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7 Gender-Affirming Care Cases To Watch In 2024's 2nd Half

By **Kellie Mejdrich**

Law360 (July 12, 2024, 4:24 PM EDT) -- The U.S. Supreme Court has agreed to review a constitutional challenge by the federal government to Tennessee's ban on gender-affirming care for minors, while other appeals courts are weighing the constitutionality of states' and employers' restrictions on gender dysphoria treatment.

The raft of discrimination litigation challenging limitations on care by state lawmakers and employers' health plan exclusions could have major impacts for transgender individuals' healthcare access. Many pending appeals involve recently enacted state bans on youth access to gender-affirming care. But a patient-led class action against an insurer administering individual employer health plan exclusions that limit gender dysphoria treatment coverage, a case invoking healthcare nondiscrimination law, has also grabbed attorneys' attention.

The outcomes of these cases could also have significant consequences for employer-provided health plans, which are having to grapple with a wide array of state-law restrictions that could disrupt healthcare administration for children and, in some cases, adults.

Xavier Baker, principal at Groom Law Group, said that with all the restrictions popping up, many private employer health plans continue to discuss ways to preserve healthcare access for beneficiaries in states where their treatment could be cut off, such as travel benefits.

"These are not abstract legal issues. They affect real people, and they affect deeply personal concerns," Baker said. "That issue is not lost on plan sponsors and carriers."

"The fact that interruptions to ongoing care could be significantly harmful is absolutely something that folks are considering and trying to find solutions for," he said.

Here are seven cases involving gender-affirming care access that attorneys will be tracking in the second half of the year.

Justices Take Up Tenn. Trans Health Ban

Attorneys will be monitoring how the Supreme Court handles a case it **agreed to review** in June, in which the federal government is challenging the constitutionality of Tennessee's ban on gender-affirming care for minors, as well as two related pending petitions from transgender adolescents and their families in Tennessee and Kentucky.

The U.S. filed a petition seeking to undo a Sixth Circuit ruling from September that **allowed Tennessee to keep its ban** in place on certain medical treatments for transgender youths. While the government's petition only posed questions to justices about the Tennessee ban, the Sixth Circuit decision had consolidated disputes over restrictions in Tennessee and Kentucky.

The case tees up a fundamental question about the extent to which the 14th Amendment's equal protection clause protects gender-affirming care access that many appellate courts have so far sidestepped.

Numerous discrimination disputes involving gender-affirming care that the appeals courts have taken up have so far have focused on interpretations of federal nondiscrimination law instead of

constitutional questions. Those laws include the Affordable Care Act's healthcare nondiscrimination provision, Section 1557, which incorporates the provisions of Title IX in order to address sex discrimination in the healthcare field, and Title VII of the Civil Rights Act, which protects against discrimination in employment. The Eleventh Circuit **decided a pivotal Title VII case** in May involving a county employee's fight for gender-affirmation surgery, ruling that a coverage exclusion violated the law.

The justices' last major case involving gender identity discrimination, Bostock v. Clayton County in 2020, also involved interpretations of Title VII, with the court finding that a ban on discrimination because of sex covers sexual orientation and gender identity bias in the workplace. But with conservative justices in that decision appearing to disagree on how broadly the precedent should apply to other nondiscrimination contexts, such as Title IX, appellate courts have now begun to splinter on the issue.

Katie Barrett Wiik, partner and co-chair of the appellate practice at Saul Ewing LLP, said she's following the Supreme Court case and keeping an eye on how the justices handle the other parties' petitions for certiorari.

"Until the court either grants or denies these other related petitions, we don't know the scope of the issues relating to bans on gender-affirming care that will be at the court," she said.

Barrett Wiik said a particularly important issue is how the court handles those petitions' arguments that the bans usurped parental rights of constitutional due process.

"They make some very interesting substantive due process arguments that relate to parents' rights to make decisions about their children's medical care," she said.

The cases are U.S. v. Jonathan Skrmetti et al., case number 23-477, L. W. et al. v. Jonathan Skrmetti et al., case number 23-466, and Jane Doe 1 et al. v. Kentucky, case number 23-492, in the U.S. Supreme Court.

9th Circ. To Weigh Idaho Trans Health Ban

The Ninth Circuit has scheduled oral arguments for Aug. 21 in Idaho's appeal of a trial court judge's ruling that blocked a ban on hormones or puberty blockers for minors with gender dysphoria, after the Supreme Court allowed the ban to largely go into effect in April.

The U.S. Department of Justice's Civil Division, which filed an amicus brief in the case in March in support of the transgender minor plaintiffs, has asked the circuit court for permission to participate in oral arguments.

The Ninth Circuit had denied Idaho's request to pause the district court's statewide injunction against the ban in January. But the Supreme Court on April 15 **granted Idaho's emergency request to stay** the district court ruling pending its appeal and any follow-on petition for certiorari. The justices did allow the injunction to remain in effect as to the individual transgender minor Idaho residents who sued, though.

Idaho appealed to the Ninth Circuit after the district judge in December entered the preliminary injunction blocking its Vulnerable Child Protection Act, also known as H.B. 71, which makes it a felony for healthcare providers to administer certain types of gender-affirming care to minors.

