

Honorable Ricardo S. Martinez

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CHERYL ENSTAD et al.,

Plaintiffs,

vs.

PEACEHEALTH,

Defendant.

No. 2:17-cv-01496-RSM

**DEFENDANT’S REQUEST FOR  
JUDICIAL NOTICE IN SUPPORT OF  
MOTION TO DISMISS COMPLAINT  
PURSUANT TO RULE 12(B)(6)**

NOTE ON MOTION CALENDAR:

February 9, 2018

Complaint Filed: October 5, 2017  
Trial Date: None Set

ORAL ARGUMENT REQUESTED

1           **PLEASE TAKE NOTICE THAT** pursuant to Federal Rule of Evidence 201, Defendant  
2 PeaceHealth respectfully requests that the Court take judicial notice of Exhibits 1-3.

3           Federal Rule of Evidence 201(b) provides that the Court may take judicial notice of a fact  
4 not subject to reasonable dispute that is either (1) generally known within the territorial  
5 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to  
6 sources whose accuracy cannot reasonably be questioned.

7           Exhibit 1: The October 16, 2017 Status Report filed by the United States Department of  
8 Justice in *Franciscan Alliance v. Price*, Case No. 7:16-cv-00108, pending in the United States  
9 District Court for the Northern District of Texas.

10           “[T]he Court may take judicial notice of undisputed matters of public record, such as  
11 documents on file in federal or state courts.” *Kenny v. Pac. Inv. Mgmt. Co. LLC*, No. C14-  
12 1987RSM, 2015 WL 10635505, at \*3 (W.D. Wash. Aug. 26, 2015), citing *Harris v. Cty. of*  
13 *Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012).

14           Exhibit 2: The October 4, 2017 Memorandum from the Attorney General of the United  
15 States, Jeff Sessions, to all United States Attorneys and the Heads of Department Components  
16 entitled “Revised Treatment of Transgender Employment Discrimination Claims Under Title VII  
17 of the Civil Rights Act of 1964.” The Memorandum is publicly available at  
18 <https://www.justice.gov/ag/page/file/1006981/download>.

19           Courts routinely take judicial notice of information available on government websites.  
20 *See, e.g., Horizon Air Indus., Inc. v. Airline Professionals Assoc.*, No. 2:13-CV-681 RSM, 2014  
21 WL 2896001, at \*7 n.1 (W.D. Wash. June 25, 2014); *Crawford v. Marion Cty. Election Bd.*, 553  
22 U.S. 181, 198-99 n.17-18 (2008); *Lake v. MTC Fin., Inc.*, No. C16-1482JLR, 2017 WL 1378438,  
23 at \*1 n.3 (W.D. Wash. Apr. 11, 2017); *Segle v. PNC Mortg.*, No. 10-5655RJB, 2011 WL  
24 1098936, at \*2 (W.D. Wash. Mar. 25, 2011).

25           Exhibit 3: The Office of Insurance Commissioner Washington State webpage “Who to  
26 contact for issues with your employer health plan” publicly available at  
27 <https://www.insurance.wa.gov/who-contact-issues-your-employer-health-plan>.

28           Courts routinely take judicial notice of information available on government websites.

1 See, e.g., *Horizon Air*, 2014 WL 2896001, at \*7 n.1; *Crawford*, 553 U.S. at 198-99 n.17-18; *Lake*,  
2 2017 WL 1378438, at \*1 n.3; *Segle*, 2011 WL 1098936, at \*2. Moreover, Plaintiffs' Complaint  
3 relies upon the Washington State Office of the Insurance Commissioner website. (Complaint, ¶¶  
4 83 and 95.) See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.13 (2007) (court is "entitled to  
5 take notice of the full contents of the published articles referenced in the complaint, from which  
6 the truncated quotations were drawn").

7  
8 Dated: January 8, 2018

MANATT, PHELPS & PHILLIPS  
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# **Exhibit 1**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION**

FRANCISCAN ALLIANCE, INC., *et al.*,

*Plaintiffs,*

v.

