

Gender-Affirming Care for Minors— Recent Executive Order

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Why Discussing This?

- In general, we do not discuss Executive Orders, rather we wait for the applicable Agencies (such as the Departments of Health and Human Services, Treasury and Labor) to issue regulations
- We decided to do a webinar on this topic because employers—especially those with large government contracts—have been asking about this specific Executive Order
- The aim of the webinar is to provide: (1) plan sponsors with a basic understanding of this specific Executive Order and (2) guidance for HR/Benefits professionals to discuss the potential impact of the Executive Order with executives at their company—who are asking questions

Agenda

- The language of the Order
- Status of the Order
- Scope of Gender-Affirming Care Impacted by the Order
- Possible Impact of the Order on employer-sponsored health plans
- Possible practical implications of the Order on employer-sponsored health plans
- Timing of future regulations
- Possible actions to be considered by plan sponsors

Executive Order

- On January 28, 2025, President Trump issued an Executive Order titled, **“PROTECTING CHILDREN FROM CHEMICAL AND SURGICAL MUTILATION”**
- The Order applies to gender transition services for children under the age of 19. It states, “it is the policy of the United States that it will not fund, sponsor, promote, assist, or support the so-called “transition” of a child from one sex to another, and it will rigorously enforce all laws that prohibit or limit these destructive and life-altering procedures.”

Executive Order

- The Order directs heads of agencies that provide research of educational grants to medical institutions to, “consistent with applicable law and in coordination with the Director of Management and Budget, immediately take appropriate steps to ensure that institutions receiving Federal research or education grants to end the chemical and surgical mutilation of children.”
- The Order also directs the Secretary of Health and Human Services (HHS) to “take all appropriate steps” to end certain insurance coverage for many gender-affirming care services.
- The Order specifically names Tricare (which serves the military), Medicare and Medicaid and federal and postal health benefits programs
- We do not believe that most employers will need to take any immediate action regarding their health plans in response to the Order

Status of the Order

- Two different federal courts (one in Maryland and one in Washington) issued **temporary** restraining orders
- The orders temporarily block the Trump administration from withholding federal funds for healthcare providers that provide certain gender-affirming care for young people

Status of the Order

- The memorandum opinion from the Judge in Washington provides the most details on the reason for the temporary injunction
- **Violation of the Separation of Powers:** The memorandum opinion states, “The United States Constitution exclusively grants the power of the purse to Congress, not the President, and the President does not have unilateral authority to refuse to spend the funds Congress appropriates.” It also states “This oversteps the President’s authority under the separation of powers.”
 - These statements from the Judge focused on the aspect of the Order that impacts the money that Congress appropriated for research and education grants to medical institutions

Status of the Order

- **Violation of the 5th Amendment’s Equal Protection Clause:** The memorandum opinion states, “The Fifth Amendment’s Equal Protection Clause prohibits the federal government from treating people differently based on sex or transgender status unless such differential treatment (1) serves important governmental objectives and (2) is substantially related to the achievement of those objectives.”
 - The memo cites Ninth Circuit law for this standard—not a Supreme Court case
- The memorandum opinion also states, “And critically, the Executive Order prevents transgender youth from obtaining necessary medical treatments that are completely unrelated to their gender identity. For example, a cisgender teen could obtain puberty blockers from a federally funded medical provider as a component of cancer treatment, but a transgender teen with the same cancer care plan could not.”

Status of the Order

- **Violation of the 10th Amendment:** The memorandum opinion states that the President cannot unilaterally regulate or criminalize medical practices in Washington state. In general, the power to regulate the practice of medicine is reserved to the States.
- This is in reference to the part of the Order that makes it a crime to “perform, attempt to perform, or conspire to perform female genital mutilation on another person who has not attained the age of 18 years”
- The memorandum opinion states that Congress has not acted to criminalize that service and that it has no power to do so to the extent the service has no nexus to interstate commerce. “A criminal act committed wholly within a State cannot be made an offense against the United States, unless it ha[s] some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.”
- The State of Washington has passed a law stating that the provision of or participation in any gender-affirming treatment consistent with the standard of care in Washington by a license holder does not constitute unprofessional conduct subject to discipline.

Status of the Order

- In December of 2024, the Supreme Court heard oral arguments in United States v. Skrmetti. The case considers the constitutionality of state laws that ban certain gender-affirming care for minors.
- There has been no decision in that case.
- The outcome of United States v. Skrmetti will likely impact the legality of the Order
- It is unclear what will happen next in these cases—and if the restraining orders will become permanent or be narrowed

Status of the Order

- One question is what power does the Trump administration have over federal funds that have been already been approved
- If Congress has approved the funds for a specific use, it seems that the Trump administration cannot unilaterally change that approval
- What about when Congress approves funds for uses, but the specific use is more general in nature, allowing the applicable Agencies under the control of the President to determine how those funds will be allocated?
- Can the Trump administration amend approved funds/contracts with healthcare providers—in the middle of the contract/funding approval term?
- Could the Trump administration add restrictions, similar to those in the Order, for new government contracts?
- The answer to these questions are unclear

