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To Whose Benefit: What *Bostock v. Clayton County* Means for Benefits Practitioners

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"Bias both conscious and unconscious […] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."

—Justice Ruth Bader Ginsberg

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> Dissenting opinion, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)

On June 15, 2020, the Supreme Court issued a landmark decision in *Bostock v. Clayton Cnty.*, holding that Title VII's prohibition against workplace discrimination on the basis of sex extends to prohibit discrimination on the basis of sexual orientation and gender identity.[1] Because Title VII broadly prohibits employers from discriminating against employees in setting their terms and conditions of employment, this decision carries significant implications for the provision of employee benefits. In this column, we briefly describe the relevant case law leading up to the *Bostock* decision, as well as discuss several key considerations for employers following it, including: (1) how it affects the final regulations of the Department of Health and Human Services (HHS) under Section 1557 of the Patient Protection and Affordable Care Act (ACA), which strictly interpreted "sex" to be one's biological sex assigned at birth; and (2) what employers should do and/or be thinking about to avoid running afoul of Title VII in this uncertain political landscape.

BACKGROUND

Title VII of the Civil Rights Act of 1964 prohibits covered employers[2] from discriminating against employees on the basis of race, color, religion, sex, and national origin when making certain employment-related decisions, such as hiring, firing, and/or setting the terms and conditions of employment (*e.g.*, group medical insurance).[3]

Although Title VII expressly prohibits discrimination on the basis of sex and has been interpreted to cover pregnancy and childbirth-related conditions, the statute does not expressly prohibit discrimination on the basis of sexual orientation or gender identity.[4] Thus, whether (and to what extent) Title VII may be interpreted to prohibit these additional categories of sex-related discrimination has been hotly debated for decades.[5]

To that end, there have been a number of unsuccessful attempts by Congress to amend Title VII to include sexual orientation and gender identity.[6] However, reform efforts have largely focused on establishing that discrimination based on sexual orientation and/or gender identity necessarily involve discrimination on the basis of sex and are therefore prohibited by Title VII. In fact, this argument gained traction in 1989 when the Supreme Court recognized sex stereotyping as a form of actionable sex discrimination under Title VII,[7] prompting some

federal courts to gradually adopt this approach with respect to gender identity more broadly.[8]

Thereafter, certain circuit courts recognized that discrimination based on sexual orientation is also unlawful under Title VII.[9] However, several other circuit courts continued to strictly interpret "sex" as covering only one's sex assigned at birth and therefore determined that gender identity is not protected from discrimination under Title VII.[10]

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As a result of the above-described circuit split about whether Title VII prohibits discrimination on the basis of sexual orientation and/or gender identity, the Supreme Court agreed to hear argument in *Bostock*, *Altitude Express,* and *R.G. & G.R. Harris Funeral Homes* to decide the scope of Title VII's sex discrimination prohibition.

At oral argument, petitioners advocated that "when an employer fires a male employee for dating men but does not fire female employees who date men" the employer engages in discrimination no different than kinds and forms of discrimination "that have been already recognized by every court to have addressed them" as violations of Title VII.[11] Respondents, by contrast, argued against a broad interpretation of "sex" under Title VII, positing that "sex and sexual orientation are independent and distinct characteristics, and sexual orientation discrimination by itself does not constitute discrimination because of sex under Title VII."[12]

In the majority opinion authored by Justice Neil Gorsuch (joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan), the Court was persuaded that, for purposes of Title VII, discrimination on the basis of sex includes sexual orientation and gender identity.[13] The majority relied heavily on the plain language of Title VII, recognizing that "an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex," and that, as such, "sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[14]

Importantly, the Supreme Court's decision in *Bostock* serves as a floor, not a ceiling. States, localities, and individual employers can (and do) provide greater protections for their LGBTQ+[15] employees that employers operating in those more protective states and localities must be mindful of.[16]

BOSTOCK'S IMPLICATIONS FOR EMPLOYEE BENEFIT PLANS

Title VII's protections extend well-beyond the discriminatory terminations in each of the *Bostock*, *Altitude Express,* and *R.G. & G.R. Harris Funeral Homes* cases. As such, the implications of the Supreme Court's decision in *Bostock* on the employer–employee relationship may be broader.

For example, Title VII prohibits discrimination relating to employee benefits plans, including medical, hospital, accident, life insurance and retirement plans, profit-sharing/bonus plans, and medical leave.[17] Additionally, Title VII's prohibition against discrimination encompasses policies, practices, and employment decisions that may appear facially neutral but which may, in actuality, disparately affect LGBTQ+ employees.

It is unclear how far future courts will extend the *Bostock* holding. For example, employers may wish to consider the uncertainty as to how the ruling will be applied to benefits-related provisions such as the following:

- Restricting coverage to opposite-sex spouses or domestic partners;

- Denying coverage to transgender employees or charging transgender employees a higher premium for coverage;

- Failing to cover certain health benefits where medically necessary, including those specific to gay and transgender employees, such as hormone therapy and gender-affirmation surgery;

- Limiting access to sex-specific care based on sex assigned at birth, including, for example, denying coverage for a mammogram to a transgender man; or

- Otherwise discriminating in providing generally-applicable benefits, including the provision of reproductive technology assistance, parental leave programs, adoption benefits, and disability benefits for gender affirmation surgery.

