MEMORANDUM

To: Plan Administrators

From: Transcend Legal

Date: October 4, 2019

Re: Liability for transgender health care exclusions in employer health plans

I. Excluding transgender-related health care is discriminatory.

Singling out transgender health care for exclusion is a form of discrimination. Just as it would be sex discrimination if a plan were to exclude all coverage for gynecological care, and it would be disability discrimination if a plan were to exclude all treatments for HIV, it is both sex and disability discrimination when a health plan carves out and excludes medically necessary care simply because it is for the purpose of treating gender dysphoria.

Transgender employees pay the same premiums as other employees yet receive unequal benefits in return. Employees who are transgender or have transgender dependents subsidize the health care of their co-workers yet are denied doctor-recommended care for themselves or their families.

Transgender-related care is medically necessary, and there is no legitimate, nondiscriminatory basis to single out transgender care for exclusion. It is precisely for that reason that insurance companies developed explicit exclusions for transgender-related care—because it would otherwise fall under standard surgical, mental health, physician, diagnostic, or pharmaceutical benefits. Transgender care is neither experimental nor cosmetic, and existing plan definitions of medical necessity are sufficient to ensure that only medically necessary services are provided.

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II. Plans that exclude transgender care have fallen behind other employer and government-run health plans.

Employers have increasingly removed transgender exclusions to meet the needs of their transgender employees, remain competitive in hiring,¹ win customers,⁴ and comply with nondiscrimination laws. Transgender-inclusive benefits are an important signal that customers and applicants rely on to assess a company’s commitment to diversity. As Julie Stich of the International Foundation of Employee Benefit Plans notes, “employers that lag behind are already paying the price in recruiting and retention. … When searching for meaningful employment, individuals look for employers with cultures that resonate. … Employers are seeking top talent, and offering an inclusive benefits package sets them apart from their competition.”⁵

In the Human Rights Campaign’s Corporate Equality Index 2018, over three-fourths (79%) of the businesses ranked—and over half of Fortune 500 businesses—offer transgender-inclusive health care coverage.⁶ Colleges and universities have also increasingly removed exclusions from student⁷ and staff⁸ plans.

The federal government prohibits categorical transgender exclusions in its

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¹ Sandra Cherub, Nevada to offer transgender health coverage starting July 1, Las Vegas Review-Journal, Jun. 17, 2015, http://www.reviewjournal.com/news/nevada/nevada-offer-transgender-health-coverage-starting-july-1 (“Jeffery Garofalo, a Las Vegas attorney and [Public Employee Benefits Program] board member, said the policy change is a positive step for Nevada. ‘I am grateful that our plan documents … are going to be in line with current and modern thinking and respectful of our society,’ Garofalo said. It sends a message, he said, that Nevada ‘is an enlightened and welcoming place.’”).


⁷ Campus Pride, Colleges and Universities that Cover Transition-Related Medical Expenses Under Student Health Insurance, https://www.campuspride.org/tpc/student-health-insurance (list not comprehensive).

⁸ Campus Pride, Colleges and Universities that Cover Transition-Related Medical Expenses Under Employee Health Insurance, https://www.campuspride.org/tpc/employee-health (list not comprehensive).
employee health plans. Medicare covers gender dysphoria treatments. At least 20 states have explicit coverage in their Medicaid plans for gender dysphoria treatments, and courts have repeatedly struck down blanket exclusions under Medicaid. Nineteen states and the District of Columbia have laws, regulations, or

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9 FEHB Program Carrier Letter No. 2015-12, Covered Benefits for Gender Transition Services (June 23, 2015), https://www.opm.gov/healthcare-insurance/healthcare/carriers/2015/2015-12.pdf (“no carrier participating in the Federal Employees Health Benefits Program may have a general exclusion of services, drugs or supplies related to gender transition or ‘sex transformations.’”).


12 E.g., Flack v. Wisconsin Dep’t of Health Servs., No. 18-CV-309-WMC, 2019 WL 3858297 (W.D. Wis. Aug. 16, 2019) (striking down Wisconsin Medicaid exclusion under § 1557 of the Affordable Care Act, Availability and Comparability Provisions of the Medicaid Act, and Equal Protection); Good v. Iowa Dep’t of Human Servs., No. CV055470 (Iowa Dist. Ct. Jun. 6, 2018) (striking down Iowa’s categorical Medicaid ban as discrimination under the Iowa Civil Rights Act and the Iowa Equal Protection Clause, as violative of privacy rights, and as unreasonable, arbitrary and capricious), aff’d Good v. Iowa Dep’t of Human Servs., 924 N.W.2d 853 (Iowa 2019) (holding that the exclusion discriminates against transgender Medicaid recipients in Iowa under the Iowa Civil Rights Act); Cruz v. Zucker, 195 F.Supp.3d 554, 571 (S.D.N.Y. 2016), on reconsideration, 218 F.Supp.3d 246 (S.D.N.Y. 2016), and appeal withdrawn, (Dec. 30, 2016) (finding that a categorical ban on medically necessary treatments for a specific diagnosis, gender dysphoria, violates the federal Medicaid Act’s Availability Provision); J. D. v. Lackner, 80 Cal. App. 3d 90, 95 (requiring coverage for transgender surgery under California’s Medicaid program); G.B. v. Lackner, 80 Cal. App. 3d 64, 71 (Cal. 1st Dist. 1978) (same); Doe v. State of Minn., Dep’t of Pub. Welfare, 257 N.W. 2d 816, 820 (Minn. 1977) (deeming the catetgoral denial of gender dysphoria to be arbitrary and capricious); Pinneke v. Preissler, 623 F.2d 546, 550 (8th Cir. 1980) (striking down Iowa’s Medicaid transgender exclusion, which “reflect[ed] inadequate solicitude for the applicant’s diagnosed condition, the treatment prescribed by the applicant’s physicians, and the accumulated knowledge of the medical community.”); Rush v. Parham, 625 F.2d 1150, 1157 n.12 (5th Cir. 1980) (observing that a categorical denial of healthcare simply “because it was transsexual surgery” would violate Medicaid laws); M.K. v. Div. Med. Assistance & Health Servs., 92 NJAR2d (DMA) 38, 1992 WL 280789 at *9 (N.J. Admin. 1992) (ordering
bullets that clarify that the exclusion of transgender-related care is prohibited under state and federal laws governing insurance.\footnote{See Transcend Legal, State Health Insurance Laws & Guidance, https://transcendlegal.org/state-health-insurance-laws-and-guidance (listing bulletins, regulations and statutes that prohibit exclusions).} The IRS has recognized treatment for gender dysphoria as medically necessary, tax-deductible care.\footnote{\textit{O’Donnabhain v. C.I.R.}, 134 T.C. 34, 61 (2010) recommendation regarding acq., 2011 WL 5198999 (Nov. 3, 2011), acq., 2011-47 I.R.B. 789 (November 21, 2011).} Courts have issued preliminary injunctions preventing the military from excluding transgender health care under the Equal Protection Clause.\footnote{\textit{Karnoski v. Trump}, No. C17-1297-MJP, 2018 WL 1784464, at *1 (W.D. Wash. Apr. 13, 2018) (order granting in part and denying in part motions for summary judgment) (applying strict scrutiny to transgender people as a protected class where defendants sought to deny transgender-related health care to military service members); \textit{Karnoski v. Trump}, No. C17-cv-1297-MJP, 2017 WL 6311305 at *7 (W.D. Wash. Dec. 11, 2017) (applying intermediate scrutiny to a policy of denying transgender-related health care to military service members and granting a preliminary injunction); \textit{Stone v. Trump}, 280 F.Supp.3d 747, 768 (D. Md. 2017) (applying intermediate scrutiny to transgender people as a quasi-suspect class to find that military personnel denied coverage for surgery have an Equal Protection claim).} Nine of the U.S. Courts of Appeals have concluded or assumed that severe gender dysphoria constitutes a “serious medical need.”\footnote{\textit{See Battista v. Clarke}, 645 F.3d 449, 455 (1st Cir. 2011) (finding that gender dysphoria can be extremely dangerous and upholding injunction requiring hormone therapy for inmate); \textit{Ciuco v. Morrisugu}, 222 F.3d 99, 106 (2d Cir. 2000) (assuming without deciding that gender dysphoria constitutes a serious medical need); \textit{De lonta}, 708 F.3d 520; \textit{Praylor v. Texas Dept. of Criminal Justice}, 430 F.3d 1208, 1209 (5th Cir. 2005) (assuming without deciding that gender dysphoria does present a serious medical need); \textit{Phillips v. Michigan Dept. of Corrections}, 731 F.Supp. 792, 800 (W.D. Mich. 1990), decision aff’d, 932 F.2d 969 (6th Cir. 1991) (upholding lower court finding that gender dysphoria presents a serious medical need and reaffirming injunction entitling inmate to hormone therapy); \textit{Meriwether v. Faulkener}, 821 F.2d 408, 411-13 (7th Cir. 1987) (holding that gender dysphoria presents a serious medical need and noting that sex reassignment surgery has been found to be a medical necessity for treatment of gender dysphoria rather than being a cosmetic surgery); \textit{Fields v. Smith}, 653 F.3d 550, 555 (7th Cir. 2011), cert. denied, 132 S. Ct. 1810 (U.S. 2012) (finding that gender dysphoria presents a serious medical need and that hormone therapy—not counseling—is the only effective treatment); \textit{White v. Farrier}, 849 F.2d 322, 325-27 (8th Cir. 1988) (acknowledging that gender dysphoria is a serious medical condition); \textit{Allard v. Gomez}, 9 Fed. Appx. 793, 794 (9th Cir. 2001) (finding it undisputed that gender dysphoria presents a serious medical need); \textit{Brown v. Zavaras}, 63 F.3d 967, 970 (10th Cir. 1995) (finding that gender dysphoria presents a medical need entitling inmate to treatment); \textit{Kothmann v. Rosario}, 558 Fed. Appx. 907 (11th Cir. 2014) (finding that gender dysphoria presents a serious medical need). \textit{See also Wolfe v. Horn}, 130 F.Supp.2d 648, 652 (E.D. Pa. 2001) (assuming without deciding that gender dysphoria presents a serious medical need).} Indeed, the medical necessity of transgender-related care is so well established that blanket exclusions in the prison coverage of genital reassignment surgery under NJ Medicaid).
context have repeatedly been found to be in violation of the Eighth Amendment’s prohibition on cruel and unusual punishment.\textsuperscript{17} And in the context of child custody cases, parents have been denied custody where they refuse to provide doctor-recommended transgender-related medical treatment.\textsuperscript{18} In short, there is no legitimate medical basis to deny coverage for transgender-related care.

