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Agencies Issue Guidance on Employer Obligations Relating to Posting Machine Readable Files Under Transparency in Coverage Final Rule

A new set of frequently asked questions ("FAQs") clarifies that employers are not necessarily required to post the machine-readable files to their public websites even if they do not maintain a separate public site for their health plans. Instead, they can contract with their service providers to post the files on their public websites on behalf of the group health plan.

Background

Among other things, the transparency in coverage ("TinC") rule requires most group health plans to publish certain machine-readable files regarding in-network rates for covered items and services, out-of-network allowed amounts and billed charges for covered items and services, and negotiated rates and historical net prices for covered prescription drugs on a public website. The compliance deadline for the in-network rates and out-of-network allowed amounts and billed charges was July 1, 2022. The requirement relating to the prescription drug file has been indefinitely deferred while the Departments of Health and Human Services, Labor, and Treasury ("Agencies") determine if it is still appropriate in light of subsequent statutory requirements relating to prescription drug benefit disclosures.

Many employers do not maintain separate, public websites for their self-insured group health plans. But the TinC rules and subsequent guidance raised questions about whether they would be required to establish such a site or post the files to the employer's public website.

FAQ Guidance

The new FAQs clarify that employers in this situation can satisfy the posting requirement by entering into a written agreement with a third-party administrator ("TPA") to post the files on a public website on behalf of the plan. But that doesn't mean the plan is off the hook. The FAQs also clarify that, even if the plan enters into an agreement with a service provider to post the files, the plan will still be responsible if the service provider fails to do so.

The full text of the FAQs is available here.

Fourth Circuit Rules that Gender Dysphoria is a Protected Disability Under the ADA

In a landmark ruling, the Fourth Circuit found that the Americans with Disabilities Act ("ADA") protects individuals with gender dysphoria. Even though the Fourth Circuit case did not involve a claim against an employer, the decision has implications for employers because they are subject to the ADA as well.

Case Summary

The plaintiff, a transgender woman who suffered from "gender dysphoria", spent six months incarcerated at a Fairfax, Virginia prison. In general, gender dysphoria refers to discomfort or distress caused by a discrepancy between a person's gender identity and that person's sex assigned at birth.

Originally placed in the prison's women's housing, prison deputies moved her to men's housing when they learned she was transgender. While in men's housing, she allegedly experienced delays in medical treatment for her gender dysphoria as well as harassment by other inmates and prison employees.

Following her release, she sued the Sheriff of Fairfax County, a prison deputy, and a prison nurse, alleging in part that they violated the Americans with Disabilities Act ("ADA"). The ADA generally prohibits state and local government entities from discriminating against individuals based on disability, which is defined under the statute as "a physical or mental impairment that substantially limits one or more major life activities of such individual." Employers likewise may not discriminate against anyone based on their disability and may not make disability-related inquiries, among other things.

A federal district court dismissed the ADA claim because it concluded that gender dysphoria is not a disability for purposes of the ADA. On appeal, the U.S. Court of Appeals for the Fourth Circuit held the ADA does protect individuals with gender dysphoria. A key question before the Fourth Circuit was whether gender dysphoria was specifically excluded from ADA protection based on the statute's exception for "gender identity disorders not resulting from physical impairments."

Because the ADA does not define the term "gender identity disorder," the Fourth Circuit looked to how that term was understood at the time the ADA was enacted in 1990, as well as advancements in medical understanding since that time. Referencing the Diagnostic and Statistical Manual of Medical Disorders (DSM) and recent developments in the medical community's characterization of gender identity and gender dysphoria, the court concluded that gender dysphoria does not fall within the ADA's gender identity disorder exclusion and is a disability protected by the ADA.

Considerations for Employers

The national landscape of laws related to protections for transgender individuals (and in some states, laws targeting transgender rights) is rapidly evolving, and the issue of gender dysphoria may very well be considered by another Circuit Court in the future. For now, employers in the states within the Fourth Circuit—Maryland, Virginia, West Virginia, North Carolina, and South Carolina—should be aware that employees with gender dysphoria may have rights under the ADA as well as other federal or state laws.

A related, but different, issue that is being increasingly litigated is whether group health plans sponsored by state and local governments and other public-sector health plans are obligated to cover certain procedures for transgender individuals, such as gender reassignment surgery and hormone therapy.

