Executive Order on Health Care Access for Gender-Affirming Treatments for Minors

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*Seyfarth Synopsis: Following through on a campaign theme focused on transgender issues and access to **gender-affirming** health care, on Friday, January 28, President Trump signed an Executive Order, titled "Protecting Children from Chemical and Surgical Mutilation," that aims to restrict the availability of **gender-affirming** care (GAC) to individuals under the age of 19. The Executive Order will directly impact employers' group health plans who receive federal financial assistance as well as indirectly impact other medical benefit plans.*

The Executive Order declares that "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." The Executive Order directs federal agencies to cease funding, promoting, or supporting GAC for minors, which is defined to include the use of puberty-blockers, hormone therapy, and surgical procedures.

The key points of the Executive Order and its impact on employee benefit plans subject to ERISA, are summarized below. Of note, lawsuits have been filed challenging the legality of the order and multiple state attorney generals have reiterated that health care providers in their states will violate the law if they cease providing gender affirming care to minors. As these legal battles over federalism and constitutionality are waged, we provide the below analysis to clearly delineate the scope and goals of the order.

Defunding Mechanisms under the Executive Order

The Executive Order's directives will make it harder for participants to receive GAC services by restricting availability of such services to minors. Agencies providing research or education grants must ensure that recipient institutions cease providing GAC to minors. Health care providers who receive federal assistance must cease providing GAC for minors or risk losing federal funding. TRICARE and other federal healthcare programs must also exclude coverage for GAC.

Directives to Federal Agencies

The Executive Order directs the Department of Health and Human Services (HHS) to withdraw its current guidance on "HHS Notice and Guidance on Gender Affirming Care, Civil Rights and Patient Privacy" which provides protections under Section 1557 of the Affordable Care Act (Section 1557) and HIPAA for individuals of all ages seeking GAC.

It orders HHS to "take all appropriate actions" to discontinue GAC, including by "regulatory and sub regulatory action" to ensure compliance with it's policy, involving the following areas: (1) Medicare or Medicaid conditions of participation; (2) clinical-abuse or inappropriate-use assessments relevant to state Medicaid programs; (3) mandatory drug use reviews; (4) Section 1557; (5) quality, safety, and oversight memoranda; and (6) essential health benefits requirements; and (7) federally funded medical manuals.

HHS must revise its rules that implement Section 1557 and government programs to ensure compliance with the Executive Order.

Additionally, HHS must publish a review of best practices for addressing gender dysphoria within 90 days, prioritizing non-invasive and psychological approaches.

Federal agencies must rescind policies that rely on guidance from the World Professional Association for Transgender Health.

Federal agencies are expected to submit a report of their progress in implementing directives under the EO by March 28, 2025.

Federal Medical Benefits Coverage

The Federal Employee Health Benefits and Postal Service Health Benefits programs must eliminate coverage for pediatric GAC.

Drug Safety

The Food and Drug Administration (FDA) is directed to reassess the safety and efficacy of the use of puberty blockers and **gender-affirming** hormones for GAC, particularly for use in minors.

Directives to the Department of Justice ("DOJ")

The Executive Order instructs the DOJ to prioritize the enforcement of laws against GAC.

It directs the Attorney General to draft legislation for Congress to enact a private right of action for adults who received GAC as minors and parents of children.

The DOJ is to prioritize investigations against sanctuary states that facilitate stripping custody from parents who resist GAC, including by considering the application of the Parental Kidnapping Prevention Act. If followed through, this would mean that parents could potentially be tried for taking their child to an appointment for gender affirming care treatment.

The Impact on Employer-Sponsored Benefit Plans Subject to ERISA

The Executive Order, through its directives, restricts GAC coverage under group health plans that receive federal financial assistance (which include medical plans that receive a CMS retiree drug subsidy or are structured as an Employer Group Waiver Plan) and insured plans that are Medicare Supplemental Arrangements. The extent to which this may impact employer-sponsored health plans that are covered by Section 1557 is unclear. However, employers should be advised that applicable HHS guidance on GAC coverage and treatment is subject to change.

As ERISA does not preempt other federal laws or criminal laws (such as those related to prohibitions on GAC for minors), even group health plans that are not subject to Section 1557 or do not receive federal financial assistance could be impacted by the downstream effects of the Executive Order.

Federal agencies with important oversight roles of employer-sponsored health plans are directed to take regulatory action and prioritize enforcement (including criminal laws) of laws restricting GAC. It is presently not known whether the forthcoming regulatory action, including guidance, rulemaking and proposed legislation, might impact the ability of ERISA governed plans to provide GAC and maintain their tax-qualified status.

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