Similarly, all major insurance companies currently recognize the medical necessity of treatment for gender dysphoria\textsuperscript{19} and administer plans that will cover such care. For example, Aetna’s gender dysphoria medical policy notes, “Aetna considers gender reassignment surgery medically necessary” when its clinical criteria are met.\textsuperscript{20} UnitedHealthcare’s policy similarly states that where the stated criteria are

\textsuperscript{17} E.g., \textit{Edmo v. Corizon, Inc.}, No. 19-35017, 2019 WL 3978329, at *30 (9th Cir. Aug. 23, 2019) (ordering gender-confirmation surgery as its denial was an Eighth Amendment violation and rejecting analysis in \textit{Gibson v. Collier}, 920 F.3d 212, 215 (5th Cir. 2019)); \textit{Fields v. Smith}, supra note 16 at 556 (striking down a Wisconsin statute that barred comprehensive transgender healthcare to prisoners as an Eighth Amendment violation, observing that there was no evidence that there are adequate alternative treatments for gender dysphoria that “reduces dysphoria and can prevent the severe emotional and physical harms associated with it.”); \textit{Hicklin v. Precythe}, No. 14:16-CV-01357-NCC (E.D. Mo. May 22, 2018) (striking down a blanket policy of denying hormone treatment to any prisoner who was not receiving hormone treatment prior to entering prison as a violation of the Eighth Amendment); \textit{Sonega v. Spencer}, 851 F.Supp.2d 228, 247 (D. Mass. 2012) (holding that a “blanket ban on certain types of treatment, without consideration of the medical requirements of individual inmates, is exactly the type of policy that was found to violate Eighth Amendment standards in other cases both in this district and in other circuits.”); \textit{De’lonta v. Johnson}, 708 F.3d 520 (4th Cir. 2013) (declining to dismiss an Eighth Amendment claim where the prison provided psychological counseling and hormones but not surgery); \textit{Norsworthy v. Beard}, 87 F.Supp.3d 1164 (N.D. Cal. 2015) (granting a preliminary injunction ordering genital reassignment surgery to be provided to an inmate who had been denied care based on a blanket exclusion); \textit{Brooks v. Berg}, 270 F.Supp.2d 302, 312 (N.D.N.Y 2003) \textit{vacated in part}, 289 F.Supp.2d 286 (N.D.N.Y. 2003) (finding a denial of care objectively unreasonable “[i]n light of the numerous cases which hold that prison officials may not deny transsexual inmates all medical attention, especially when this denial is not based on sound medical judgment”). \textit{Cf. Gibson v. Collier}, 920 F.3d 212, 221 (5th Cir. 2019) (declining to find a denial of gender reassignment surgery as an 8\textsuperscript{th} Amendment violation where the record contained only the WPATH Standards of Care).


\textsuperscript{19} \textsc{Transcend Legal, Transgender insurance medical policies}, https://transcendlegal.org/health-insurance-medical-policies (providing links to 135+ insurance company clinical guidelines on gender reassignment surgery and related treatments).

met, the procedures are “medically necessary and covered as a proven benefit.” 21

Such widespread coverage is unsurprising given that transgender-related care has been endorsed by all of the leading medical groups, including the following:

- American Medical Association
- American Psychiatric Association
- American Psychological Association
- American Academy of Child and Adolescent Psychiatry
- American Academy of Family Physicians
- American Academy of Nursing
- American Academy of Pediatrics
- American College of Nurse-Midwives
- American College of Obstetricians and Gynecologists
- American College of Physicians
- American Counseling Association
- American Osteopathic Association
- American Public Health Association
- American Society of Plastic Surgeons
- Endocrine Society
- National Association of Social Workers
- National Commission on Correctional Health Care
- Pediatric Endocrine Society Special Interest Group on Transgender Health
- World Medical Association
- World Professional Association for Transgender Health. 22

Globally, transgender-inclusive health care has long been standard in national health plans. Countries that publicly fund transgender-related surgeries include

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22 Transcend Legal, Medical organizations supporting transgender health care, https://transcendlegal.org/medical-organization-statements (listing 20 medical organizations that have endorsed transgender health care).
Argentina, 23 Brazil, 24 Canada, 25 Cuba, 26 Iran, 27 Japan, 28 and the following European countries: Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Malta, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom, 29 where a court found a blanket ban to be unlawful. 30 The Parliamentary Assembly of the Council of Europe also passed a resolution calling on member states to “make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible for transgender people, and ensure that they are reimbursed by public health insurance schemes.” 31 A commitment to transgender health care equality is


30 A. Jain & C. Bradbeer, Gender Identity Disorder: Treatment and Post-Transition Care in Transsexual Adults, 18 INT’L J. OF STD & AIDS 147, 149 (2007).

