealth program went into effect on April 23, 2019, following a preliminary injunction granted in *Flack v. Wisconsin Department of Health*.⁹⁰ In *Flack*, the Western District of Wisconsin concluded that the plaintiffs made a persuasive evidentiary showing that the exclusions in the state Medicaid regulation prevented them from getting medically necessary treatments on the basis of their natal sex and transgender status.⁹¹ The court enjoined Wisconsin Department of Health from enforcing the program's exclusion against the plaintiffs because that exclusion prevented them from getting medically necessary treatments on the basis of both their natal sex and transgender status, which the court held surely amounted to discrimination on the basis of sex in violation of the ACA.⁹²

Finally, the Public Health Service Act (PHSA) may also apply to require trans-inclusive coverage. The PHSA reaches dependents covered under employer health plans by requiring a group health plan and a health insurance issuer to group health coverage to provide coverage for evidence-informed preventive care and screenings provided

87. 42 U.S.C. § 18116; see *Flack v. Wis. Dep't of Health*, 328 F. Supp. 3d 931, 947 (W.D. Wis. 2018).

88. Nondiscrimination in Health and Health Education Programs or Activities Delegation of Authority Action Final Rule, 85 Fed. Reg. 37160, 37162 (June 19, 2020) (to be codified at 45 C.F.R. § 92), <https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-11758.pdf>.

89. ForwardHealth, No. 2019-20, Transgender Surgery Policy 1 (Oct. 31, 2019), <https://www.forwardhealth.wi.gov/kw/pdf/2019-20.pdf> [perma.cc/JET2-NYBT].

90. ForwardHealth, No. 2019-XX, Transgender Surgery Policy 1 (June 2019), https://www.dhs.wisconsin.gov/document/forwardhealthupdatetopictransgender_surgerypolicy.pdf; *Flack*, 328 F. Supp. 3d 931. This policy became permanent when the court issued a permanent injunction. ForwardHealth, No. 2019-20, *supra* note 91, at 1; *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019) (granting permanent injunction).

91. *Flack*, 328 F. Supp. 3d at 951. Sections (23) which excluded drugs, including hormone therapy, associated with "transsexual surgery" or medically unnecessary alteration of sexual anatomy or characteristics and (24) "transsexual surgery" were explicitly listed as services not covered. WIS. ADMIN. CODE DHS § 107.03.

92. *Flack*, 328 F. Supp. 3d at 951, 955. The court also held that the challenged exclusion violated the Medicaid Act and the Equal Protection clause. *Id.* at 1018–19, 1021–22.

for in comprehensive guidelines support by the Health Resources and Services information.⁹³ Compliance with the PHSA may require an employer-sponsored health plan and the issuer to cover medical treatments for congenital conditions related to children that may be born intersex because intersex children may benefit from evidence-informed preventative care and screenings provided for males and females.⁹⁴

C. Protection for Dependents

Recall Reid Olson, whose story began this note. Olson was prescribed Lupron, which can suspend menstruation, and Androderm, which is a form of testosterone. Both drugs are hormonal treatments for gender dysphoria, which support an individual's transition from female to male.⁹⁵ Coverage for Androderm was specifically denied because the medicine was "for use by males only" and was not covered for Olson's natal gender.⁹⁶ The Essentia Health plan specifically denied coverage for hormonal treatments available for one gender based on Olson's transgender status.⁹⁷ Now recall that, in finding that transgender employees are protected against sex discrimination under Title VII, the Supreme Court concluded that it is impossible to discriminate against a person for being transgender without discriminating against that individual based on sex⁹⁸ and determined that, for an employer to discriminate against employees for being transgender, the employer must intentionally discriminate against individual men and women in part because of sex.⁹⁹

Currently, an employee may bring and succeed in an employment-discrimination action under Title VII and *Bostock* for an adverse employment action based on the employee's sex or transgender status. The denial of coverage for transgender-related treatments that are available for another sex or gender but are not covered for transgender employees is an adverse employment action. It is less clear that actions that deprive a dependent of coverage based on the dependent's sex is actionable under Title VII. After all, in *Newport News*, the Court focused on the sex of the employee as determining what benefits that employee received.¹⁰⁰ Still, even if a dependent covered by an employer sponsored health plan may not be successful at bringing a

93. 42 U.S.C. § 300gg-13(a)(3).