Additionally, plans have recently seen an increase in claims that certain gender-affirmation surgeries (*e.g.*, brow lifts, rhinoplasties, and cheek implantations) are required to be covered. These procedures are often excluded as cosmetic procedures, and participants have challenged those exclusions on the grounds of medical necessity.

Post-*Bostock*, however, participants are also beginning to raise Title VII issues, which benefit plan administrators will need to address.

BOSTOCK'S POTENTIAL EFFECT ON THE ACA

On June 12, 2020, shortly before the issuance of the *Bostock* decision, HHS released final regulations under Section 1557 of the Patient Protection and Affordable Care Act. Section 1557 generally prohibits discrimination in certain health programs or activities that receive federal funding or are administered by federal agencies.

The final regulations repealed the prior interpretation of Section 1557 that discrimination "on the basis of sex" encompassed gender identity. The new 1557 regulations permit the categorical refusal of health coverage to transgender participants and the denial of treatment inconsistent with gender identity. In making this determination, HHS apparently relied on the plain meaning of "sex" as one's biological sex assigned at birth, which it asserted to be consistent with federal statutes—including Title IX, which covers educational activities and institutions. However, HHS's stance on the definition of "sex" may be inconsistent with that applied by the Supreme Court in *Bostock*.[18]

Following *Bostock*, the U.S. District Court for the Eastern District of New York ordered a stay and issued a preliminary injunction precluding the final regulations from taking effect.[19] Further guidance on this issue is expected.

CONCLUSION

Following the Supreme Court's decision in *Bostock*, employers would be well-served to review their employee benefit and compensation practices (including claims procedures as well as antiharassment, nondiscrimination, and reasonable accommodations policies and trainings) to ensure compliance with Title VII's prohibition against sex discrimination. This review should also consider other applicable federal, state, and local laws that may provide more rigorous protections than those afforded by *Bostock*.

For example, Executive Order 11246 continues to bar federal contractors from discriminating based on gender identity and sexual orientation; and state and local laws in California and New York prohibit discrimination on the basis of sexual orientation, gender identity, and gender expression.

Additionally, the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) prohibits placing limits on mental health treatments

that exceed the limits on medical benefits. The mental health parity requirements under the MHPAEA may be particularly relevant when dealing with gender identity treatments, which often necessitate both medical and behavioral health services.

Now, more than ever, it is important to keep in mind that this is a rapidly developing area of law and, particularly in light of conflicting analyses from various government agencies, regular review and advice from experienced employment and employee benefits counsel is critical.

NOTES

1. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). *Bostock* was consolidated with *Altitude Express v.Zarda,* 140 S. Ct. 34 (2019), and *R.G. & G.R. Harris Funeral. Homes Inc. v. EEOC,* 139 S. Ct. 1599 (2019) for purposes of oral argument, and addressed in a single opinion.

2. Covered employers are generally considered to be those with 15 or more employees. 42 U.S.C. § 2000e(b).

3. 42 U.S. Code § 2000e–2.

4. Pregnancy Discrimination Act of 1978 (Pub. L. 95–555); 42 U.S.C. § 2000e(k).

5. *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (1984); *Price Waterbouse v. Hopkin*s, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

6. *See, e.g.,* The Equality Act, H.R.5—116th Congress (2019–2020).

7. *Price Waterbouse v. Hopkins*, 490 U.S. 228 (1989) (holding gender stereotyping is sex discrimination in violation of Title VII).

8. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

9. *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

10. *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977); *Ullane v. E. Airlines, Inc.*, 742 F.2d 1081 (1984); *R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2018).

11. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), Oral Argument Tr. p. 4.

12. *Id.* at 32.

13. The Court's decision in *Bostock* is distinct from the related analysis under the Equal Protection Clause, which broadly guarantees the "equal protection of the laws." Though not addressed in *Bostock*, there is a separate line of cases articulating treatment of sexual orientation and gender identity under the Equal Protection Clause. (*Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015)). Notably, Justice Gorsuch expressly left open the question of whether sexual orientation or gender identity would be considered a protected

class under an equal protection analysis and to what extent religious exemptions may apply. Given the current uncertainty surrounding the makeup of the Court, it is unclear whether an equal protection argument may alter the Court's view on this issue.

14. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

15. For purposes of this article, LGBTQ+ is defined broadly to include all non-heterosexual or non-cisgender individuals.

16. NYSHRL, Exec. Law Art. 15, HRL § 291 (prohibits discrimination in obtaining employment because of sexual orientation and gender identity and expression); NYCHRL, NYC Admin. Code § 8-102 (prohibits discrimination by employers because of gender and sexual orientation); CA FEHA, Gov. Code § 12940(a) (makes refusal to hire or employ because of gender, gender identity and gender expression, or sexual orientation an unlawful employment practice).

17. EEOC Compliance Manual § 3 (Employee Benefits). Certain of these benefits (*e.g.*, medical insurance) may be subject to the Employee Retirement Income Security Act of 1974 (ERISA). Note that ERISA generally preempts state but not federal law and, accordingly, protections under Title VII apply without qualification to many employer-sponsored benefit plans. *See* ERISA § 514 (29 U.S.C. § 1144).

18. 85 FR 37160.

19. *Walker et al v. Azar*, No. 20-cv-2834, 2020 WL 4749859 (E.D.N.Y. Aug. 17, 2020).