No. 7:16-cv-00108

THOMAS E. PRICE, M.D., Secretary  
of Health and Human Services, *et al.*,

*Defendants.*

**STATUS REPORT**

In response to this Court's August 16, 2017 Order, ECF No. 108, Defendants hereby provide the following update on any "rulemaking proceedings initiated with respect to the challenged Rule." ECF No. 108. *See also* 45 C.F.R. § 92 (the "Rule"). As previously described, Defendants are reevaluating the reasonableness, necessity, and efficacy of the Rule that is challenged in this case and, as part of that process, assessing the issues identified by the Court in granting Plaintiffs a preliminary injunction.

A draft of a proposed rule is going through the clearance process within the Executive Branch. Specifically, Defendants are engaging with the Department of Justice ("DOJ") on a draft of a proposed rule pursuant to Executive Order 12,250 ("Leadership and Coordination of Nondiscrimination Laws"). DOJ's review pursuant to the Executive Order and DOJ's implementing procedures is ongoing. DOJ anticipates completing its review in the near future. Once the Executive Order 12,250 process is complete, the proposed rule must go through an inter-agency clearance process managed by the Office of Management and Budget ("OMB") under Executive Order 12,866.

Defendants anticipate that after the clearance process is complete, the future rulemaking proceedings will involve notice and comment. The time required to complete both the clearance process and notice and comment rulemaking proceedings will depend largely on inter-agency coordination and on the public comments on the proposed rule. Defendants anticipate the submission of the proposed rule to OMB in due course, and will inform the Court when that occurs.

Defendants request an opportunity to continue reconsidering the Rule and do not request that the Court close this case. Meanwhile, Defendants will continue to abide by this Court's preliminary injunction and will therefore not enforce the Rule's prohibition against discrimination on the basis of gender identity or termination of pregnancy.

Defendants therefore request that the Court maintain the stay in this case.

DATED: October 16, 2017

CHAD A. READLER  
Acting Assistant Attorney General

JENNIFER D. RICKETTS  
Director, Federal Programs Branch

JOEL McELVAIN  
Assistant Director, Federal Programs Branch

/s/ Alex Haas  
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*Counsel for Defendants*

## **Exhibit 2**



Office of the Attorney General  
Washington, D. C. 20530

October 4, 2017

MEMORANDUM

TO: UNITED STATES ATTORNEYS  
HEADS OF DEPARTMENT COMPONENTS

FROM: THE ATTORNEY GENERAL 

SUBJECT: Revised Treatment of Transgender Employment Discrimination Claims  
Under Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate in the employment of an individual “because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a) (prohibiting discrimination by private employers and by state and local governments); 42 U.S.C. § 2000e-16(a) (providing that personnel actions by federal agencies “shall be made free from any discrimination based on . . . sex”). Title VII’s prohibition of sex discrimination is a strong and vital principle that underlies the integrity of our workforce.

The question of whether Title VII’s prohibition on sex discrimination encompasses discrimination based on gender identity *per se*, including discrimination against transgender individuals, arises in a variety of contexts. In a December 15, 2014, memorandum, Attorney General Holder concluded that Title VII does encompass such discrimination, based on his view that Title VII prohibits employers from taking into account “sex-based considerations.” Memo. at 2; *see also id.* at 1 n.1 (defining “gender identity” and “transgender individuals”).

Although federal law, including Title VII, provides various protections to transgender individuals, Title VII does not prohibit discrimination based on gender identity *per se*. This is a conclusion of law, not policy. The sole issue addressed in this memorandum is what conduct Title VII prohibits by its terms, not what conduct should be prohibited by statute, regulation, or employer action. As a law enforcement agency, the Department of Justice must interpret Title VII as written by Congress.