94. See Arcelus & Bouman, *supra* note 8, at 8. An intersex individual is someone born with anatomy and/or chromosome patterns that do not fit the typical sexual anatomy and/or the chromosomal pattern of male or female. *Id.* at 5.

95. *Tovar v. Essentia Health*, 187 F. Supp. 3d 1055, 1057 (D. Minn. 2016), *aff'd in part, rev'd in part*, 857 F.3d 771 (8th Cir. 2017).

96. *Id.*

97. See *id.*

98. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020).

99. *Id.* at 1743.

100. *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp. Opportunity Comm'n*, 462 U.S. 669, 683–84 (1983).

claim against an employer or plan administrator under Title VII and *Bostock*, a dependent likely can bring a claim for discriminatory denial of treatment against an employer or plan administrator under the Patient Protection and Affordable Care Act of 2010.

As discussed earlier, the final section 1557 rule will continue to use Title IX and Title VII to interpret sex. Now that the Supreme Court has determined that sex discrimination includes discrimination against transgender individuals under Title VII,¹⁰¹ a dependent covered by an employer-sponsored health plan has a claim if denied coverage under an employer-sponsored health plan based on their transgender status. Even before *Bostock*, the Eighth Circuit remanded Brittany Tovar's case to determine whether her son, Reid Olson, could bring a discrimination claim under the Affordable Care Act. On remand, the district court held that section 1557 of the Affordable Care Act¹⁰² prohibits discrimination by an employer and third-party administrators on the basis of the individual's gender identity.¹⁰³ The court determined that Tovar's son had an interest in being treated equally and not discriminated against on account of his identity and that the denial of access and receipt of delayed medically necessary care was proximately caused by the third-party administrator's designing and providing to Essentia a health plan with discriminatory provisions.¹⁰⁴ Fortunately, despite HHS's change to its section 1557 rule, which called this decision into question, the court's reasoning is strengthened by the *Bostock* holding.

Third-party administrators and insurers of employer-sponsored health plans, thus, may face liability under the ACA. Denial of medically necessary care for gender dysphoria will likely be discriminatory.¹⁰⁵ Additionally, where the plan administrator considers the sex of a dependent before determining whether health services are coverable under a given health plan, the employer may face liability, especially where treatments are available to another sex for the same purpose. For example, the prescription drug Lupron is not only recommended to suspend menstruation as a gender-affirming treatment for transmasculine people, but also to treat painful menstruation in cisgender women.¹⁰⁶ Since Lupron is a prescription drug covered for cisgender females to treat a condition specific to women, it should have also been

101. *Bostock*, 140 S. Ct. at 1737.

102. 42 U.S.C. § 18116(a).

103. *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953–54 (D. Minn. 2018); *see also* 45 C.F.R. § 92.4 (2019) (explicitly providing that section 1557's prohibition of sex discrimination covered gender identity; this regulation had been enjoined by the District Court of the Northern District of Texas in *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 689 (2016)).

104. *Tovar*, 342 F. Supp. 3d at 956.

105. *Id.*

106. *Tovar v. Essentia Health*, 187 F. Supp. 3d 1055, 1057 (D. Minn. 2016), *aff'd in part, rev'd in part*, 857 F.3d 771 (8th Cir. 2017).

covered for Olson, yet it was not. But for Olson's use of Lupron to affirm his gender identity, the plan administrator would have covered use of the drug. Considering that Olson and a hypothetical cisgender female whose Lupron would be covered were both assigned the sex female at birth and both have uteruses, it is discriminatory to deny medically necessary treatment based on the motivation for using the drug.

