Miller & Chevalier

Employer Considerations After 11th Circ. Gender Care Ruling

Originally published in* Law360, *November 10, 2025

Joanne Roskey
Member
jroskey@milchev.com

Elizabeth J. Jonas
Counsel
ejonas@milchev.com

On September 9, the U.S. Court of Appeals for the Eleventh Circuit, sitting *en banc* in *Lange v. Houston County, Georgia*, found that a county health plan did not facially violate Title VII of the Civil Rights Act on the basis of sex when it covered medically necessary treatments for certain diagnoses, but excluded coverage for gender-affirming care sought by the plaintiff.

The full court departed from a previous Eleventh Circuit panel that had affirmed the decision of the U.S. District Court for the Middle District of Georgia, which granted the plaintiff's motion for summary judgment and permanently enjoined the exclusion of gender-transition surgery from the county's insurance policy.

The Eleventh Circuit's about-face in *Lange* is jurisprudentially significant, because the *en banc* panel relied on *U.S. v. Skrmetti*, a June ruling from the U.S. Supreme Court concerning the equal protection clause, to find that the health plan at issue did not discriminate on its face in violation of Title VII.

Lange is also practically significant, because it disincentivizes anti-discrimination suits against health plans, as well as perhaps similar challenges to state laws regulating coverage of gender-affirming care pursuant to the equal protection clause.

Plans must be cognizant of both federal and state liability, but now increasingly so, as states continue to pass benefits mandates concerning gender-affirming care that, based on the particular state, either require or restrict access.

Anna Lange is an employee of Houston County, Georgia, who was diagnosed with gender dysphoria and sought gender-affirming surgery. The plaintiff's health insurance plan excluded coverage for her surgery.

The plaintiff filed a Title VII discrimination claim against the county and relied on the Supreme Court's 2020 decision in *Bostock v. Clayton County, Georgia*, which held that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."

Quoting prior precedent, Lange argued that the exclusion in the county's plan "violates Title VII because it reflects a 'formal, facially discriminatory policy requiring adverse treatment of' transgender employees based on sex."

In May 2024, an Eleventh Circuit panel applied the holding in *Bostock* to find that the "blanket denial of coverage for gender-affirming surgery" violated Title VII.

The panel reasoned that "Health Plan participants who are transgender are the only participants who would seek gender-affirming surgery. Because transgender persons are the only plan participants who qualify for gender-affirming surgery, the plan denies health care coverage based on transgender status."

The *en banc* court reached a different result, relying on *Skrmetti* to find that the coverage exclusion at issue does not violate Title VII. In *Skrmetti*, which involved an equal protection clause challenge to a Tennessee law outlawing certain gender-transition medical treatment for minors, the Supreme Court stated that it would not "address whether *Bostock*'s reasoning reaches beyond the Title VII context," but then applied the *Bostock* analysis to the case.

The justices in *Skrmetti* concluded that the Tennessee law did not violate Title VII under *Bostock* because it was the type of diagnosis, rather than sex or transgender status, that was the but-for-cause of the inability to obtain gender-affirming care under the law.

Lange is jurisprudentially significant, because it is an example of a circuit court sitting en banc relying almost exclusively on the Skrmetti equal protection clause decision as precedent in a Title VII case.

The majority's approach in *Lange* was sharply criticized by the dissenting judges, who argued that *Skrmetti*'s application of *Bostock* is dictum, and that *Bostock*, outside the *Skrmetti* lens, controls.

The dissenting judges in *Lange* also criticized the majority opinion's reliance on *Skrmetti*, because it "implicitly relied on since-rejected reasoning" from the Supreme Court's 1974 decision in *Geduldig v. Aiello*, and its 1976 ruling in *General Electric Co. v. Gilbert*, such that "the Supreme Court has created a tension that only it can resolve."

The *Lange* decision is also important because it may be indicative of a new wave of decisions where courts rely on *Skrmetti*'s application of *Bostock* to find no violation of Title VII, whereas *Bostock* was, by itself, relied on affirmatively by plaintiffs bringing Title VII claims.