Previous Mandates

- Back in 2021, President Biden issued Executive Order 14042: Ensuring Adequate COVID Safety Protocols for Federal Contractors (“COVID 2021 Order”)
- The COVID 2021 Order required, that unless legally exempt, such as an accommodation for disability or religious belief, “covered contractor employees must be fully vaccinated no later than December 8, 2021.”
- The COVID 2021 Order applied to specific contracts with the federal government
- In general, the requirements of COVID 2021 Order did not apply to an employer until it actually entered into a government contract or subcontract that included a clause requiring compliance

Previous Mandates

- The COVID 2021 Order was litigated and its application narrowed by certain federal courts
- In 2023, the Biden administration issued a new order that advised all Agencies to stop enforcing any policies adopted to implement the COVID 2021 Order
- This left uncertainty with respect to the scope of the President's authority under the Federal Property and Administrative Services Act (commonly known as the Procurement Act).
- The Fifth, Sixth, and Eleventh Circuits all upheld the lower courts' preliminary injunction of the COVID 2021 Order
- In contrast, the Ninth Circuit found that the President *does* have the authority to impose health-related requirements on federal contractors under the Procurement Act
- It is unclear how the current U.S. Supreme Court would rule on this issue today—especially with respect to this new Order for gender-affirming care for minors

The Order

- Given the uncertainty of how the federal courts will ultimately rule on the legality of the Order, or if the Trump administration will include contract provisions similar to those in the Order for new government contracts, employers should understand how the Order could impact the health plans that it sponsors

Gender-Affirming Care

- What gender-affirming care is targeted by the Order?
- The focus is on hormonal and surgical care for those under age 19
- It does not appear to apply to counseling/behavioral health services
- In this webinar, we will refer to hormonal and surgical care for transgender youth as gender-affirming care—but note that we do not mean for that to include counseling

Possible Impact

- Under the section of the Order titled, “***Directive of the Department of Justice***” the Order states that the Attorney General shall convene States’ Attorneys General and other law enforcement officers to coordinate the enforcement of laws against female genital mutilation across all American States and Territories
- It is unclear what this means
- It seems likely that the Attorney General will encourage States to aggressively prosecute healthcare providers who provide gender-affirming care services for children

Possible Impact

- For any State that makes it illegal for a child to receive gender-affirming care in their State of residence, the laws of those States could have provisions that make it illegal for someone to “assist” that child with obtaining those services
 - An open question is if a travel benefit in a health plan could be seen as “assisting” a child in obtaining the services not permitted in their State of residence
 - At this point, it seems unlikely that this will be the focus of any actions taken by the States that prohibit this type of care of children

Possible Impact

- Two cases have been filed against a provider of abortion services—and these cases give us some hints of what actions the States may take against providers of gender-affirming care for minors
- In January of 2025, Louisiana indicted a doctor in New York who prescribed and sent abortion pills to a Louisiana resident. The doctor prescribed the drugs via a telehealth visit.
- The charges were brought against Dr. Margaret Carpenter, who was operating under New York’s telemedicine abortion shield law, which stipulates that New York authorities will not cooperate with prosecutions or other legal actions filed against New York abortion providers by other States
- The case appears to be the first time criminal charges have been filed against an abortion provider for sending pills into a State with an abortion ban
- Carpenter was also sued by the Texas attorney general in December of 2024 under similar allegations of prescribing and sending abortion pills to an individual who resides in Texas. That case did not involve criminal charges.

Unlikely to Impact

- The next few slides discuss certain aspects of the Order that we reviewed for the potential impact on an ERISA-covered health plan.
- **ACA Section 1557.** The Order states that HHS will take action to rescind all regulatory and sub-regulatory guidance issued under ACA Section 1557 in support of gender-affirming care for children
 - Because most companies' health plans do not receive federal funds from HHS, a change in ACA Section 1557 would not directly impact the health plans
 - The third-party administrator for a self-funded health plan is likely subject to ACA Section 1557. This Order does not make it illegal for them to administer a non-governmental health plan that covers the treatment of gender-affirming care for children.

Unlikely to Impact

- **Essential Health Benefits.** The Order states that HHS will take action to rescind all regulatory and sub-regulatory guidance issued under the essential health benefits rules in support of gender-affirming care for children
 - The essential health benefit rules for ERISA-covered plans do not mandate coverage for the treatment of gender-affirming care for children
 - Self-funded plans can select any State's benchmark plan to determine what is considered an essential health benefit
 - This aspect of the Order should not impact most companies' health plans
 - Note that Colorado added gender-affirming care to their State "benchmark plan" as an essential health benefit. This would impact insured plans in that state, but self-funded plans can select a different State benchmark plan for determining what is an essential health benefit
 - In our experience, many self-funded plans designate Utah as the State benchmark plan, given it appears to have the least required essential health benefits

