

Election 2024: Gender-Affirming Care in the US

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In Depth

On the issue of gender-affirming care, how would a Harris-Walz administration affect clients in your practice?

Bottom line: A Harris-Walz administration would likely provide health plans and health plan sponsors with consistency and continuity, especially in the arena of gender-affirming care. It would continue the strides taken by the Biden-Harris administration toward reducing barriers to LGBTQI+ healthcare equity.

Added context:

Greg Fosheim, healthcare partner: Continued efforts would include defending the recently finalized Affordable Care Act (ACA) Section 1557 rules, which expanded the definition of “sex discrimination” to include gender identity and sexual orientation, against challenges and injunctions. They would also continue to intervene on behalf of families seeking access to gender-affirming care in the matter of *U.S. v. Skrametti*.

Sarah Raaij, EB partner: Many health plan sponsors have felt the whiplash of the ACA Section 1557 rules, which have been repeatedly issued and invalidated by courts since 2016, and the latest iteration is no different. Shortly after the recent final Section 1557 rules were issued, parts of the rules were successfully challenged, and now health plans are left to either voluntarily comply or risk potential future penalties.

Alden Bianchi, EB counsel: A Harris-Walz administration would likely stay the course on the enforcement of the ACA, which includes the law’s insurance market reforms (e.g., bar on preexisting

conditions and coverage of children to age 26, among other things).

How would a Trump-Vance administration affect clients in your practice?

Bottom line: It would be a dramatic change for health plans, as it would attempt to reduce many ACA protections, including the recent Section 1557 rules that broadly apply nondiscrimination provisions to most health plans. There would likely be a return to the limited interpretation of “sex discrimination” that the Trump-Pence administration adopted in 2020 (defining “sex discrimination” solely to reflect an individual’s sex assigned at birth), so health plans would not be subject to a federal mandate to cover gender-affirming care.

Added context:

Greg Fosheim: A Trump-Vance administration is also unlikely to continue intervening on behalf of families seeking gender-affirming care and would instead push to allow states to prohibit gender-affirming care for minors, similar to how access to reproductive health became a state-by-state decision after the *Dobbs* decision. This would result in a challenging patchwork of state laws for providers to navigate as parties travel across state lines or use telemedicine modalities to access gender-affirming care.

Sarah Raaii: For those reasons, we would expect to see an increased focus on travel benefits from plan sponsors that seek to continue providing coverage for gender-affirming care.

Alden Bianchi: A Trump-Vance administration would cut back on many of the ACA’s insurance reforms, which would result in the proliferation of sub-standard insurance products. While some cohort of employers might embrace these products to reduce costs, they would result in broad gaps in coverage, with the rank-and-file employees (among others) incurring substantial unreimbursed expenses.

With either administration, what should clients be most focused on from a regulatory and enforcement perspective?

Bottom line: Clients should continue efforts to comply with Section 1557 irrespective of the occupant of the Oval Office.

Added context:

Greg Fosheim: A Harris-Walz administration would continue the Biden-Harris administration’s uptick in investigating and entering into resolution agreements with entities that are noncompliant with healthcare nondiscrimination rules. But other than sex discrimination being defined to include sexual orientation and gender identity, Section 1557 has not been challenged or enjoined, and therefore the date for full compliance is rapidly approaching. Additionally, clients should be prepared to balance their duty to patients under Section 1557 with their duty to staff/workforce under rights of conscience laws should staff have a religious or moral objection to providing gender-affirming care.

Sarah Raaii: Gender-affirming care could create the same administrative and compliance challenges that health plans faced after the *Dobbs* decision (in determining whether and how to cover reproductive healthcare in multiple states). Health plans may again be forced to take a state-by-state approach to assessing risks associated with providing gender-affirming care, to the extent that the

Section 1557 rules are modified. ERISA preemption may not be a foolproof protection for health plans and company executives who oversee health plans, in light of state criminal laws that may target parties that assist others in receiving gender-affirming care, even when traveling out of state to obtain gender-affirming care legally.

Alden Bianchi: Additionally, clients should keep an eye on the mental health parity final regulations, recently issued by the Departments of Health & Human Services, Labor, and Treasury. The costs and complexity of compliance will prove daunting, perhaps even unmanageable (thereby resulting in widespread noncompliance). Equally worrisome is the anticipated coming wave of lawsuits against employers relating to the costs of their group health plan coverage.

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