This type of sex-based denial or exclusion of treatment may also affect intersex dependents and leave employers and plan administrator liable under the Patient Services Protection Act. Like treatments for gender dysphoria, treatments for conditions related to dependent children and adults born intersex may be marked for male or female only use. For example, under the reasoning in *Newport News*, an employer health plan that covers prostate cancer screenings and treatments for cisgender males and does not cover the same for transgender females or for a person with an intersex condition who has a prostate because they are not classified as male fails to provide complete coverage. It can logically be concluded that this failure would violate both the PHSA and the ACA.¹⁰⁷ These sex-based designations may open employers and plan administrators to further liability for prohibited sex based exclusions and denials.

To reduce liability under Title VII, the ACA, and the Patient Health Services Protection Act, employers should review their health plans to determine whether there are specific denials or exclusions of treatments based on an individual's natal or experienced sex. The Society of Human Resources Management and the Human Rights Campaign offer online resources to assist employers wishing to review their current health plans and those wishing to offer trans-inclusive health plans and to correct current plans for discriminatory exclusions and denials.

III. Employers Should Provide Transgender Inclusive Health Benefits, Even If Federal Law Does Not Require Employers to Offer Transgender Inclusive Health Benefits.

A. Increasing Transgender Inclusion

The increase in trans-inclusive health plans is evidence of the increase of transgender inclusion in the workplace, and transgender inclusion is good for business. The Human Rights Campaign Foundation reported that the number of major U.S. employers affording transgender-inclusive health coverage has grown from 278 employers

107. See *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp. Opportunity Comm'n*, 462 U.S. 669, 682 (1983).

in 2013¹⁰⁸ to 1040 employers in 2021.¹⁰⁹ As millennials solidify their position in the workforce and Gen-Z comes of age, the number of adults in the United States who identify as LGBT will continue to increase.¹¹⁰ The Supreme Court's *Bostock* decision protecting transgender status under Title VII will provide a fairer and more attractive workplace for transgender employees, but many large companies were already striving for inclusion because this protection was preceded by protections in other countries. As of 2017, twenty countries have passed legislation recognizing the rights of transgender individuals.¹¹¹ To continue to compete for workers in the global workforce and to attract talented candidates, costs and controversy associated with trans-inclusive health coverage need to be overcome.

The American legal system could borrow from some of the legal protection put in place by other countries, like Argentina and India, for example. Argentina enacted the Gender Identity Law in 2012. Argentinian adults are permitted to change their recorded sex without having sex reassignment surgery.¹¹² Minors with legal representatives can also change their recorded sex.¹¹³ Most notable here, the Gender Identity Law protects all transgender individuals against discrimination in health care. Article 11 provides that an individual will be able to access total and partial surgical and/or comprehensive hormonal treatments to adjust their bodies, including genitalia, to their self-perceived gender identity, without requiring any judicial or administrative authorization.¹¹⁴ India's Supreme Court classifies transgender people, or Hijra, as a third gender.¹¹⁵ In India, as in Argentina, transgender people have the right to self-identify without reassignment surgery.¹¹⁶ Transgender people in India are also allowed equal access to education, health care, and employment, and protection from discrimination.¹¹⁷ More expansive protections like equal access to education, health care, employment, and the opportunity to change one's recorded

108. HUM. RTS. CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2020, at 18 (2020), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/CEI-2020.pdf>.

109. HUM. RTS. CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2021, at 18 (2021), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/CEI-2021-revised-030121.pdf>.

110. Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx> [<https://perma.cc/8CU2-LCZN>].

111. Ansari, *supra* note 19.

112. Identidad de Género [Gender Identity Law], Law No. 26743 art. 4, May 23, 2012 (Arg.), http://www.jus.gov.ar/media/3108867/ley_26743_identidad_de_genero.pdf [<https://perma.cc/2TDX-9R2S>], translated in *Argentina Gender Identity Law*, TGEU (Sept. 23, 2013), <https://tgeu.org/argentina-gender-identity-law>.

113. *Id.* art. 5.

114. *Id.* art. 11.

