

3 Checklists for Avoiding LGBTQ Discrimination in Your Benefits Programs

Reviewing benefits plans can help avoid lawsuits following a Supreme Court ruling

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The U.S. Supreme Court ruled June 15 in *Bostock v. Clayton County, Ga.* (https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf) that the prohibition against sex discrimination in the workplace under Title VII of the Civil Rights Act covers sexual orientation and gender identity. Title VII applies to employers with 15 or more employees, including part-time and temporary workers.

Following the decision, benefits experts advise that employers review their benefits programs to ensure that lesbian, gay, bisexual, transgender and queer (LGBTQ) employees are treated equally. Below are three checklists that employers can use to find and correct discriminatory language and practices, and thereby reduce the likelihood of being sued under Title VII or other statutes that provide employees with sexual-orientation and gender-identity protections.

SHRM RESOURCE SPOTLIGHT

Overcoming Workplace Bias (www.shrm.org/ResourcesAndTools/Pages/overcoming-workplace-bias.aspx)

CHECKLIST #1

Review Benefits Plans

"Because of *Bostock*, employers who sponsor group health plans [and other benefits programs] should consider taking the following steps (<https://www.mwe.com/insights/lgbtq-title-vii-ruling-may-impact-your-employee-benefit-plan/>), in addition to a general review of their benefit plans," attorneys at McDermott Will & Emery recommended. In a post on the firm's website, Jacob M. Mattinson and Judith Wethall, partners at the firm's Chicago office, and Emily Rickard and Philip Shecter, associates based in Washington, D.C., and San Francisco, respectively, advised these actions:

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

Feedback

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

CHECKLIST #2

Revise Discriminatory Policies

Nancy K. Campbell, a partner at law firm Snell & Wilmer in Phoenix, and Matthew P. Chiarello, an associate at the firm, gave several examples showing how health and welfare plans might inadvertently discriminate (https://information.swlaw.com/REACTION/2020/Newsletters/SWBenefits/0619_SWBenefitsUpdate_WEB.html) against LGBTQ employees. Although the legality of some benefits policies may depend on future court rulings—for instance, if an employer/owner contends that deeply held religious beliefs prevent the business from providing coverage for sex-realignment treatment and surgery—check to see if your benefits programs present the following red flags:

- ▶ Provide coverage to opposite-sex spouses but not same-sex spouses, or vice versa.
- ▶ Provide coverage to same-sex domestic partners but not opposite-sex domestic partners, or vice versa.
- ▶ Deny coverage to transgender employees.
- ▶ Charge transgender employees a higher premium for coverage.
- ▶ Do not provide medically necessary mental health benefits, hormone therapy and some level of gender-affirmation surgical benefits for transgender employees.
- ▶ Limit sex-specific care based on an individual's sex assigned at birth, gender identity or recorded gender (e.g., not covering a hysterectomy for a transgender man or a prostate exam for a transgender woman).
- ▶ Do not cover family planning benefits for LGBTQ employees if family planning benefits are covered for opposite-sex couples.
- ▶ Do not provide disability benefits for short-term or long-term disability due to gender dysphoria or gender-affirmation surgeries.

"The *Bostock* ruling takes effect immediately, so employers might need to move fast to implement appropriate changes to provide equal benefits," Campbell and Chiarello advised.

[*SHRM members-only toolkit: Managing Equal Employment Opportunity* (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingequalemploymentopportunity.aspx)]

CHECKLIST #3

Look Broadly for Bias

"Employers evaluating existing limits on health coverage for same-sex spouses or gender-transition services in light of [the *Bostock*] decision need to keep in mind not just Title VII but also other federal and state laws protecting the LGBTQ community," noted Katharine Marshall and Kaye Pestaina, principals in the law and policy group and HR consultancy Mercer. They recommended these steps to ensure fair treatment for all employees (<https://www.mercer.com/content/dam/mercer/attachments/global/law-and-policy/gl-2020-justices-title-vii-ruling-on-lgbtq-bias-has-health-benefit-impacts.pdf>):

- ✓ Review anti-harassment and other workplace policies and training programs on LGBTQ issues, taking applicable federal and state laws into consideration.
- ✓ Ensure compliance with the ongoing contracting requirements prohibiting LGBTQ discrimination if you're a federal contractor or subcontractor.
- ✓ Consider Mental Health Parity and Addiction Equity Act (MHPAEA) compliance challenges. While the MHPAEA does not require employers to provide a particular set of benefits, putting limits on behavioral health treatments for gender dysphoria could violate the law if they are not on par with the limits on medical and surgical benefits.
- ✓ Review the group health plan's provider network for adequate access to providers supportive of and knowledgeable about LGBTQ health care. Consider a provider directory identifying practitioners welcoming LGBTQ patients or with expertise in LGBTQ health-related expertise.
- ✓ Review benefit administration gender-assignment requirements, and consider options for more inclusive descriptors.
- ✓ Review disability plan coverage for temporary disability due to gender-affirmation surgeries.
- ✓ Review EAPs or other support-service vendors (e.g., digital behavioral health care providers) for offerings specific to the needs of LGBTQ members.
- ✓ Consider family planning benefits within the group health plan and elsewhere that include the needs of LGBTQ employees. (The 2018 LGBTQ Family Building Survey (<https://www.familyequality.org/resources/lgbtq-family-building-survey/>) from the Family Equality Council indicated that up to 3.8 million LGBTQ Millennials were considering expanding their families, and many expected to use assisted reproductive technology, foster care or adoption.)

When designing benefits, "employers can always maintain nondiscrimination policies and practices broader than what federal or state law requires," Marshall and Pestaina pointed out.

Related SHRM Articles:

What Does the High Court's LGBTQ Ruling Mean for Employee Benefits? (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/What-Does-the-High-Court-LGBTQ-Ruling-Mean-for-Employee-Benefits.aspx) *SHRM Online*, June 2020

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