31 Parliamentary Assembly of the Council of Europe, Discrimination against transgender people in
also found under international human rights principles. ³²

The widespread coverage for and endorsement of transgender-related health care calls into question any professed justification for singling out this care for exclusion.

III. Cost is not a legitimate basis to exclude transgender care.

There is no legitimate reason to target transgender care—and transgender care only—for cost-saving purposes. All health care costs money, and there are far more widespread or expensive medical conditions that could be targeted—such as for preventative measures—if cost were truly the concern. ³³ Cost containment measures must instead be applied equally to all plan members and not single out treatment that is used exclusively by an historically marginalized population.

In reality, removing a transgender exclusion is cost-neutral or cost-saving. There is no actuarial basis to price transgender-related surgeries separately from any other type of surgery. ³⁴ A survey of employers found that two thirds of employers that provided information on actual costs of employee utilization of gender dysphoria

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³² The Yogyakarta Principles are an authoritative statement under international human rights law of the rights of persons of diverse sexual orientations and gender identities. They provide that “[e]veryone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of … gender identity.” The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 22 (2006), http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf. Further, states shall “[e]nsure that gender affirming healthcare is provided by the public health system or, if not so provided, that the costs are covered or reimbursable under private and public health insurance schemes.” Id. at 20.

³³ The North Carolina state employee health plan has identified the top high-cost treatments as “diabetes, cancers, cardiology, orthopedics, and rheumatology.” The other “biggest cost drivers” are inflation and utilization of specialty drugs. Dee Jones and Beth Horner, The North Carolina State Health Plan for Teachers and State Employees: Strategies in Creating Financial Stability While Improving Member Health, 79 NORTH CAROLINA MEDICAL J. 56, 57, 59 (2018).

³⁴ The City and County of San Francisco initially raised premiums when it became the first major U.S. employer to remove blanket exclusions for transgender-related care in 2001. But after five years, “beneficial cost data led Kaiser and Blue Shield to no longer separately rate and price the transgender benefit—in other words, to treat the benefit the same as other medical procedures such as gall bladder removal or heart surgery.” City and County of San Francisco and San Francisco Human Rights Commission, San Francisco City and County Transgender Health Benefit (Aug. 7, 2007), https://transcendlegal.org/sites/default/files/uploads/SF_transgender_healthBenefit.pdf.
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coverage reported zero costs.\textsuperscript{35} An analysis of the utilization of transgender-related care over 6.5 years in one California health plan found a utilization rate of 0.062 per 1000 covered persons.\textsuperscript{36} Estimates from other state health plans show equally low costs with North Carolina estimating 0.011% to 0.027% of premium,\textsuperscript{37} in Alaska, 0.03% to 0.05%,\textsuperscript{38} and in Wisconsin the costs at worse were “immaterial at 0.1% to 0.2% of the total cost.”\textsuperscript{39} Cost estimates under Wisconsin Medicaid were “actuarially immaterial as they are equal to approximately 0.008% to 0.03%” of Wisconsin’s share of its Medicaid budget.\textsuperscript{40} An analysis in the military context concluded that the financial cost was “too low to matter”\textsuperscript{41} or as military leadership noted, “‘budget dust,’ hardly even a rounding error.”\textsuperscript{42} This is because only a small percentage of the population is transgender\textsuperscript{43} and not all transgender individuals undergo all available treatments.

\textsuperscript{35} Jody L. Herman, The Williams Inst., \textit{Costs and benefits of providing transition-related health care coverage in employee health benefits plans: findings from a survey of employers}, 2 (2013), \url{https://escholarship.org/uc/item/5z38157s}.


\textsuperscript{38} Plaintiffs’ Motion for Partial Summary Judgment, Fletcher v. Alaska, No. 1:18-cv-00007-HRH (D. Alaska July 1, 2019), ECF No. 28.

\textsuperscript{39} \textit{Boyd v. Conlin}, 341 F.Supp.3d 979, 1000 (W.D. Wis. 2018).

\textsuperscript{40} Flack \textit{v. Wisconsin Dep’t of Health Servs.}, No. 18-CV-309-WMC, 2019 WL 3858297, at *5 (W.D. Wis. Aug. 16, 2019). See also \textit{Good v. Iowa Dep’t of Human Servs.}, Nos. CVCV054956, CVCV055470, slip op. at 27, 29 (Iowa Dist. Ct. Jun. 6, 2018) (rejecting cost argument under Equal Protection analysis).

\textsuperscript{41} Aaron Belkin, \textit{Caring for Our Transgender Troops—The Negligible Cost of Transition-Related Care}, 373 NEW ENGLAND J. OF MED. 1089, 1092 (2015).


\textsuperscript{43} Transgender people comprise about 0.6% of the population. Jan Hoffman, \textit{Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults}, N.Y. TIMES, June 30, 2016, \url{https://www.nytimes.com/2016/07/01/health/transgender-population.html}; Cal. Economic Impact Assessment, \textit{supra} note 36, 2 (concluding that requiring equal benefits for transgender people “will have an immaterial impact on extra demands for treatments, because of the low prevalence of the impacted population.”).
In contrast, the exclusion of transgender-related health care services likely causes increased health care costs because of the catastrophic costs resulting from untreated gender dysphoria and co-morbidities such as anxiety, alcohol and drug abuse, incidence of HIV, depression and suicide attempts. There is a reduction in suicide attempts and the need for mental health care post-surgery. As one study concluded, “[w]hile justice, legality, and a desire to avoid discrimination should drive decisions about benefit coverage, this case for the transgender population also appears economically attractive.”

IV. Federal nondiscrimination law prohibits transgender exclusions in employee health plans.

   A. Americans with Disabilities Act – Disability discrimination

Excluding treatments for gender dysphoria is discrimination under the Americans with Disabilities Act (ADA). Courts have found people with gender dysphoria to be protected under the ADA in the context of both public accommodations and employment. This is also the position of the U.S. Department of Justice.

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47 Iglesias v. True, No. 19-CV-00415-JPG, 2019 WL 3340652, at *4 (S.D. Ill. July 25, 2019) (allowing an incarcerated transgender woman’s gender dysphoria-based Rehabilitation Act claim to proceed); Doe v. Mass. Dep’t of Correction, No. 1:17-cv-12255-RGS, 2018 WL 2994403 at *6-8 (D. Mass. June 14, 2018) (drawing a distinction between gender identity disorder and gender dysphoria and suggesting that there may be a physical etiology underlying gender dysphoria sufficient to take it out of “not resulting from physical impairments” category); Edmo v. Idaho Dep’t of Correction, No. 1:17-CV-00151-BLW, 2018 WL 2745898, at *8 (D. Idaho June 7, 2018) (declining to dismiss Title II claim because whether plaintiff’s “diagnosis falls under a specific exclusion of the ADA presents a genuine dispute of material fact in this case.”).

48 Blatt v. Cabela’s Retail, Inc., No. 5:14-CV-04822-JFL, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017) (gender dysphoria resulting in substantial limits on major life activities is encompassed within the protections of the ADA, and does not fall within the exemption under § 12211 regarding the now-deprecated diagnosis of “gender identity disorder”).

ADA prohibits employers from discriminating on the basis of disability in the provision of health insurance to their employees and dependents whether or not the benefits are administered by the employer. Insurance companies may be held liable under Title I and Title III for administering discriminatory plans.


50 42 U.S.C. § 12112(a); 29 C.F.R. § 1630.4(a)(vi) (prohibiting disability discrimination with respect to all terms, conditions, and privileges of employment including “[f]ringe benefits available by virtue of employment, whether or not administered by the covered entity”).