Title VII expressly prohibits discrimination “because of . . . sex” and several other protected traits, but it does not refer to gender identity. “Sex” is ordinarily defined to mean biologically male or female. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2007); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 362 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (citing dictionaries). Congress has confirmed this ordinary meaning by expressly prohibiting, in several other statutes, “gender identity” discrimination, which Congress lists in addition to, rather than within, prohibitions on

discrimination based on “sex” or “gender.” *See, e.g.*, 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A). Furthermore, the Supreme Court has explained that “[t]he critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment [or other employment actions] to which members of the other sex are not exposed.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Although Title VII bars “sex stereotypes” insofar as that particular sort of “sex-based consideration[ ]” causes “disparate treatment of men and women,” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242, 251 (1989) (plurality op.), Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex, *see, e.g., Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc).

Accordingly, Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status. Therefore, as of the date of this memorandum, which hereby withdraws the December 15, 2014, memorandum, the Department of Justice will take that position in all pending and future matters (except where controlling lower-court precedent dictates otherwise, in which event the issue should be preserved for potential further review).

The Justice Department must and will continue to affirm the dignity of all people, including transgender individuals. Nothing in this memorandum should be construed to condone mistreatment on the basis of gender identity, or to express a policy view on whether Congress should amend Title VII to provide different or additional protections. Nor does this memorandum remove or reduce the protections against discrimination on the basis of sex that Congress has provided all individuals, including transgender individuals, under Title VII. In addition, the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act and the Violence Against Women Reauthorization Act prohibit gender identity discrimination along with other types of discrimination in certain contexts. 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A). The Department of Justice has vigorously enforced such laws, and will continue to do so, on behalf of all Americans, including transgender Americans.

If you have questions about this memorandum or its application in a case, please contact your Civil Chief or your Component’s Front Office.

# **Exhibit 3**



MENU

For Consumers

# Who to contact for issues with your employer health plan

LIVE CHAT

You have an employer health plan if you get your health insurance through your job. If you have an issue with the health insurer, you'll need to know what type of health plan you have so you can get help from the right source. There are three types of employer health plans:

## 1. Insured employer health plans

Also referred to as a fully-funded employer health plan, this is when your employer buys a health insurance plan from an insurance company to provide health coverage to its employees. The health insurer directly pays claims for the employees and their dependents. If your employer buys its group health plan, for example, from Regence BlueShield, or Group Health Cooperative, then it may be an insured health plan. Insured health plans are governed by both federal and state laws. If you're not sure if you have an insured employer health plan, check with your employer.

If you have an insured employer health plan, and need help resolving an insurance problem, [file a complaint with us](#), or call us at 800-562-6900.

## 2. Self-funded employer health plans

Large employers, like Boeing, Microsoft or Weyerhaeuser, don't buy a plan from an insurance company. They provide payments for health care claims from their own funds. If you're employed by a very large employer, then you probably have an employer self-funded plan. In these plans, the employer pays the claims out of a fund or trust. Large employers who self-fund their plans may use third-party administrators (TPA's) to process insurance claims. Insurance companies often act as administrators.

Self-funded plans are not subject to Washington state insurance laws. Instead, they must follow federal laws, such as the [Employee Retirement Income Security Act of 1974 \(ERISA\) \(www.dol.gov\)](#). If you have a self-funded plan and need help, contact the:

[U.S. Department of Labor - Employee Benefits Security Administration \(www.dol.gov\)](#)  
Seattle District Office  
300 Fifth Avenue, Suite 1110  
Seattle WA 98104  
866-444-3272  
Fax: 206-757-6662

## 3. Self-funded government plans

If you have a self-funded or self-insured health plan through your county, town or religious organization and you have a problem with the plan, you can file a complaint with the plan directly.

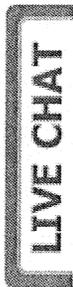
Review your employee benefit booklet or contact your employer to find out what kind of plan you have. If you're still not sure, give us a call at 800-562-6900.

SEE ALSO

- | [Large employer health insurance](#)
- | [Appealing a health insurance denial](#)
- | [Health insurance frequently asked questions](#)

NEED MORE HELP?

- | [Call us at 800-562-6900, 8 a.m. to 5 p.m., Monday - Friday](#)
- | [Live chat with us](#)
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- Can't afford coverage
- Options for people with disabilities
- Appealing a health insurance denial
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