For example, in June, the Supreme Court granted *certiorari* in *Folwell v. Kadel* and *Crouch v. Anderson*, cases concerning the equal protection clause, Title VII, Affordable Care Act, and Medicaid Act challenges to two state health plans that excluded certain gender dysphoria treatments from coverage.

Citing *Skrmetti*, the Supreme Court vacated the lower court's decision and remanded the cases back to the U.S. Court of Appeals for the Fourth Circuit in its orders granting the petitions for a writ of *certiorari*.

Last year, the Fourth Circuit sitting en banc had found the exclusions unlawful and, notably, relied in part on *Bostock* for the equal protection clause analysis.

Also on the federal front, the U.S. Department of Health and Human Services (HHS) rescinded subregulatory guidance in February that stated that section 1557 of the ACA prohibits discrimination based on gender identity.

In June, the HHS issued its "Patient Protection and Affordable Care Act; Marketplace Integrity and Affordability" final rule, which, in pertinent part, provides that ACA-regulated plans that are subject to essential health benefit requirements may not cover specified sex-trait modification procedures as essential health benefits, effective plan year 2026.

Of note, the HHS responded to the public comment that this regulation violates *Bostock* by citing *Skrmetti*'s application of *Bostock*, and concluded that "the *Bostock* reasoning does not apply here," because "neither an individual's sex nor transgender status is the but-for cause of their inability to obtain certain sex trait modification procedures as an [essential health benefit]."

Further, on October 22, the U.S. District Court for the Southern District of Mississippi, in the *State of Tennessee v. Kennedy Jr.*, found that the reasoning of *Bostock* does not extend to Title IX, and vacated certain HHS regulations interpreting discrimination on the basis of sex to include gender identity in the context of Title IX.

Adding to the legal mix is the panoply of state laws regulating coverage of gender-affirming care in health policies and plans. There are a number of state laws prohibiting health insurers and plans from excluding coverage for gender-affirming

care,[1] and a few states that explicitly allow health benefit plans to refuse to cover certain gender-affirming care for minors or for all persons.[2] States will likely continue to regulate in this area.

These laws are in addition to state laws that prohibit medical professionals from providing gender-affirming care to minors, which have been upheld in the face of equal protection clause challenges in multiple cases.[3]

Employers and plan sponsors are faced with the practical question of how to structure their plans and offer benefits that comply with both federal and state law as the legal landscape continues to take shape after *Skrmetti*.

It is important to note that even though federal law is developing in this area, employers and plan sponsors should be measured in their approach, given that *Lange* is not the law of the land and Title VII is not the only federal law prohibiting discrimination in the employment setting.

Furthermore, as to state law liability, the first question for a private employer or plan sponsor is whether a certain state law concerning the coverage of gender-affirming care applies at all. This comes down to whether the employee benefit plan is a fully insured plan, and is therefore subject to some state insurance regulation, or whether it is a self-funded plan and exempt from state insurance mandates by Employee Retirement Income Security Act (ERISA) preemption.

Sometimes a state law mandating benefits only includes insurers and/or fully insured plans by definition. Other times, though, these state benefit mandates also sweep up self-funded plans in their definitions, and are therefore potentially subjects of ERISA preemption challenges.

Additionally, employers and plan sponsors that operate in multiple states, or have participants and beneficiaries in multiple states, must be aware of the extraterritorial reach of these state laws regulating the coverage of gender-affirming care.

At both federal and state levels, the antidiscrimination legal landscape implicating employer coverage of gender-affirming care is rapidly shifting and evolving. Employers should be measured and thoughtful in their approach to gender-affirming care coverage.

---

[1] *E.g.*, Cal. Code Regs. tit. 10 § 2561.2 (2025); Colo. Rev. Stat. Ann. § 10-16-104 (West 2025); Va. Code Ann.38.2-3449.1.
[2] *E.g.*, Miss. Code Ann.§ 83-9-36.1 (West 2025) (minors); Ark. Code Ann. § 23-79-166 (West 2025).
[3] *Poe v. Drummond*, No. 23-5110 (10th Cir. 2025), and *Brandt ex rel. Brandt v. Griffin*, No. 23-2681 (8th Cir. 2025) (*en banc*).