51 29 C.F.R. § 1630.8 (“It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.”); See also Polifko v. Office of Personnel Management, EEOC Request No. 05940611 (Jan. 4, 1995) (holding that, based on the association provision of the ADA and the Commission’s “Interim Guidance on Application of ADA to Health Insurance,” Complainant had standing to bring a claim of discrimination on the basis of his relationship with his wife, an individual with a disability, who had been denied specific treatment for breast cancer by an insurance carrier); Polifko v. Office of Personnel Management (OPM), EEOC Appeal No. 01960976 (April 3, 1997), request for reconsideration denied, EEOC Request No. 05970769 (January 23, 1998) (finding a disability-based exclusion was unlawful).

52 The EEOC and numerous courts have concluded that insurance companies may be considered “agents” of employers and therefore “covered entities” for purposes of the ADA. Compare EEOC Compliance Manual, No. 915.003, 2-III(B)(2)(b)(2000), https://www.eeoc.gov/policy/docs/threshold.html (citing Carparts) (stating that “an insurance company that provides discriminatory benefits to the employees of a law firm may be liable under the EEO statutes as the law firm’s agent”), with e.g., Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc., 37 F.3d 12, 17 (1st Cir. 1994) (holding that insurance company could be considered a covered entity for purposes of ADA if, inter alia, it “act[s] on behalf of the entity in the matter of providing and administering employee health benefits”); accord. Spirt v. Teachers Ins. & Annuity Ass’n, 691 F.2d 1054, 1063 (2d Cir. 1982), vacated and remanded sub nom. Long Island Univ. v. Spirt, 463 U.S. 1223 (1983), reinstated on remand, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881 (1984) (Title VII); Graf v. K-Mart Corp., No. 88-1254, 1989 WL 407247, at *2-4 (W.D. Pa. Aug. 28, 1989) (Title VII); United States v. State of Illinois, 3 A.D. Cases 1157, 1994 WL 562180, at *2 (N.D. Ill. 1994) (“There is no express requirement that the covered entity be an employer of the qualified individual.”). These authorities make clear that, when an insurer provides discriminatory benefits policies or model policies that affect the compensation, terms, conditions or privileges of employment, the insurer or third-party administrator can be held liable under the ADA for its own discriminatory policies carried out within the agency relationship that it has with the employer.

53 E.g., Fletcher v. Tufts University, 367 F.Supp.2d 99, 115 (D. Mass. 2005) (denying motion to dismiss and holding that employee of Tufts University could sue the Metropolitan Life...
Accordingly, an exclusion for treatment of gender dysphoria, which has no nondiscriminatory basis, would be an unlawful disability-based exclusion.

Such diagnosis-based exclusions are anomalous, because singling out a particular disability for exclusion of coverage is an unlawful disability-based distinction. Thus plans do not exclude, for example, all treatments related to diabetes, HIV, or any other specific medical condition. Courts have ruled that categorical exclusions of conditions other than gender dysphoria—such as “developmental disabilities” that excluded all autism treatment—also violate the ADA absent a non-discriminatory actuarial justification.

Covering only non-medical treatment of gender dysphoria would not correct the discrimination here, because psychotherapy alone cannot resolve gender dysphoria. Most people diagnosed with gender dysphoria need to undergo


54 EEOC COMPLIANCE MANUAL, supra note 1, Disability-Based Distinctions https://www.eeoc.gov/policy/docs/benefits.html#II.%20Equal%20Benefits%20(ADA) (noting that singling out a particular disability for exclusion of coverage is an unlawful disability-based distinction).


56 See, e.g., In re Heilig, 816 A.2d 68, 78 (Md. 2003) (“Although psychotherapy may help the transsexual deal with the psychological difficulties of transsexualism, courts have recognized that psychotherapy is not a ‘cure’ for transsexualism. Because transsexualism is universally recognized as inherent, rather than chosen, psychotherapy will never succeed in ‘curing’ the patient.”); Sommers v. Iowa Civil Rights Comm’n, 337 N.W.2d 470, 473 (Iowa 1983) (“It is generally agreed that transsexualism is irreversible and can only be treated with surgery to remove some of the transsexual feelings of psychological distress; psychotherapy is ineffective.”); Doe v. McConn, 489 F.Supp. 76, 77 (S.D. Tex. 1980) (making a factual finding that “[t]reatment of this condition in adults by psychotherapy alone has been futile” and that “[a]dministration of hormones of the opposite sex followed by sex-conversion operations has resulted in better emotional and social adjustment by the transsexual individual in the majority of cases.” Because transsexualism is not a “choice,” “it has been found that attempts to treat the true adult transsexual psychotherapeutically have consistently met with failure.”); Richards v. U.S. Tennis Ass’n, 400 N.Y.S. 2d 267, 271 (N.Y. Sup. Ct. 1977) (“Medical Science has not found any organic cause or cure (other than sex reassignment surgery and hormone therapy) for transsexualism, nor has psychotherapy been successful in altering the transsexual’s identification with the other sex or his desire for surgical change.”); Doe v. State of Minn., Dep’t of Pub. Welfare, 257 N.W. 2d 816, 819 (Minn. 1977) (“Given the fact that the roots of
medical treatments to alleviate their symptoms. In the Medicaid context, courts have repeatedly found that categorical exclusions of transgender-related medical care are arbitrary and unlawful diagnosis-based exclusions,57 and the same would be true for gender dysphoria exclusions.

B. Section 504 of the Rehabilitation Act – disability discrimination

Similarly, for entities receiving federal funding, Section 504 of the Rehabilitation Act of 1973 also prohibits disability discrimination, and by the same logic diagnosis-based exclusions. Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”58 Under Section 504, a “program or activity receiving Federal financial assistance” includes “a department, agency, special purpose district, or other instrumentality of a State or of a local government,” “a college, university, or other postsecondary institution, or a public system of higher education,” or “an entire corporation, partnership, or other private organization,” which receives federal funds or “[a]ny other thing of value by way of grant, loan, contract or cooperative agreement.”59

C. Title VII – Sex discrimination

A transgender-related care exclusion is also unlawful sex discrimination. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”60 An employer is

transsexualism are generally implanted early in life, the consensus of medical literature is that psychoanalysis is not a successful mode of treatment for the adult transsexual.”).

57 Cruz, supra note 12, at 571 (rejecting categorical transgender care ban under NY Medicaid); Pinneke, supra note 12, at 549 (finding “a state plan absolutely excluding the only available treatment known at this stage of the art for a particular condition must be considered an arbitrary denial of benefits based solely on the ‘diagnosis, type of illness, or condition.'”); Rush, supra note 12, at 1157 (“We caution, however, that if defendants simply denied payment for the proposed surgery because it was transsexual surgery, Georgia should now be required to pay for the operation, since a ‘state may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . solely because of the diagnosis, type of illness, or condition.’”); Doe v. State of Minn., supra note 12, at 820 (“The total exclusion of transsexual surgery from eligibility for M.A. benefits is directly related to the type of treatment involved and, therefore, is in direct contravention of the aforesaid regulation.”).


60 42 U.S.C. § 2000e-2(a)(1); Newport News Shipbldg. & Dry Dock v. EEOC, 462 U.S. 669, 682 (1983) (“Health insurance and other fringe benefits are ‘compensation, terms, conditions, or privileges of employment.’”)).
liable for discriminatory conduct by a third-party administrator, even if the discriminatory terms and coverage determinations are made by or influenced by a third-party administrator.\textsuperscript{61} Third-party administrators are also liable as agents under Title VII, especially where they recommend inclusions and exclusions,\textsuperscript{62} which could include providing a model plan with an exclusion.

