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**TO:** Health and Welfare Trust Fund Clients

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**RE:** Coverage of Transgender Benefits and Gender Dysphoria

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In recent years more attention has been paid to transgender considerations and benefit plan coverage for gender dysphoria treatments, including gender affirmation surgery. While many plans have historically excluded gender dysphoria treatments, plans should now reconsider recent legislation and court decisions and determine whether coverage of gender dysphoria treatments is now warranted. Additionally, even if plans find they are not explicitly required to cover gender dysphoria services, plans should consider the likelihood of facing increased litigation risks.

Recent litigation on coverage of gender dysphoria has focused on Title VII discrimination claims under the Civil Rights Act, discrimination claims under Section 1557 of the Affordable Care Act, and disability discrimination under the Americans with Disabilities Act. This memorandum will also consider the role the Mental Health Parity and Addiction Equity Act may play in relation to the coverage of gender dysphoria treatments.

#### Title VII and the Civil Rights Act of 1964

Title VII of the Civil Rights Act generally deals with the prohibition of employment discrimination based on race, color, religion, sex, and national origin for employers with 15 or more employees. On June 15, 2020, the U.S. Supreme Court issued a ruling in *Bostock v. Clayton County*.<sup>1</sup> In *Bostock*, two of the three plaintiffs alleged they were fired for being gay, and a third plaintiff alleged she was fired after telling her employer that she was transgender. The court found in favor of the plaintiffs noting that sexual orientation and gender identity, though they do not appear in Title VII, are impossible to discriminate against without discriminating against that individual on the basis of sex. Therefore, any “employer who fires an individual merely for being gay or transgender defies the law.”<sup>2</sup>

Though *Bostock* dealt with the ability to terminate employees based on their sexual orientation or gender identity, the decision also implicated sex-based discrimination issues for benefit plans. Within Title VII is the prohibition of treating employees differently with respect to compensation, terms, conditions, or

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<sup>1</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

<sup>2</sup> *Bostock* at 1754.

privileges of employment, which encompasses employee benefit plans.<sup>3</sup> Since *Bostock*, there has been an increase in lawsuits against benefit plans and plan sponsors alleging Title VII discrimination against plans that do not cover gender dysphoria services and courts.

- *Lange v. Houston County*, 2022 WL 1812306 (M.D. GA 2022) – Plaintiff Lange is a transgender woman who filed suit challenging a provision in her employer’s healthcare plan (i.e. single employer plan) that excludes coverage for sex change surgery. Lange alleged significant distress and anxiety due to gender dysphoria. When such symptoms persist, gender-confirming surgery is considered “medically necessary”, with recommendations from Lange’s endocrinologist, two psychologists, and a surgeon that a vaginoplasty was the next step of treatment for Lange’s gender dysphoria. Lange was denied pre-authorization for gender confirmation surgery in accordance with the plan’s exclusion. The court found that discrimination of transgender status, under *Bostock*, was discrimination based on sex and therefore an unquestionable violation of Title VII because health benefits are among the protected “compensation, terms, conditions, or privileges of employer” under the law. The matter was remanded to determine the appropriate remedy.
- *Fletcher v. Alaska*, 443 F. Supp. 3d 1024 (D. Alaska 2020) (Pre-*Bostock*) – Plaintiff is a transgender woman and employee of the State of Alaska and a participant in defendant’s self-funded health care plan for public employees. Under the plan, services and procedures that are medically necessary are not otherwise excluded. There was no dispute in the case that gender transition-related surgery can be, and for plaintiff, was medically necessary. However, defendant categorically did not cover any treatment related to changing sex or sexual characteristics. Plaintiff was granted summary judgment finding the defendant’s exclusion evidence of sex discrimination and the and a violation of the plaintiff’s rights under Title VII.
- *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018) (Pre-*Bostock*) – Plaintiff is a transgender woman and employee of the State of Wisconsin and challenged the State's exclusion of "[p]rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" from health insurance coverage provided to state employees under Title VII". The court found the State’s exclusion on its face treats transgender individuals differently on the basis of sex, which violates the protections of Title VII’s anti-discrimination provision.

### Affordable Care Act and Section 1557

On May 18, 2016, the Department of Health and Human Services (HHS) issued a final rule implementing Section 1557 (2016 Rule), which prohibited discrimination in the provision of health care on the basis of sex, which included gender identity, and further provided that an explicit categorical exclusion for all health services related to gender transition was facially discriminatory.<sup>4</sup> Thereafter, on December 31, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide preliminary injunction blocking enforcement of the 2016 Rule<sup>5</sup> and subsequently vacated the 2016 Rule’s definition of

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<sup>3</sup> 42 U.S.C § 2000e–2.

