

Another Class Action Alleging Discriminatory Coverage of Fertility Treatment Proceeds to Trial

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Berton v. Aetna Inc., 2024 WL 869651 (N.D. Cal. 2024)

A participant in a self-insured health plan filed a class action lawsuit against the plan's administration company under Affordable Care Act Section 1557, alleging that the plan discriminated against her, her wife, and similarly situated participants based on their sexual orientation by denying them equal access to fertility treatments. The plan initially covered such treatments for participants who were "infertile" based on their inability to conceive after one year of "frequent, unprotected heterosexual sexual intercourse," or, for women without a male partner, 12 cycles of donor insemination (six months/six cycles for older participants). The plan was later amended to base its infertility determination on "egg-sperm contact" rather than intercourse or insemination, with the definition applicable to "all individuals regardless of sexual orientation or the presence/availability of a reproductive partner." The participant claimed that, even as amended, the plan discriminated against LGBTQ participants by imposing different and more onerous prerequisites for fertility treatment access than those applicable to heterosexual couples. Specifically, the participant argued that heterosexual couples could demonstrate infertility simply by representing that they had had 12 months of frequent intercourse, whereas same-sex couples were forced to undergo up to 12 cycles of donor insemination at a cost of hundreds of dollars per procedure.

The administration company argued that the case should be dismissed: First, because the participant had failed to state a claim of intentional discrimination under Section 1557, and second, because the participant had not named the employer plan sponsor in the lawsuit. The court, however, concluded that the participant had adequately alleged that on its face, the plan imposed an unequal burden on same-sex couples by requiring them to incur out-of-pocket costs and provide verifiable proof of multiple cycles of donor insemination, while heterosexual couples could show infertility without cost or documentation. The court further concluded that the employer was not a necessary party to the litigation despite the administration company's argument that the employer had the final say on the benefits offered by the plan. Accordingly, the court refused to dismiss the case, allowing it to proceed to trial.

EBIA Comment: Plan coverage of fertility benefits is a hot topic—both in the courts and in the news. Employer plan sponsors and their plan administrators will want to follow developments in this area (including the potential finalization of proposed Section 1557 regulations) and take steps to ensure that plan documents are drafted and benefits are provided in a nondiscriminatory manner. For more information, see EBIA's Health Care Reform manual at Section XXXIV.A ("Section 1557 Nondiscrimination: Grounds Prohibited Under Federal Laws") and EBIA's Group Health Plan Mandates manual at Sections XXI.M.1 ("Interaction of Title VII and Section 1557") and XXI.H ("Plan Coverage of Fertility Treatments Under Title VII, as Amended by the PDA"). See also EBIA's Self-Insured Health Plans

manual at Section XIII.D.5 (“Section 1557 Nondiscrimination: Nondiscrimination in Health Programs and Activities”).

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