Excluding treatments that change sex is inherently discrimination because of sex. No reasonable interpretation of “sex” under Title VII could exclude the very physical characteristics that—along with the brain—comprise and define one’s sex, i.e., hormone levels, genital appearance, reproductive organs, and secondary sex characteristics such as breasts.\textsuperscript{63} Under Title VII, an employer could not fire a woman for not having a uterus or require all men to have a certain level of testosterone. Similarly, it would be discriminatory to offer an insurance policy that prohibited coverage for services associated with one sex, such as hysterectomies or prostate exams.

By the same token, a policy of prohibiting coverage for treatments that change sex characteristics is facially discrimination “because of sex.”\textsuperscript{64} A hysterectomy, for example, is covered for treating myriad conditions such as endometriosis. But where medically necessary hysterectomies are excluded only when the purpose of the surgery is to change sex characteristics, this is a sex-based exclusion.\textsuperscript{65}

By excluding coverage for transgender-related surgical care, an employer is in effect dictating the very configuration of an employee’s physical sex.

\textsuperscript{61} \textit{Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris}, 463 US 1073, 1090-91 (1983) (“It would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe-benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis. An employer who confronts such a situation must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all.”).

\textsuperscript{62} \textit{Boyden v. Conlin}, 341 F.Supp.3d 979, 997-98 (W.D. Wisc. Sept. 18, 2018) (finding government agencies that determine benefits to be agents of the direct employer and subject to Title VII).

\textsuperscript{63} See, e.g., Julie A. Greenberg & Marybeth Herald, \textit{You Can’t Take it With You: Constitutional Consequences of Interstate Gender Identity Ruling}s, 80 Wash. L. Rev. 819, 825-26 (2005) (discussing eight factors that contribute to a person’s sex, including gender identity); Dru M. Levasseur, \textit{Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights}, 39 Vt. L. Rev. 943, 951, 951 n.36 (2015).

\textsuperscript{64} See \textit{Schroer v. Billington}, 577 F.Supp.2d 293, 306-08 (D.D.C. 2008) (noting that “the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination ‘because of ... sex.’”).

\textsuperscript{65} Viewed another way, an employee may have a hysterectomy covered under employee benefits only if the sex of that individual is female. If the individual is currently or is seeking to be recognized as male, then the surgery will be excluded \textit{because of} that employee’s sex.
characteristics—in contradiction to the recommendations of that individual’s physician—for no other reason than that the employer has an unlawful preference regarding its employees’ anatomy, such as whether an employee has female breasts, a penis, or a vagina. 66 The employer’s specific discomfort with medical treatment because it deliberately changes sex characteristics from one sex to another is impermissible sex discrimination—in the same way that adverse employment action against an employee changing from one religion to each other is impermissible religious discrimination. 67 As the Sixth Circuit notes, “[g]ender (or sex) is not being treated as ‘irrelevant to employment decisions’ if an employee’s attempt or desire to change his or her sex leads to an adverse employment decision” 68—in this case, the decision to not provide equal compensation under the health plan.

Separately, viewed under a sex stereotyping framework, transgender people do not conform with the core sex stereotype, namely that people born with “male” sex organs are men and people born with “female” sex organs are women. The Sixth Circuit notes, “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.” 69 This is a much more basic form of sex stereotyping than has already been widely recognized under Price Waterhouse and its progeny. Common procedures such as hysterectomy, oophorectomy, mastectomy, vaginectomy, orchiectomy, and penectomy all change genital sex characteristics. But those procedures are covered for employees so long as they are not performed for the purpose of changing sex characteristics from one sex to another. That is, they are covered as long as the individual does not challenge the sex stereotype that genitals at birth are the sole and permanent determinant of one’s sex and gender.

Finally, it is well-settled law that transgender discrimination is prohibited under


67 Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574 (6th Cir. 2018), cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019); Schroer, 577 F. Supp. 2d at 306. See also Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989) (noting that “once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.”).

68 Harris Funeral Homes, 884 F.3d at 574.

69 Id. at 576.
Liability for transgender health care exclusions

Title VII. 70 A robust body of case law holds that discriminatory treatment of transgender individuals is unlawful sex discrimination. 71 In 2012, the Equal Employment Opportunity Commission (EEOC) held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII.” 72 As the Sixth Circuit put it, “[h]ecause an employer cannot discriminate against an employee for being transgender without considering that employee’s biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex.” 73 Federal courts, including the First, Sixth, Seventh, Eighth, Ninth, Eleventh and D.C. Circuits explicitly or implicitly agree that discrimination against transgender people is actionable sex discrimination. 74 The Third and Tenth Circuits have assumed that a sex

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70 An assertion that the statute prohibits only prohibits discrimination against “men because they are male or women because they are female” is not in accordance with the plain language of the statute. Title VII prohibits discrimination because of “sex” not “the status of being either male or female.”


73 R.G. & G.R. Harris Funeral Homes, supra note 68, at 19.

74 See Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (recognizing claim for sex discrimination under Equal Credit Opportunity Act, analogizing to Title VII); R.G. & G.R. Harris Funeral Homes, supra note 68 at 14 (holding “that discrimination on the basis of transgender and transitioning status violates Title VII); Smith v. City of Salem, 378 F.3d 566, 574-75 (6th Cir. 2004) (“Price Waterhouse…does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is transsexual.”); Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (upholding a Title VII sexual orientation discrimination claim and implicitly rejecting Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984)); Hunter v. United Parcel Serv., 697 F.3d 697, 702 (8th Cir. 2012) (evaluating a transgender man’s Title VII claim “based on his non-conformity to gender stereotypes or his being perceived as transgendered”); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (relying on Title VII cases to conclude that violence against a transgender woman was violence because of gender under the Gender Motivated Violence Act); Chavez v. Credit Nation Auto Sales, 641 F.App’x 883, 883 (11th Cir. 2016) (“Sex discrimination includes discrimination against a transgender person for gender nonconformity.”) (citing Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011)); Schroer v. Billington, 577 F.Supp.2d 293, 306-08 (D.D.C. 2008).
stereotyping claim is available to transgender plaintiffs. Furthermore, dozens of district courts—both within and outside of the circuits that have explicitly recognized sex discrimination claims by transgender people—have found that anti-transgender discrimination is unlawful sex discrimination. In 2017, a jury awarded a $1.1 million verdict to a transgender professor after it found her employer’s discrimination based on her transgender status violated Title VII. The court had previously declined to dismiss a hostile work environment claim based in part on the university’s health plan, which contained a transgender exclusion.

75 See Stacy v. LSI Corp., 544 F. App’x 93, 97-98 (3d Cir. 2013); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007). Additionally, the Second Circuit’s reasoning in Zarda v. Altitude Express, recognizing sexual orientation discrimination as sex discrimination under Title VII, would apply equally to recognizing transgender discrimination as sex discrimination. Zarda v. Altitude Express, Inc., 883 F.3d 100, 115 (2d Cir. 2018), cert. granted sub nom. Altitude Exp., Inc. v. Zarda, No. 17-1623, 2019 WL 1756678 (U.S. Apr. 22, 2019) (finding both that sexual orientation discrimination is a function of sex and that heterosexuality is a core sex stereotype to which gay employees do not conform); see also Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 200-01 (2d Cir. 2017) (per curiam) (holding that a plaintiff had stated a plausible Title VII claim based on a gender stereotyping theory).