In its amicus brief, the DOJ said the U.S. had a "strong interest in protecting the rights of individuals who are lesbian, gay, bisexual, transgender and intersex," and pointed to a 2021 executive order from President Joe Biden recognizing equality on the basis of gender identity and sexual orientation.

The government's core argument in support of the transgender minors is that the law violates the equal protection clause — the same issue teed up before the Supreme Court in the case involving Tennessee's gender-affirming care ban.

"When, as here, states differentiate based on suspect classifications, the equal protection clause gives courts not just the power but the duty to carefully scrutinize a law's proffered justifications,"

the government told the court.

The case is Poe et al. v. Labrador et al., case number 24-142, in the U.S. Court of Appeals for the Ninth Circuit.

Private Health Exclusions at 9th Circ.

Another case at the Ninth Circuit is an appeal by Blue Cross Blue Shield of Illinois seeking to overturn a Washington federal court's judgment in favor of patients in self-funded, employer-provided health plans who challenged coverage denials for gender-affirming care.

A reply from BCBS of Illinois in support of its appeal is expected in August. The federal judge agreed in January to **stay his ruling**, which granted nominal damages and classwide relief to the class of approximately 500 patients, pending the insurer's appeal.

The judge, U.S. District Judge Robert J. Bryan, had in December **ruled in favor** of the patients in health plans regulated by the Employee Retirement Income Security Act who had sued BCBS of Illinois for administering their employers' individual gender-affirming care exclusions. Judge Bryan said the conduct violated the ACA's Section 1557.

BCBS of Illinois had argued that under ERISA, reprocessing wasn't a proper remedy for their claims. But Judge Bryan backed the patients' argument that their rights should be vindicated under Section 1557, not ERISA.

A new complication in the case is that Biden administration finalized regulations in April further implementing Section 1557 that made clear the law protected against gender identity and sexual orientation bias, but those rules were **nationally enjoined by a Mississippi federal judge** in July.

Ben Conley, a partner at Seyfarth & Shaw LLP in the firm's employee benefits and executive compensation practice group, said he's paying attention to the case.

Conley said the Washington federal court's decision "seems to say that, even in the context of an employer's plan design where the employer says, 'Hey, [third party administrator], we want you to administer a discriminatory design,' the court there seems to suggest that that would violate Section 1557," Conley said.

"I don't think the final regs fully endorsed that approach, but they certainly danced around that suggestion," Conley added.

The case is Pritchard et al. v. Blue Cross Blue Shield of Illinois, case number 23-4331, in the U.S. Court of Appeals for the Ninth Circuit.

8th Circ. To Rule on Ark. Trans Health Ban

Another appeal on attorneys' radar is at the Eighth Circuit, where the court **heard arguments en banc** in April — in the first instance — over Arkansas' appeal seeking to keep in place a state law that banned gender-affirming care for children and teens.

The state wants to overturn a June 2023 ruling from U.S. District Judge James M. Moody Jr. that **permanently blocked it** from enforcing Act 626. Dubbed the SAFE Act by Arkansas state lawmakers, the law was the first-enacted state ban on any gender-affirming medical treatment for people under 18.

Judge Moody ruled after an eight-day bench trial that the law violated the First Amendment, the equal protection clause and due process rights in the U.S. Constitution.

Barrett Wiik of Saul Ewing said she's watching for how the Eighth Circuit rules, noting that the Supreme Court's decision to also take up a gender-affirming care ban could influence the circuit court.

"If we end up getting a narrower scope of the issues before the U.S. Supreme Court, I would expect

that the Eighth Circuit might proceed to deal with some of the issues that aren't going to be on review ... but you know, maybe not," she said.

The case is Dylan Brandt et al. v. Tim Griffin et al., case number 23-2681, in the U.S. Court of Appeals for the Eighth Circuit.

States Fight ACA Discrimination Rule

Attorneys continue to track an Administrative Procedure Act suit in Mississippi federal court **from 15 states challenging** the U.S. Department of Health and Human Services' rule clarifying the application of nondiscrimination protections to gender identity, after the court on July 3 nationally blocked the rule's effective date using a preliminary injunction.

The suit, led by Tennessee, is one of three challenges filed against the HHS rule implementing ACA Section 1557 to have some form of preliminary injunction granted at the district level. But the other two injunctions, in Texas and Florida district court, only apply to parties who sued, including the state of Montana and members of a Catholic employee benefits group. The federal government has not yet appealed the Mississippi decision.

Baker of Groom Law Group said he's monitoring how the Tennessee-led case proceeds, particularly because it involves questions of how courts should interpret federal rules in the wake of the Supreme Court repealing Chevron deference in Loper Bright Enterprises v. Raimondo .

"Now, you have a different landscape where there's not this deferential standard," Baker said, adding that to the extent that litigation over gender-affirming care is tied to challenges of regulations, "it's a different can of worms."

"At least in the 1557 cases, I think there's a lot more opportunity for cases to percolate and potentially reach different outcomes," he said.

The case is State of Tennessee et al. v. Xavier Becerra et al., case number 1:24-cv-00161, in the U.S. District Court for the Southern District of Mississippi.

--Editing by Aaron Pelc and Nick Petruncio.
