



Analysis

Many Plans Already In Front Of 11th Circ. Trans Health Ruling

By [Kellie Mejdrich](#) ·

Law360 (May 17, 2024, 12:20 PM EDT) --The Eleventh Circuit's decision that a county health plan's coverage exclusion for gender transition surgery violated federal anti-discrimination law likely won't have a big impact on plans because they have already made adjustments for the [U.S. Supreme Court](#) ruling the appeals court applied, experts say.

A three-judge panel [upheld](#) a Texas court's injunction against Houston County and Sheriff Cullen Talton in the discrimination suit from Sheriff's Deputy Anna Lange on Monday, keeping in place an order preventing the county employee health plan from excluding coverage for surgery to treat gender dysphoria.

In upholding Lange's trial court win, the panel said that protections against sexual orientation and gender identity discrimination in Title VII extend to the employee benefits context, which the U.S. Supreme Court made clear in its 2020 decision [Bostock v. Clayton County](#). Specifically, the county health plan's exclusion blocks coverage for drugs "for sex change surgery" as well as services and supplies "for a sex change and/or the reversal of a sex change," according to the panel opinion.

For now, the decision makes clear that at least in the Eleventh Circuit — which covers Alabama, Georgia and Florida — transgender workers' health benefits are protected from nondiscrimination under Title VII, though a petition to the U.S. Supreme Court is expected, and attorneys say they still have open questions.

"I think that it underscores the risk of having an outright exclusion or ban, but it doesn't answer for employers what coverages they need to allow, in order to not run afoul of Title VII, and so hopefully that's an area there will be further

guidance," said Sam Schwartz-Fenwick, a partner in [Seyfarth & Shaw LLP](#)'s labor and employment practice group and leader of the firm's LGBT affinity group. "Or, if not, litigation will clarify what those boundaries are."

But while legal battles over the scope of gender identity protections in the law may continue, the Eleventh Circuit's impact on employer plans will be limited because many employers and plans already took action to eliminate potentially problematic exclusions following the Bostock decision.

"I would say that after Bostock, most employers did change their plans to the extent they still had exclusions. So most employers just wanted to be cautious and clearly on the right side of the law to avoid litigation," Schwartz-Fenwick said. "In addition to [how] a lot of employers just believe this is the right thing to do. And it makes sense, and it's part of having a fulsome package of healthcare benefits, to provide it."

There are significant proceedings to come in the Lange trial once the appeal wraps up, because parties agreed to proceed to trial on the county employee's claim that the health plan exclusion violated the Equal Protection clause of the U.S. Constitution.

But Katie Barrett Wiik, partner and vice chair of the appellate practice at [Saul Ewing LLP](#), said for the current appeal, she's looking out for a potential en banc petition for rehearing from the county, though she isn't confident about the prospects for such an effort.

"The precise nature of the reasoning of the panel makes the framing of the issues en banc, I think, somewhat challenging," Barrett Wiik said.

Beyond the Bostock decision, Barrett Wiik pointed out how the panel's decision to affirm Title VII liability for the county as an employer was also clearly based on Eleventh Circuit precedent.

"The majority opinion is squarely grounded in Bostock and prior Eleventh Circuit precedent," Barrett Wiik said.

Schwartz-Fenwick said he's looking to see how future Eleventh Circuit panels address the issue of what procedures must be covered. He pointed out the dissent's criticism of the Title VII analysis as a potentially expansive reading of the law.

In the dissent, U.S. Circuit Judge Andrew L. Brasher said the majority had established that "an employer-provided insurance plan must always cover every treatment for gender dysphoria."

"I think on its face the majority overstates the law by suggesting that something more than parity might be required," Schwartz-Fenwick said, referring to how the panel characterized determining coverage under Title VII. "I think there's going to be a lot of test cases in the Eleventh Circuit, to see what that means, and what types of procedures are required."

While questions about gender identity may eventually be bound for the nation's highest court, experts say the Lange case probably isn't the vehicle that will get them there.

Anticipated challenges to Affordable Care Act regulations bolstering protections against gender identity discrimination in health coverage that were recently finalized, however, might provide an avenue. Those rules, which interpret Section 1557 of the law, [have indirect consequences on employers](#) because of an expansion in the regulations' applications to third-party administrators.

Anna Kirkland, a women's and gender studies professor at the University of Michigan who's studied transgender healthcare coverage and restrictions in self-insured private employer health plans, said she expects justices "will ignore this one," referring to the Eleventh Circuit and its prospects for Supreme Court review.

She said she thinks a case related to [regulations under Section 1557](#) is more likely to grab justices' attention because "there's more wiggle room" than under Title VII for the court to rule regarding the extent of protections for transgender rights.

"The conservatives have a problem now that in that Bostock was a pretty strong case, written by one of their own, [Justice Neil] Gorsuch, pretty much saying you can't discriminate against trans and gay people in employment," Kirkland said.

--Editing by Amy Rowe and Bruce Goldman.