78 United States v. Se. Oklahoma State Univ., No. 5:15-cv-00324, 2015 WL 4606079 (W.D. Okla.)
Considering this widespread acceptance that transgender-based discrimination is prohibited under the category of sex, it is no longer viable to argue that transgender people are not protected under Title VII. When Saks Fifth Avenue attempted to argue this in a motion to dismiss, the Human Rights Campaign publicly suspended Saks’s ranking on its Corporate Equality Index. The Attorney General of New York announced that it would investigate Saks. On the day that the Department of Justice chose to weigh in and file a statement of interest, Saks withdrew its motion to dismiss and subsequently settled the case.

The EEOC has obtained $21.3 million in settlements and awards on behalf of LGBT claimants bringing sex discrimination claims over the past five years, and has filed numerous cases for LGBT charging parties in federal court. As employer-defense counsel have concluded, “Based on litigation and conciliation activity, the EEOC’s stance on benefits for transgender employees appears to be that partial or categorical exclusions for otherwise medically necessary care solely on the basis of sex, including transgender status and gender dysphoria, violates

July 10, 2015).


Title VII.”

D. Title IX – Sex Discrimination

Education programs receiving federal funding are prohibited from discriminating on the basis of sex, including in employment, compensation, and fringe benefits. Discriminating in the provision of benefits on the basis that the care sought is intended to change sex characteristics is inherently sex discrimination. As is the case with other federal nondiscrimination statutes described above, courts


87 34 C.F.R. § 106.51(a)(1) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment … under any education program or activity operated by a recipient which receives Federal financial assistance.”).

88 34 C.F.R. § 106.54 (“A recipient shall not make or enforce any policy or practice which, on the basis of sex: (a) Makes distinctions in rates of pay or other compensation.”).

89 34 C.F.R. § 106.56(b) (“A recipient shall not: (1) Discriminate on the basis of sex with regard to making fringe benefits available to employees.”); 34 C.F.R. § 106.51(a)(3) (“A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with … organizations providing or administering fringe benefits to employees of the recipient.”); 34 C.F.R. § 106.51(b)(7) (applying employment discrimination protections to “[f]ringe benefits available by virtue of employment, whether or not administered by the recipient”).

have generally recognized discrimination based on transgender status to be covered under Title IX’s prohibition.\textsuperscript{91} Cases to the contrary are readily distinguished.\textsuperscript{92}

\section*{E. Duty of Fair Representation}

Unions have a duty to fairly represent all employees in the bargaining unit.\textsuperscript{93} This duty of fair representation (DFR) obligates a union to serve the interests of all members “without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”\textsuperscript{94} The DFR governs union conduct in the negotiation\textsuperscript{95} and administration\textsuperscript{96} of collective bargaining agreements. Demonstrating “that the union’s actions or omissions during the grievance process were arbitrary, discriminatory, or in bad faith” proves

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\item \textsuperscript{92} \textit{Johnston v. Univ. of Pittsburgh}, 97 F.Supp.3d 657 (W.D. Pa. Mar. 31, 2015) (relying on outdated precedent to hold that Title IX does not prohibit discrimination based on gender identity or transgender status per se); \textit{Texas v. United States}, 201 F.Supp.3d 810 (N.D. Tex. Aug. 21, 2016) (finding in a preliminary injunction that Title IX permitted bathrooms to be separated by biological sex in light of specific regulations under Title IX).

\item \textsuperscript{93} This arises separately from federal common law and § 8(b)(1)(A) of the National Labor Relations Act.

\item \textsuperscript{94} \textit{Vaca v. Sipes}, 386 U.S. 171, 177 (1967).


\item \textsuperscript{96} \textit{See Vaca}, 386 U.S. at 177–78 (statutory duty of fair representation in administering collective bargaining agreement); \textit{Conley v. Gibson}, 355 U.S. 41, 45–46 (1957) (same).
a breach of the DFR. More specifically, discrimination against a worker for being transgender states a claim of breach of the DFR. Unions therefore have an obligation to ensure that welfare plans provide non-discriminatory benefits to transgender workers, and the presence of a discriminatory exclusion constitutes a breach of the DFR.

F. Executive Order (EO) 11246

A transgender exclusion is prohibited under Executive Order (EO) 11246, as amended by EO 13672. Federal contractors are prohibited from discriminating against employees on the basis of transgender status. The Department of Labor’s Employment Standards Administration’s Office of Federal Contract Compliance Programs (OFCCP) enforces EO 11246 and is accepting complaints based on sex and gender identity. OFCCP specifically notes that “trans-exclusive health benefits offerings may constitute unlawful discrimination.” OFCCP states, “an explicit, categorical exclusion of coverage for all care related to gender dysphoria or gender transition is facially discriminatory because such an exclusion singles out services and treatments for individuals on the basis of their gender identity or transgender status, which violates EO 11246’s prohibitions on both sex and gender


98 Fowlkes v. Ironworkers Local 40, 790 F.3d 378, 388–89 (2d Cir. 2015) (recognizing DFR claim of transgender ironworker who “alleg[ed] that the union refused to refer him for work for which he was qualified because of his transgender status”).


100 41 C.F.R. § 60-20.2(a) (“It is unlawful for a contractor to discriminate against any employee or applicant for employment because of sex. The term sex includes … gender identity; transgender status; and sex stereotyping.”); 41 C.F.R. § 60-20.7(b) (listing “[a]dverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status” as an example unlawful discrimination based on sex-based stereotypes); 41 C.F.R. § 60-20.2(14) (contractors may not treat employees adversely “because they have received, are receiving or are planning to receive transition-related medical services designed to facilitate the adoption of a sex or gender other than the individual’s designated sex at birth.”); Contractors are prohibited from engaging in “[a]dverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status including discrimination in “rates of pay or other forms of compensation” 41 C.F.R. § 60-1.4 or in fringe benefits because of sex. 41 C.F.R. § 60-20.6).


identity discrimination.”

A contractor in violation of EO 11246 may have its contracts canceled, terminated, or suspended in whole or in part, and the contractor may be debarred, i.e., declared ineligible for future government contracts. Despite its decision to rescind a number of transgender-related protections, the current administration has left EO 11246 and EO 13672 in place and has indicated its intent to continue to enforce them.

G. Section 1557 of the Affordable Care Act prohibits insurance companies from administering a plan with a transgender exclusion.

Section 1557 of the Patient Protection and Affordable Care Act (ACA) prohibits sex and disability discrimination in health programs or activities that receive federal financial assistance. Additionally, covered entities that are principally engaged in providing health services are liable for violations of § 1557 in their employee health plans.

Section 1557 has been in force since the passage of the ACA in March 2010 and includes a private right of action. Courts have and continue to find that § 1557

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104 41 C.F.R. § 60-1.4(a).


107 42 U.S.C. 18116(a); 45 C.F.R. § 92.207(a) (“A covered entity shall not, in providing or administering health-related insurance or other health-related coverage, discriminate on the basis of … sex, age, or disability.”).

108 45 C.F.R. § 92.208(a) (“A covered entity that provides an employee health benefit program to its employees and/or their dependents shall be liable for violations of this part in that employee health benefit program only when: …The entity is principally engaged in providing or administering health services, health insurance coverage, or other health coverage”).

Liability for transgender health care exclusions

...itself—independent of any regulation—protects transgender individuals from discrimination in health care in general, and that transgender insurance exclusions in particular trigger sex discrimination protections under § 1557. To the extent that a court may look to Title IX to interpret § 1557, courts have generally recognized discrimination based on transgender status to be covered under Title IX as detailed above.

Additionally, under the Department of Health and Human Services’ Office of Civil Rights’ (OCR) 2016 implementing regulations, discriminatory denials of coverage—including categorical exclusions—for treatments related to gender transition are explicitly prohibited.

Finally, the statute and regulations wholly separately prohibit claim denials and “benefit designs that discriminate on the basis of … disability.”

