

## Supreme Court Ruling – Title VII Nondiscrimination Rules

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The recent Supreme Court decision in *Bostock v. Clayton County* (6/15/2020) may require employers to reconsider who is eligible for, and what coverage is available under, employer-sponsored benefits. The Court held that Title VII protection against employment discrimination based on sex should extend to discrimination based on an individual's sexual orientation or gender identity.

### **Title VII – General Rule**

Title VII makes it “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.” Employer-sponsored health and welfare benefits are part of the employment package and therefore fall under the broad protection of Title VII.

### **Title VII – Protection Against Discrimination Based on “Sex”**

The recent Supreme Court ruling indicates that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because of their sexual orientation or gender identity, because “*homosexuality and transgender status are inextricably bound up with sex.*” The Supreme Court case considered several situations in which termination of employment based on both homosexuality and gender identity occurred, but the interpretation of “sex” is applicable for any employment discrimination that may be subject to Title VII, including an employer's benefit offering.

### **Employer-Sponsored Benefit Plan Considerations**

Employers should be careful that their benefits do not discriminate based on sex, which has now been interpreted to include sexual orientation and gender identity. There is no specific list of items or categories that must be covered, so there is no easy way to ensure there is no risk of discrimination under Title VII. However, a good starting point is for employers to consider whether their benefit plans provide the following:

- (i) Identical coverage for same-sex and opposite-sex spouses or domestic partners;
- (ii) Coverage for both medical/surgical benefits and mental health benefits related to gender dysphoria, gender reassignment surgery, hormone therapy, etc.; and
- (iii) Broad family planning coverage.

As employers are going through their next renewal, they should review their plan eligibility rules to ensure they aren't discriminatory. For example, consider the definition of eligible dependents. Then actual coverage should also be considered.

For fully-insured plans, the best approach may be to reach out to carriers and verify that they are considering these items in how plans are designed. It seems likely that most major carriers will adjust plan designs if needed to ensure that employers are not at risk of discrimination claims (even though the carriers are not directly liable), but that may not always be the case, and it may take some time for this to occur. While employers have very little control over carrier plan design, employers could consider changing carriers if their current plan(s) seem risky.

For self-funded plans, it is likely necessary to do a more thorough review of definitions, exclusions and limitations to understand if there is discrimination risk. One benefit of a self-funded plan is more flexibility in plan design, but because plan designs vary quite a bit, this review will have to be done on a plan-by-plan basis.

### **Summary**

There has been debate over the definition of “sex” for purposes of applying federal nondiscrimination rules for at least the last couple decades, including under ACA §1557 nondiscrimination rules, which the Trump administration recently interpreted as not necessarily including sexual orientation or gender identity. However,

with this Supreme Court decision, employers who choose to discriminate in employment, including via benefit offerings, based on sexual orientation or gender identity, risk a violation under Title VII.

Supreme Court Opinion - [https://www.supremecourt.gov/opinions/19pdf/17-1618\\_hfci.pdf](https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf).

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