In June 2022, for instance, a North Carolina district court held that the state's health plan for state employees unlawfully discriminated against certain transgender employees by excluding gender-affirming treatment, such as hormone therapy and gender reassignment surgery, from its plan coverage. In that case, all of the plaintiffs had been diagnosed with gender dysphoria and brought suit against North Carolina's health plan alleging that the refusal of coverage violated the Equal Protection Clause of the Constitution and Title VII of the Civil Rights Act of 1964 by unlawfully discriminating against transgender employees on the basis of sex and transgender status. In its ruling that those statutes had been violated, the court emphasized that, in certain cases, gender-affirming medical and surgical care may be medically necessary to treat gender dysphoria.

In a similar case decided in August 2022 involving West Virginia's Medicaid program, a district court ruled that the program may not exclude gender affirming surgical treatment of gender dysphoria. Likewise, in June 2022, a Georgia district court found that a county health plan violated Title VII and the Equal Protection Clause by excluding gender affirming medical care from its coverage.

Employers should be mindful of the implications of these and other cases for any obligations under the ADA, and the growing number of civil rights cases involving health plan coverage of gender affirming treatment.

Fifth Circuit Finds Department of Labor Advisory Opinion Is Subject to Judicial Review

In a case with implications for plan sponsors' ability to rely on Advisory Opinions issued by the Department of Labor, the Fifth Circuit determined that an Advisory Opinion issued for a health insurance plan violated the Administrative Procedure Act.

Case Overview

Data Marketing Partnership ("DMP"), a data-mining company, offers "limited partnership interests" to certain individuals who furnish DMP with their phone and computer data. If those individuals furnish enough data, they have the option to purchase insurance through DMP's health insurance plan. In 2018, DMP applied to the Department of Labor ("DOL") for an Advisory Opinion relating to this plan, seeking a finding that the plan was governed by ERISA as an employee welfare benefit plan.

According to DOL, the agency issues Advisory Opinions to answer inquiries from both individuals and organizations by applying the law to a specific set of facts.

By 2019, the company had still not received the requested Advisory Opinion, and so it filed an action in a Texas district court seeking a declaratory judgement that the plan was indeed governed by ERISA, as well as an injunction prohibiting DOL from issuing a contrary Advisory Opinion. After the case was filed, DOL issued an Advisory Opinion finding that state insurance laws, not ERISA, would govern the plan, and the "limited partners" were not DMP's "employees" for purposes of ERISA.

DMP argued that DOL's action violated the Administrative Procedure Act ("APA"), while DOL argued that the Advisory Opinion was not subject to judicial review under the APA because it was not a "final agency action." Under the APA, a court can only review an agency action that is deemed "final." The district court held that the Advisory Opinion was unenforceable and enjoined DOL from not recognizing the plan as an ERISA-governed plan.

The case was appealed to the U.S. Court of Appeals for the Fifth Circuit, which considered two key issues: (1) whether the Advisory Opinion was subject to judicial review as a "final agency action" under the APA; and (2) if it was indeed a final agency action, whether the opinion was "arbitrary and capricious" in violation of the APA, which would allow a court to set aside the opinion. First, the Fifth Circuit held that the Advisory Opinion was a final action because it encompassed DOL's determination with respect to the plan, and it was not subject to further agency review. The court reasoned that even though DOL could change its position or reasoning for its decision in the future, the Advisory Opinion is still a final decision by the agency at the time it is issued. Second, the Fifth Circuit held that the Advisory Opinion was arbitrary and capricious because it relied on a definition related to DMP's "limited partners" that was materially different than the definition as applied in prior guidance, an inconsistency which DOL had failed to explain.

Outlook

The most significant takeaway from the Fifth Circuit's ruling is that an Advisory Opinion may be subject to judicial review. Advisory Opinions are typically seen as guidance that plan sponsors can depend on, but with this ruling, it appears that—at least in the Fifth Circuit—Advisory Opinions are subject to judicial review and may be set aside in some circumstances. Note too, however, that this is merely one case, and it is not clear at this time whether other Circuit Courts would come to the same decision regarding Advisory Opinions.

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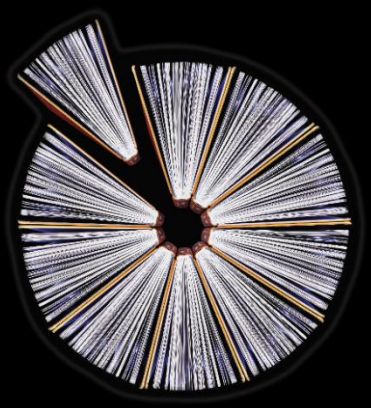

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