115. Ansari, *supra* note 19.

116. *Id.*

117. *Id.*

sex with or without sex reassignment surgery are also initiatives that could be implemented by the states ahead of federal enforcements.¹¹⁸

As millennials and members of Gen-Z continue to transition into the workforce, some may expect trans-inclusive plans from employers because they have been covered by a trans-inclusive health plans in college. According to the Human Rights Campaign, eighty-nine colleges and universities provide minimum or better transgender-inclusive coverage including at least some transition-related surgeries.¹¹⁹ A change in the level of inclusivity of coverage during a candidate's transition from student to employee coupled with the increase in trans-inclusive health plans could negatively impact an employer's ability to attract diverse and competitive talent, if the employer chooses not to offer trans-inclusive health coverage.

B. Increases in Health Plans Are Offset by the Benefit the Overall Health of Transgender Individuals and Savings to Employers.

Previously, the risk of losing transgender employees due to an employer's lack of transition-related care may have been negligible,¹²⁰ but, with the growing number of protections for transgender individuals, employers should prepare to assess the costs of offering trans-inclusive benefits or at least the benefit of offering nondiscriminatory plans. Jennifer Wong, author of *Recasting Transgender-Inclusive Healthcare Coverage: A Comparative Institutional Approach to Transgender Healthcare Rights*, predicted that, if courts were to extend Title VII protections to transgender employees, the cost of defending a policy as nondiscriminatory might exceed the benefits retained from denying infrequent claims.¹²¹ Since the Supreme Court has now extended Title VII protections to transgender employees, it is worth considering the costs of transgender care. Currently, costs of hormone and surgical therapies are relatively small, and not all transgender individuals desire surgical treatment, making inclusion less expensive, especially compared to the costs of an individual's poor mental health.¹²² A cost

118. For information on the various policies of states, see generally *Snapshot LGBTQ Equality by State*, TRANSGENDER L. CTR., <https://transgenderlawcenter.org/equality-map> (last visited June 21, 2021) (scroll down and click "Gender Identity" tab). And for information on state policies regarding identity documents in particular, see *ID Documents Center*, NAT'L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/documents> (last visited June 21, 2021).

119. *Transgender-Inclusive Benefits: Colleges and Universities*, HUM. RTS. CAMPAIGN (May 13, 2020), <https://www.hrc.org/resources/transgender-inclusive-benefits-colleges-universities> [<https://perma.cc/QQ2A-RWCZ>].

120. Jennifer Wong, *Recasting Transgender-Inclusive Healthcare Coverage: A Comparative Institutional Approach to Transgender Healthcare Rights*, 31 L. & INEQUAL. 471, 489 (2013), <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1176&context=lawineq>.

121. *Id.* at 506.

122. Keran Landman, *Fresh Challenges to State Exclusions on Transgender Health Coverage*, NPR (Mar. 12, 2019, 5:15 AM), <https://www.npr.org/sections>

analysis of the City and County of San Francisco showed that costs of covering gender-affirming surgeries of transgender patients is averaging between \$.77 and \$.96 per year, per enrollee, and results in no surcharge or premium increases.¹²³

The Human Rights Campaign reports that, when compared to the costs of other common health care expenditures, the costs of coverage specific to transgender people's needs are comparable or lower than expenditures for diseases experienced regardless of transgender status.¹²⁴ In 2002, Diabetes Care published a study of the out-of-pocket payments for 20,937 people with diabetes.¹²⁵ According to the results of the study, the mean annual insurance plan expenditures for diabetes was \$4,065.¹²⁶ The 2002 study suggests that the cost of transitions for transgender employees and their dependents is less than the costs of diabetes treatment for employees and their dependents.¹²⁷ A 2013 study found that provider coverage for medically necessary services for transgender people was cost effective in eighty-five percent of simulations.¹²⁸ Compared to transgender patients with no health benefits for transgender-related treatments, insurance coverage for medically necessary services came at a greater cost and effectiveness. Although the cost of provider coverage for transitions is \$2,175 per year, the study found that these expenses were a good value for reducing the risk of negative and more costly outcomes.¹²⁹ Untreated gender dysphoria can lead to adverse and expensive outcomes like HIV infection, depression, suicide, and drug abuse.¹³⁰

The California Department of Insurance issued an economic impact assessment that determined that aggregate costs of the antidiscrimination rules would be insignificant or immaterial while yielding significant benefits to transgender individuals.¹³¹ The assessment found that the regulation prohibiting plans and insurers from denying an individual a plan contract or policy, or coverage for a benefit included in the contract

/health-shots/2019/03/12/701510605/fresh-challenges-to-state-exclusions-on-transgender-health-coverage [https://perma.cc/XGM6-K3HM].