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References:

110 Rumble, supra note 109, at *2; Prescott v. Rady Children’s Hospital–San Diego, 265 F.Supp.3d 1090, 1099 (S.D. Cal. Sept. 27, 2017) (“Because Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex, the Court interprets the ACA to afford the same protections.”).

111 Cruz v. Zucker, 116 F.Supp.3d 334, 348 (S.D.N.Y. 2015) (entertaining a sex discrimination claim for transgender people under Medicaid); Flack, supra note 109, at 25 (granting a preliminary injunction barring enforcement of Wisconsin Medicaid’s transgender exclusion because such an exclusion denies surgery on the basis of sex in violation of § 1557); Flack supra note 12, at *10 (granting summary judgment because transgender exclusion discriminates on the basis of sex in violation of § 1557); Boyden v. Conlin, 341 F.Supp.3d 979, 997 (W.D. Wisc. 2018) (applying § 1557 to Wisconsin state employee health plan); Tovar v. Essentia Health, 342 F.Supp.3d 947, 954 (D. Minn. 2018) (holding that employer and third-party administrator may be held liable for administering a self-funded plan containing an exclusion for “gender reassignment” treatment).

112 See 42 U.S.C. § 18116; 45 C.F.R. § 92.207(b) (providing that a covered entity shall not “[h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition”). While OCR is presently enjoined under Franciscan Alliance v. Azar from enforcing limited portions of its regulations and it is reviewing the regulations, Dep’t of Health and Human Services, Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846-27895 (June 14, 2019), that injunction is not applicable here. It only applies to government enforcement and is expressly limited to the “prohibition against discrimination on the basis of gender identity.” Franciscan Alliance, Inc. v. Burwell, 227 F.Supp.3d 660, 695 (N.D. Tex. 2016) (“Only the Rule’s command this Court finds is contrary to law and exceeds statutory authority—the prohibition of discrimination on the basis of “gender identity” and “termination of pregnancy”—is hereby enjoined.”). Prohibitions against discrimination on the basis of sex and disability are still enforceable by OCR.

113 45 C.F.R. § 92.207.
Liability for transgender health care exclusions

protections are independent of sex-based protections and, as outlined in the ADA section above, prohibit categorical gender dysphoria exclusions.

V. The Federal Equal Protection Clause prohibits transgender exclusions.

Finally, for government employers, the disparate treatment of transgender employees raises issues under the federal Equal Protection Clause. Because only transgender people need treatments that change sex characteristics for the purpose of treating gender dysphoria, the exclusion unlawfully targets transgender people, who receive unequal benefits.

As detailed above, there is no rational basis to single out and exclude transgender care over any other type of medically necessary care. Nor is lack of medical necessity a basis for the exclusion—health plans already contain a separate exclusion for any non-medically necessary treatment. The inevitable inference is that the exclusion solely exists due to animus toward transgender people and the medical treatment they need. Animus-based classifications are not legitimate bases for government classification and do not withstand rational basis review. For example, courts have issued preliminary injunctions preventing the military from excluding transgender health care under the Equal Protection Clause, and a Minnesota court found a categorical exclusion under Medicaid to be a violation of Minnesota’s equal protection clause.

Furthermore, a transgender exclusion is subject to intermediate scrutiny. Courts have found that because transgender people are a quasi-suspect class.

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114 Romer v. Evans, 517 U.S. 620, 634-35 (1996); U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (“a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).


117 See, e.g., Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019) (applying “something more
Transgender people have been regarded as a quasi-suspect class because (1) they “have immutable and distinguishing characteristics that make them a discernable class;” (2) “[a]s a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination;” (3) there is no “evidence suggesting that being transgender in any way limits one’s ability to contribute to society;” and (4) “transgender people as a group represent a very small subset of society lacking the sort of political power other groups might harness to protect themselves from discrimination.”

This applies to transgender people as a class regardless of whether the action in question constitutes discrimination under Title VII on the basis of sex or disability. Transgender discrimination has also been widely regarded as an unconstitutional sex-based classification triggering intermediate scrutiny.\(^{119}\)


Under intermediate scrutiny, the government must demonstrate an “exceedingly persuasive justification” for its actions.\textsuperscript{120} “The burden of justification is demanding and it rests entirely on” the government.\textsuperscript{121} The government “must show ‘at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’”\textsuperscript{122} “The justification must be genuine, not hypothesized or invented \textit{post hoc} in response to litigation.”\textsuperscript{123} “And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,”\textsuperscript{124} such as that it is inappropriate to change sex characteristics from one sex to the other. Because there is no important government interest in ensuring that employees do not physically change their sex characteristics in order to treat a medical condition, the transgender exclusion will be struck down under intermediate scrutiny.

VI. Recent and ongoing cases involving transgender exclusions in employer-sponsored health plans.


Exclusion of trans health care in the State of Wisconsin employee health plan violated Title VII, § 1557 and Equal Protection. Just prior to the ruling, noting that the “legal landscape” had changed, the Wisconsin Group Insurance Board then voted to voluntarily remove the exclusion.\textsuperscript{125}

A jury issued a $780,000 verdict for the plaintiffs, including likely constitutes sex-based discrimination in violation of the Equal Protection Clause); \textit{A.H. v. Minersville Area Sch. Dist.}, 290 F.Supp.3d 321, 331 (M.D. Pa. 2017) (holding intermediate scrutiny applied in transgender school bathroom case); \textit{Glenn v. Brumby}, 663 F.3d 1312 (11th Cir. 2011) (recognizing discrimination against transgender people as sex discrimination and applying intermediate scrutiny); \textit{Smith v. City of Salem, Ohio}, 378 F.3d 566, 577 (6th Cir. 2004) (holding that the facts alleged by transsexual plaintiff to support claims of gender discrimination on the basis of sex stereotyping “easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution”).


\textsuperscript{121} Id. at 533.

\textsuperscript{122} Id. (quoting \textit{Mississippi Univ. for Women v. Hogan}, 458 U.S. 718, 724 (1982) (internal quotations omitted)).

\textsuperscript{123} Id.

\textsuperscript{124} Id.

reimbursement for facial gender reassignment surgery.\textsuperscript{126}

- \textit{Tovar v. Essentia Health}, 342 F.Supp.3d 947, 954 (D. Minn. 2018). Employer and third-party administrator may be held liable under § 1557 of the Affordable Care Act for administering a self-funded plan containing an exclusion for “gender reassignment” treatments. Brittany Tovar, the mother of a transgender child brought claims under Title VII after being denied transgender-related care under her employer-provided health insurance plan due to a transgender exclusion. Citing \textit{Hunter v. United Parcel Serv., Inc.}, 697 F.3d 697, 702 (8th Cir. 2012), the Eighth Circuit assumed for purposes of the appeal that Title VII applied but found that Tovar lacked standing because she personally did not experience the sex discrimination. \textit{Tovar v. Essentia Health}, 857 F. 3d 771, 775 (8th Cir. 2017). The case then settled.\textsuperscript{127}

- \textit{Dovel v. The Public Library of Cincinnati and Hamilton County}, No. 1:16-cv-955 (S.D. Ohio, filed Sept. 26, 2016). Rachel Dovel, an employee of the Public Library of Cincinnati and Hamilton County was denied coverage for sex reassignment surgery because of her employer’s health insurance. The National Center for Lesbian Rights filed suit against the Library under Title VII and the federal Equal Protection Clause of the Fourteenth Amendment and against Anthem under § 1557 of the Patient Protection and Affordable Care Act. The case settled.\textsuperscript{128}

- \textit{Enstad v. PeaceHealth}, No. 2:17-cv-01496-RSM (W.D. Wash. filed Oct. 6, 2017). The ACLU filed a lawsuit against PeaceHealth, a Catholic healthcare organization, on behalf of an employee and her teenage son for denying coverage for trans-related surgery under its self-funded employee health benefits plan. She brought § 1557 and Washington Law Against Discrimination claims. The plan removed the exclusion prior to filing the complaint and the case settled.\textsuperscript{129}

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\textsuperscript{127}Tovar v. Essentia Health, No. 0:16-cv-00100-DWF-LIB (D. Minn July 25, 2019), ECF No. 123 (order for dismissal with prejudice).


