

Court Ruling that ACA Gender Transition Mandate Violates Religious Liberty Illustrates Interplay Between ACA and ERISA

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In *Religious Sisters of Mercy v. Azar*, 2021 U.S. Dist. LEXIS 9156 (D.N.D. Jan. 19, 2021), a district court awarded a group of plaintiffs permanent injunctive relief against a provision of the Affordable Care Act (“ACA”) that required them to offer health coverage for gender-transition procedures.

The case illustrates an important aspect of the interplay between the ACA and ERISA.

Religious Sisters of Mercy was a consolidated action brought by entities associated with the Catholic Church and the State of North Dakota (collectively “Plaintiffs”) challenging implementation of an anti-discrimination provision of the ACA, which they contended has been interpreted to require them to perform and/or provide insurance coverage for gender transitions and abortions.

Specifically, Section 1557 of the ACA prohibits discrimination in any federally funded or administered health program. Although the ACA does not specify which discriminatory practices are prohibited, implementing regulations promulgated by the Department of Health and Human Services (HHS) in 2016 clarified that Section 1557 prohibits discrimination based on “termination of pregnancy” and “gender identity.” 81 Fed. Reg. 31,376. Furthermore, in illustrative examples of discriminatory conduct, HHS stated “categorical . . . exclusion or limitation on coverage for all health services related to gender transition is unlawful on its face.” *Id.* at 31, 429.

Plaintiffs asserted that these requirements violated their rights under the Religious Freedom Restoration Act, which forbids the government to “substantially burden a person’s exercise of religion” unless the burden (1) “is in furtherance of a compelling governmental interest” and (2) “is the least restrictive means of furthering that compelling interest.” 42 U.S.C. § 2000bb-1(b).

The ACA's prohibition against discriminatory practices implicates ERISA because many employers use federally funded third party administrators (TPAs) to administer their group benefits plans. These federally funded TPAs are covered by both the ACA and ERISA. ERISA requires TPAs to administer employer benefits plans as written. Thus, in certain instances where the employer plan may contain a potentially discriminatory practice, the requirement created a dilemma for federally funded TPAs: If a self-funded plan contained a categorical gender-transition exclusion, the TPA would find itself in the untenable position of having to either (1) administer the plan as written, in which case it could face liability under the ACA (even if the employer plan fell outside the scope of the regulation), or (2) abandon the written terms of the plan, in violation of ERISA.

Recognizing this dilemma, HHS implemented a unique “adjusting” enforcement mechanism whereby it first determined whether responsibility for the alleged discriminatory practice rested with the employer or the TPA. If the latter, HHS would commence with its standard enforcement procedure. If the former, however, HHS established that “jurisdictional limitations prevented the agency from pursuing enforcement unless the employer already qualified as a covered health program or activity.” 81 Fed. Reg. at 31,432. This approach has effectively shielded TPAs from liability arising from the administration of non-covered ERISA plans that contain a potentially discriminatory provision under the ACA. The *Religious Sisters of Mercy* case did not alter this enforcement strategy.

The court ultimately dismissed plaintiffs’ abortion-related claims because a 2020 amendment to HHS regulations repealed “termination of pregnancy” from the regulatory definition of sex discrimination. However, the court held that the ACA provision requiring coverage for gender transition procedures violated plaintiffs’ rights under the RFRA and caused them irreparable harm. Accordingly, the court issued a permanent injunction preventing HHS from interpreting or enforcing the ACA “in a manner that would require [Plaintiffs] to perform or provide insurance coverage for gender-transition procedures.”

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