<sup>4</sup> 81 Fed. Reg. 31376 (May 18, 2016).

<sup>5</sup> *Franciscan Alliance v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

discrimination on the basis of sex in 2019.<sup>6</sup> Consequently, on June 19, 2020 HHS issued new a new rule (2020 Rule)<sup>7</sup>, which once again prohibits discrimination in the provision of health care on the basis of an individuals' race, color, national origin, sex, age, or disability, but repealed the definition of discrimination on the basis of sex and did not include gender identity as a protected category. Additionally, the 2020 Rule did not prohibit a categorical exclusion of gender transition services. However, the preamble of the 2020 Rules noted that the *Bostock* decision could have a direct impact on the 2020 Rule if the U.S. Supreme Court included gender identity under the meaning of sex.<sup>8</sup> Not surprisingly, after *Bostock* litigants began to utilize claims against health plans controlled by the ACA for sex discrimination under *Bostock's* new definition of sex, which encompasses gender identity.

*Fain v. Crouch*, 540 F. Supp. 3d 575 (S.D.W. Va. 2021) was a class action suit against defendant state health plan and Medicaid program, claiming defendants' exclusion for gender affirming care violated ACA Section 1557. The Court allowed the case to proceed against defendant health plan, but case history indicates that the plan settled the claims by removing the exclusion and covering disputed expenses. Court also determined that defendant Medicaid program – a “health program or activity” under the ACA – violated Section 1557 because exclusion of surgical care for gender dysphoria “invidiously discriminates on the basis of sex and transgender status.” Court held that defendant Medicaid program could no longer enforce or apply the exclusion.

On August 4, 2020 the HHS published a proposed rule reinterpretation of Section 1557, which returned the original definition of sex discrimination to include gender identity. But, until finalized, the 2020 Rule applies except where in disagreement with *Bostock*.

Section 1557 is limited to entities that have a health program or activity that receives federal financial assistance from the Department of Health and Human Services (HHS), any program or activity administered by HHS under Title I of the ACA (such as the federal marketplace), or health insurance marketplaces and plans under those marketplaces. Excluded from this list would be self-funded group health plans under the Employee Retirement Income Security Act of 1974 (ERISA) that do not receive federal financial assistance. Notwithstanding that self-funded group health plans exclusion to Section 1557, plan sponsors should consider the increasing risks associated with excluding coverage of gender dysphoria services due to increasing discrimination claims utilizing *Bostock's* definition of sex, which includes gender identity.

### Americans with Disabilities Act

The Americans with Disabilities Act (ADA) generally protects employees from discrimination by their employer based on an employee's disability.<sup>9</sup> Relevant to this memorandum, the ADA defines “disability” as a “physical or mental impairment that substantially limits one or more major life activities of such individual.”<sup>10</sup> However, Congress has specifically enumerated several exclusions to the ADA's definition of covered disabilities, including the term “gender identity disorders” not resulting from

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<sup>6</sup> *Franciscan Alliance v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

<sup>7</sup> 85 Fed. Reg 37160 (June 19, 2020).

<sup>8</sup> 85 Fed. Reg 37168 (June 19, 2020).

<sup>9</sup> See 42 U.S.C. § 12112(a).

<sup>10</sup> See 42 U.S.C. § 12102(a).

physical impairments.<sup>11</sup> Notwithstanding this exclusion, there has been an increased number of cases by plaintiffs claiming violations under the ADA for exclusions or failures to cover gender dysphoria treatments, resulting in various degrees of success.