• *Robinson v. Dignity Health*, No. 4:16-cv-03035-YGR (N.D. Cal., filed Jun. 6, 2016). The ACLU filed suit because of a categorical exclusion for transgender care in Josef Robinson’s employer-based self-funded health plan. The EEOC had found reasonable cause that the employer discriminated “by excluding ‘sex transformation surgery’ from all health care coverage in violation of Title VII.” The EEOC submitted an amicus brief. The case settled for $25,000 and the employer lifted the exclusion from its benefits plans as of 2017.

• *Baker v. Aetna Life Ins. Co. & L-3 Communications Corp.*, 228 F.Supp.3d 764 (N.D. Tex. 2017). Charlize Baker was denied coverage for breast augmentation under her employer-based short-term disability benefits policy administered by Aetna. Her Title VII claim against the employer survived a motion to dismiss. The court entertained the claim but went on to find no facial discrimination because the self-funded employer health plan did not categorically exclude breast reconstruction for transgender women.

• *Simonson v. Oswego County*, No. 5:17-cv-01309-MAD-DEP (N.D.N.Y. filed Nov. 30, 2017). On June 26, 2017, the EEOC’s Buffalo Local Office found reasonable cause that Oswego County discriminated against a retired employee under Title VII due to his “sex (transgender status/gender identity)” by denying him medical benefit coverage pursuant to a blanket gender dysphoria treatment exclusion. On November 20, 2017, the New lawsuit.

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- **EEOC v. Deluxe Financial**, No. 0:15-cv-02646 (D. Minn. Jan. 20, 2016). The EEOC announced the settlement of a transgender discrimination case for $115,000.\footnote{Equal Employment Opportunity Commission, Deluxe Financial to Settle Sex Discrimination Suit on Behalf of Transgender Employee (Jan. 21, 2016), http://eeoc.gov/eeoc/newsroom/release/1-21-16.cfm; EEOC and Britney Austin v. Deluxe Fin. Servs., Inc., No. 0:15-cv-02646, ECF No. 37 ¶ 30 (D. Minn. entered Jan. 20, 2016) (requiring Deluxe to maintain health plan without “partial or categorical exclusions for otherwise medically necessary care solely on the basis of sex (including transgender status) and gender dysphoria”); See also EEOC v. Product Fabricators, Inc., 666 F.3d 1170, 1172-73 (8th Cir. 2012) (recognizing that a district court will not enter consent decree without implicitly finding it has jurisdiction over the injuries redressed therein).} The consent decree provides that the defendant’s national self-funded health benefits plan will not include any partial or categorical exclusion for otherwise medically necessary care based on transgender status.

- **Darin B. v. McGettigan**, E.E.O.C. App. No. 0120161068, 2017 WL 1103712 (Mar. 6, 2017). Established that a claim may proceed under Title VII and Section 501 of the Rehabilitation Act where a transgender man was denied nipple reconstruction under his Aetna-administered federal employee health plan.

- **Robinson v. Sam’s East, Inc.** The Tampa Field office of the EEOC found reasonable cause that Walmart discriminated against Jessica Robinson “by
denying her medical benefit coverage for treatment due to her sex (transgender status/gender identity)” in violation of Title VII. The self-funded plan contained an exclusion for “transgender treatment/sex therapy.”\(^{139}\)

- **Dashir Moore v. InnoSource**, (Colo. Civil Rts. Div. filed Feb. 11, 2019). The ACLU is bringing employment discrimination complaints for an exclusion in a self-funded plan administered by UMR.\(^{140}\)

- **Bruce v. State of South Dakota**, No. 5:17-cv-05080-JLV (D.S.D. filed Oct. 13, 2017). In this ACLU case, Mr. Bruce brought Title VII and Equal Protection claims challenging a blanket exclusion in the South Dakota state employee health plan. The case was voluntarily dismissed following Mr. Bruce’s death by suicide.\(^{141}\)

- **Vroegh v. Iowa Department of Corrections** (filed Iowa 2017). The ACLU filed a complaint with the Iowa Civil Rights Commission, which found probable cause that the DOC had discriminated against him for having a transgender exclusion in the self-funded employee health plan. A case brought Iowa Civil Rights Act and state equal protection claims. A jury awarded Vroegh $120,000 in damages.\(^{142}\)

- **Elyn Fritz-Waters vs. Iowa State University**, No. 02851 LACV050531 (Iowa Dist. Ct. filed Jan. 2, 2018). An Iowa State University employee won a settlement of $28,000.\(^{143}\) The Iowa Board of Regents removed the trans


exclusion after the suit was filed.

- **Morton v. Spectrum Health**, No. 1:18-cv-00371 (W.D. Mich. filed Apr. 2, 2018). Ms. Morton brought § 1557 and Title VII claims against her employer, a health care provider, that has explicit exclusion in its self-funded employee health plan. The matter was resolved.\(^\text{144}\)

- **Toomey v. State of Arizona**, No. 4:19-cv-00035-LCK (D. Ariz. filed Jan. 23, 2019). The ACLU is bringing Title VII and Equal Protection claims on behalf of Russel Toomey, a University of Arizona professor who was denied surgery under the state employee health plan’s blanket exclusion.\(^\text{145}\)

- **Fletcher v. State of Alaska**, No. 1:18-cv-00007-HRH (D. Alaska filed Jun. 5, 2018). In this Lambda Legal case, Ms. Fletcher is a State of Alaska legislative librarian bringing a Title VII challenge to a blanket exclusion in the state employee health plan.\(^\text{146}\)

- **Kadel v. Folwell**, No. 1:19-cv-00272-LCB-LPA (M.D.N.C. filed March 11, 2019). In this Lambda Legal/TLDEF case, state employees who are transgender or have transgender dependents are challenging an explicit exclusion under Title IX, § 1557, and Equal Protection. EEOC charges are also on file.\(^\text{147}\)

- **Krei v. Nebraska**, No. 4:19-cv-3068 (D. Neb. filed July 10, 2019). Kadence Krei is a former Nebraska state employee bringing claims under Title VII and Equal Protection.\(^\text{148}\)

- **Musgrove v. Board of Regents of the University of Georgia**, No. 3:18-cv-00080-CDL (M.D. Ga. filed Jun. 28, 2018). Transcend Legal filed this case on behalf a University of Georgia employee who was denied coverage for chest reassignment surgery due to an explicit exclusion in a self-funded plan. There were Title VII, ADA, Section 504, Title IX, and Equal Protection claims. The matter settled for $100,000 and removal of the

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exclusion.

- Lange v. Houston County, GA, No. 5:19-cv-00392-MTT (M.D. Ga. Filed Oct. 2, 2019). TLDEF filed this case on behalf of a Houston County sheriff’s deputy who was denied coverage for surgery due to an explicit exclusion in a self-funded plan. There are Title VII, ADA, and state and federal Equal Protection claims.

VII. Conclusion

Excluding transgender health care from an employer insurance plan is unlawful discrimination under federal law. It is in the best interests of employers, employees, and insurers that these exclusions be removed.