123. AM. MED. ASS'N, ISSUE BRIEF: HEALTH INSURANCE COVERAGE FOR GENDER-AFFIRMING PATIENTS 3 (2019), <https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf> [https://perma.cc/XGM6-K3HM].

124. *Transgender-Inclusive Benefits: Medical Treatment Cost and Utilization*, HUM. RTS. CAMPAIGN (2010) <https://www.hrc.org/resources/transgender-inclusive-benefits-medical-treatment-cost-and-utilization> [https://perma.cc/X3EN-PKXM].

125. Pamela B. Peele, Judith R. Lave & Thomas J. Songer, *Diabetes in Employer-Sponsored Health Insurance*, 25 DIABETES CARE 1964, 1964 (2002), <https://care.diabetesjournals.org/content/diacare/25/11/1964.full.pdf> [https://perma.cc/NR4K-4KGH].

126. *Id.* at 1967

127. *Id.*

128. William V. Padula, Shiona Heru & Jonathan D. Campbell, *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost Effectiveness Analysis*, 31 J. GEN. INTERNAL MED. 394, 394, 398 (2016).

129. *Id.* at 395, 397–98.

130. *Id.*; Landman, *supra* note 122.

131. AM. MED. ASS'N, *supra* note 123, at 3.

or policy, based on the person's sex,¹³² would have an insignificant and immaterial economic impact on the creation or elimination of jobs, the creation or elimination of new business, and the expansion of businesses in the State of California.¹³³ At the same time, the assessment found that the regulation may improve the health, welfare, and worker safety of the transgender population, which made up between .0065 and .0173% of the total population in California in 2012.¹³⁴ The assessment also identified potential cost savings in the medium to long term due to lower costs associated with suicide, attempts at suicide, overall improvements in mental health, and lower rates of substance abuse.¹³⁵ The Center for Disease Control estimates the average acute medical cost of a single suicide completion or attempt in the United States is \$2,596 and \$7,234 respectively.¹³⁶ The findings in California's Economic Impact Assessment support the positive impact trans-inclusive health plans can have on employees and the workplace environment.

Conclusion

The Supreme Court has held that transgender people are protected against sex discrimination under Title VII, which would include protection against sex discrimination in employer-sponsored health plans. And the ACA and PHSA likewise prohibit sex discrimination in the provision of health insurance. Employers should not only review their health plans for sex-based exclusions to comply with protections against sex-based discrimination under Title VII, the ACA, and the PHSA, but also to assist employees caring for transgender dependents. Health insurance is an attractive benefit especially for individuals seeking employment and caring for transgender family members. In the absence of a more explicit federal mandate to provide trans-inclusive health plans, private employers should offer at least nondiscriminatory health plans; and they are better served by offering trans-inclusive health plans. Employers can support, attract, and retain qualified employees by providing nondiscriminatory benefits that help employees fund medically necessary transgender-related treatments and widening access to health care for their families. A truly inclusive employer should support its increasingly diverse workforce, including employees who may be parents and partners of transgender individuals by reducing the financial, emotional, and sometimes physical stress experienced by employees faced with discriminatory coverage gaps in employer-sponsored health plans.

132. Cal. Dep't of Ins., Reg. File No. REG-2011-00023, Economic Impact Assessment: Gender Nondiscrimination in Health Insurance 1 (Apr. 13, 2012), <http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Non-discrimination-In-Health-Insurance.pdf> [https://perma.cc/JE9E-9H7K].

133. *Id.* at 2, 3.

134. *Id.*

135. *Id.* at 3.

136. *Id.* at 9.