Unlikely to Impact

- ***Rescind Federal Policies That Rely on WPATH.*** The Order states that federal agencies shall rescind or amend all policies that rely on WPATH guidance
 - WPATH is the World Professional Association of Transgender Health (“WPATH”), a non-profit organization that publishes a “Standards of Care” document which is a set of clinical guidelines for individuals with gender dysphoria
 - Federal agencies removing any of their policies that rely on WPATH should not have any impact on most companies’ health plans

Possible Practical Implications

- ***Limited Facilities Will Provide Gender-Affirming Care for Children.*** Even if a health plan has a travel benefit, employees may effectively have nowhere to travel to obtain gender-affirming care for their children. The Order may result in regulatory and sub-regulatory actions that dramatically reduce the number of providers in the US that are able to provide gender-affirming care to minors. Currently, 23 states prohibit this care.
- It is unclear if the Order could be implemented so that facilities that participate in Medicare cease to receive federal funds if they provide these services. (Approximately 98% of providers in the US participate in Medicare). [Annual Medicare Participation Announcement | CMS](#)
 - Consider how the Hyde Amendment works for abortion services. Medicaid is a combination state and federal funds. The Hyde Amendment banned the use of any federal funds for abortion, with very narrow exceptions. However, State Medicaid funds can be used to pay for abortion services.

Possible Practical Implications

Limited Facilities Will Provide Gender-Affirming Care for Children--Continued

- In response to the Order, some hospitals have paused such care for minors to evaluate the effects of the Order
- The media has reported a long list of hospitals that are suspending gender-affirming care for those under age 19, including:
 - VCU Health and its affiliated Children's Hospital of Richmond
 - Denver Health
 - Children's National Hospital in Washington, D.C.
 - Lurie Children's Hospital in Chicago
 - Phoenix Children's Hospital

Possible Practical Implications

- ***Private Right of Action.*** The Order calls for legislation that would provide a private cause of action for children, and parents of children, against medical professionals who have provided gender-affirming care. If such legislation is enacted into law, then even private facilities that don't receive Medicare funding may not provide gender-affirming care to minors to avoid liability.
- ***Diagnostic Coding.*** To the extent the federal government (HHS) controls diagnostic coding, they could eliminate/modify the codes associated with gender-affirming care for minors, thereby making it much more difficult to bill for these services
 - CMS, a department within HHS, oversees the standard diagnostic coding system (ICD-10)
 - ICD-10 (the International Classification of Diseases, Tenth Revision, Clinical Modification) is a standardized system used to code diseases and medical conditions . Healthcare providers use ICD-10 codes when diagnosing patients.

Human Rights Campaign (HRC)

- HRC has a scoring system—the Human Rights Campaign Corporate Equality Index—which is the national benchmarking tool on corporate policies, practices, and benefits pertinent to lesbian, gay, bisexual, transgender, and queer employees
- Many employers seek to receive a high score (even 100%)
- One aspect of the scoring criteria takes into account the health plan coverage offered to employees. There are many benefits required in order to receive a full score under this section.
- For example, to receive 5 points “Equal health coverage for gender diverse individuals for medically necessary care. Baseline coverage MUST include the following items...
Pharmaceutical coverage (hormone replacement therapies, puberty blockers for youth)”
- For employers that are seeking a 100% rating from HRC, it does not appear that the health plans that they sponsor can remove all gender-affirming care for minors

Administrative Procedures Act

- We are unlikely to see any new rules on gender-affirming care for minors in the next few months
- The Administrative Procedure Act (APA) establishes the procedural framework with which agencies generally must comply when issuing legislative rules. Under the APA, an agency generally must publish a notice of proposed rulemaking in the Federal Register and allow the public to comment on the proposal. After reviewing the comments received, the agency may publish a final rule in the Federal Register. The APA provides that final rules generally do not become effective until at least 30 days after publication. This type of rulemaking is codified at 5 U.S.C. § 553.
- 5 U.S.C. §551(5) defines “rulemaking” as the “agency process for formulating, amending, or repealing a rule.” So, the APA’s rulemaking requirements generally apply to the repeal and amendment of rules, as well as to their initial issuance

Administrative Procedures Act

- Congress can overturn or amend a rule pursuant to its legislative power
- Note that President Trump issued an Executive Order on January 20, 2025, that ordered a regulatory freeze for 60 days. This is not uncommon for new presidents and allows the new administration to pause regulatory action to ensure regulations in process align with its priorities.

Possible Action Items

- Some employers have contacted the insurance carriers and third-party administrators (TPAs) to inquire if they are taking any actions in response to the Order
- We have heard that some large hospital providers are stocking up on hormonal medications in the event these become difficult to obtain
- Some employers are asking the TPAs to review the network of providers that offer gender-affirming care for minors—and ensuring that there are some smaller clinics that do not rely on federal funds
- Employers have also asked about what actions the insurance carriers/TPAs will take if the ICD-10 codes related to gender-affirming care for minors are removed

Possible Action Items

- We do not believe that employers/plan sponsors need to take any immediate action in response to the Order
- We will continue to watch what the courts, Congress, the States and the Trump administration do in this space

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