

# LGBTQ Title VII Ruling May Impact Your Employee Benefit Plan

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On Monday, June 15, 2020, the US Supreme Court held in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964 protects transgender, gay and lesbian employees (and prospective employees) from workplace discrimination based on sex. *Bostock* was decided on the heels of the Final Section 1557 regulations (see our [On the Subject here](#)) which, in part, rescind certain protections afforded to lesbian, gay, bisexual, transgender and queer (LGBTQ) individuals.

## IN DEPTH

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*Bostock* definitively states that Title VII's prohibition against employment discrimination "because of ... sex" bars not only discrimination based on sex or gender but also discrimination because of sexual orientation or gender identity. A similar position taken by some states applies to fully insured health plans to prevent discrimination on the basis of sexual orientation or gender identity.

Because Title VII is typically thought of as governing workplace issues like hiring, firing, promotions and harassment, the benefits implications of this landmark decision may be overlooked. Title VII bans discrimination on the basis of race, color, religion, sex and national origin—by employers with 15 or more employees—in the terms, conditions and privileges of employment. The conditions and privileges of employment includes **compensation**, and the Employee Retirement Income Security Act of 1974 (ERISA) explicitly exempts Title VII from its broad preemptive authority.

This means that the protective authority of Title VII for LGBTQ individuals generally extends to employer-sponsored healthcare benefits. The decision does, however, leave unanswered the question of to what extent certain religiously affiliated employers may claim a religious exemption to Title VII's mandates.

*Bostock* is not the first time a US Supreme Court decision has effectively amended employer-sponsored healthcare plan requirements. In 1983, the Supreme Court held in *Newport News Shipbuilding Co. v. EEOC* that Title VII requires equally comprehensive coverage to both male and female employees, mandating that employer-provided health plans may not discriminate on sex-based characteristics (e.g., employer-provided health plans must cover pregnancy, childbirth and

related medical conditions).

Because of *Bostock*, employers who sponsor group-health plans should consider taking the following steps, in addition to a general review of their benefit plans to see if *Bostock* may have other implications:

- Review coverage terms for gender-affirmation surgery, gender dysphoria, pharmacy and mental health benefits coverage to determine whether changes may be appropriate.
- Review eligibility for same-sex spouses and same-sex domestic partners to determine whether any changes may be appropriate.
- Review employee assistance program (EAP) and related services to ensure adequate coverage for the specific needs of LGBTQ members.
- Review benefit plan administration and benefits claim forms for potential sex discrimination concerns, including concerns related to sexual orientation discrimination and gender identity discrimination.
- Review your health plan's provider network to ensure reasonable access to providers that are experienced with, and supportive of, LGBTQ healthcare.
- Determine whether disability plan coverage includes temporary disability due to gender-affirmation surgery.
- Consider expanding family-planning benefits (both within and outside group health plans) to include LGBTQ employees (e.g., adoption assistance, foster care, reproductive technology assistance).
- For those employers with strongly held religious beliefs, consult with legal counsel to ensure any desired religious exclusions are met.

Employers should also remember that this decision permits more expansive benefit and nondiscrimination policies and practices than what federal or state law requires.

Plan sponsors and administrators should consult with their third-party administrators, insurance providers and legal advisors to confirm *Bostock*'s implications on their existing plan policies, procedures, participant notices and applicable plan documents.

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