In *Duncan v. Jack Henry & Assocs.*, 2022 U.S. Dist. LEXIS 132980 (W.D. Mo. 2022) defendant health plan (i.e. self-funded single employer ERISA plan) contained a cosmetic treatment exclusion. Plaintiff is a transgender woman whose physicians concluded that full facial reconstruction was medically necessary to treat plaintiff's gender dysphoria. However, the defendant denied precertification of the prescribed facial feminization surgery under the plan's cosmetic treatment exclusion. Plaintiff sued for discrimination under the ADA. The court analyzed two manners plaintiffs have raised an ADA claim based on gender dysphoria, one based on a distinguishing "gender identity disorders" from gender dysphoria<sup>12</sup>, which has not been very successful, and second based on gender identity disorders resulting in physical impairment.<sup>13</sup> The court in *Duncan* granted the defendant health plan's motion to dismiss plaintiff's ADA claim, finding that the ADA's exclusion of "gender identity disorders" encompasses diagnoses of gender dysphoria and plaintiff failed to allege or argue that her gender dysphoria was a result of a "physical impairment."<sup>14</sup>

Although the results have been varying, plaintiffs are fine tuning their claims and courts are providing outlines to what would constitute a valid claim under the ADA for failure to cover gender dysphoria services.

### Mental Health Parity and Addiction Equity Act (MHPAEA)

A plan may exclude coverage for a particular condition (e.g. gender dysphoria services), but under the MHPAEA if a plan provides any coverage of a condition, it must be covered in all classifications or categories and in parity with medical/surgical benefits provided under the plan.<sup>15</sup> Additionally, under the MHPAEA, plans have discretion in defining mental health and chemical dependency conditions. However, any condition defined by the plan or coverage as being or as not being a mental health condition must be defined to be consistent with generally recognized independent standards of current medical practice (for example, the most current version of the Diagnostic and Statistical Manual of Mental

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<sup>11</sup> See 42 U.S.C. § 12112(b)(1).

<sup>12</sup> See *Doe v. Northrop*, 418 F. Supp. 3d at 929 (recognizing that "the terms 'gender identity disorder' and 'gender dysphoria' are legally synonymous" for purposes of ruling on the motion to dismiss); see also *Michaels v. Akal Sec., Inc.*, 2010 U.S. Dist. LEXIS 62954, 2010 WL 2573988, at \*6 (D. Colo. June 24, 2010) (concluding gender dysphoria is a "gender identity disorder").

<sup>13</sup> See *Doe v. Massachusetts Department of Corrections*, 2018 U.S. Dist. LEXIS 99925, 2018 WL 2994403 (D. Mass. June 14, 2018) (Court denied a motion to dismiss because it found a dispute of fact if gender dysphoria was a result of physical impairment); *Lange v. Houston Cty.*, 499 F. Supp. 3d 1258, 1270 (M.D. Ga. 2020) (Court denied motion to dismiss ADA claim because the plaintiff specifically alleged facts her gender dysphoria "results from physical impairments"); *Williams v. Kincaid*, 2021 U.S. Dist. LEXIS 106787, 2021 WL 2324162 (E.D. Va. June 7, 2021) (Court granted motion to dismiss where plaintiff failed to allege some physical impairment resulted in her gender dysphoria); *Doe v. Northrop Grumman Sys. Corp.*, 418 F. Supp. 3d 921 (N.D. Ala. 2019) (same); *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018) (same).

<sup>14</sup> In *Duncan v. Jack Henry & Assocs.*, 2022 U.S. Dist. LEXIS 132980 (W.D. Mo. 2022) at 89-90.

<sup>15</sup> This means that the Plans should confirm with their vendors (Anthem, OptumRx, etc.) that benefits are not provided for gender dysphoria treatment. If the Plans provide gender dysphoria treatment in any category of coverage (ie, inpatient, outpatient, pharmacy, emergency care), then the Plan must provide such benefits in parity with those for medical/surgical condition in all categories of coverage.

Disorders (DSM), the most current version of the ICD, or State guidelines).<sup>16</sup> Gender dysphoria is classified in both the mental health sections of the DSM<sup>17</sup> and ICD<sup>18</sup>.

If a plan does decide to cover it or because it may be otherwise be required by law (as discussed above in this memorandum), coverage of transgender benefits and gender dysphoria services should be provided in parity with medical/surgical benefits.<sup>19</sup>

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<sup>16</sup> See 45 CFR § 146.136(a).

<sup>17</sup> See DSM-5 302.85.

<sup>18</sup> See ICD-10-CM Diagnosis Code F64.9.

<sup>19</sup> See *Duncan v. Jack Henry & Assocs.*, 2022 U.S. Dist. LEXIS 132980 (W.D. Mo. 2022) (Defendant health plan's motion to dismiss was denied regarding plaintiff's allegation the plan violated the MHPAEA on its face because the plan's definition of "cosmetic treatment", for its Cosmetic Treatment exclusion, applies when procedures are necessary for psychological reasons but does not apply when procedures are necessary for physical reasons.)