

1 FENNEMORE CRAIG, P.C.  
2 Timothy J. Berg (No. 004170)  
3 Amy Abdo (No. 016346)  
4 Ryan Curtis (No. 025133)  
5 Shannon Cohan (No. 034429)  
6 2394 E. Camelback Road, Suite 600  
7 Phoenix, Arizona 85016  
8 Telephone: (602) 916-5000  
9 Email: [tberg@fennemorelaw.com](mailto:tberg@fennemorelaw.com)  
10 Email: [amy@fennemorelaw.com](mailto:amy@fennemorelaw.com)  
11 Email: [rcurtis@fennemorelaw.com](mailto:rcurtis@fennemorelaw.com)  
12 Email: [scohan@fennemorelaw.com](mailto:scohan@fennemorelaw.com)

13 *Attorneys for Defendants*  
14 *State of Arizona, Andy Tobin, and Paul Shannon*

15 UNITED STATES DISTRICT COURT  
16 DISTRICT OF ARIZONA

17 Russell B. Toomey,  
18 Plaintiff,  
19 v.  
20 State of Arizona, *et al.*  
21 Defendants.

No. 4:19-cv-00035

**DEFENDANTS STATE OF  
ARIZONA’S, ANDY TOBIN’S, AND  
PAUL SHANNON’S OBJECTIONS  
TO ORDER**

**(Oral Argument Requested)**

22 Defendants State of Arizona (the “State”), Andy Tobin, and Paul Shannon  
23 (collectively, the “State Defendants”) hereby submit their Objections to Magistrate Judge  
24 Bowman’s Order (Doc. 213) (the “Order”), dated June 28, 2021, which granted Plaintiff’s  
25 Motion to Compel Production of Documents (Doc. 195) (the “Motion”).

26 **I. THE STATE DEFENDANTS DID NOT ASSERT NOR IMPLY AN ADVICE  
OF COUNSEL DEFENSE.**

“[D]isclosing that legal counsel was consulted, the subject about which advice [was]  
received, or that action was taken based on that advice, *does not necessarily waive the  
privilege protection.*” *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2015 WL

1 12911719, at \*3 (D. Ariz. May 14, 2015) (emphasis added). Instead, the privilege is only  
2 waived when “a party, in the course of litigation, (1) makes an *affirmative act* injecting  
3 privileged materials into a proceeding, (2) thereby putting the materials at issue, (3) where  
4 application of the privilege would deny the opposing party access to information needed to  
5 effectively litigate its rights in the adversarial system.” *United States v. Amlani*, 169 F.3d  
6 1189, 1195 (9th Cir. 1999) (emphasis added); *see also Melendres*, 2015 WL 12911719 at  
7 \*2.

8 Magistrate Judge Bowman found that “the State Defendants have *waived by*  
9 *implication* [not by an affirmative act] their attorney-client privilege as to” legal advice they  
10 received regarding the legality of the exclusion for gender reassignment surgery (the  
11 “Exclusion”). (Doc. 213 at 4:11–14 (emphasis added).) In reaching this decision,  
12 Magistrate Judge Bowman relied upon the misunderstanding that the Exclusion “exists in  
13 large part . . . because the State Defendants were advised that it is legal and nothing in the  
14 law requires the Plan to cover gender reassignment surgery.” (*Id.*) Apparently, Magistrate  
15 Judge Bowman found that the State Defendants put the privileged documents at issue by  
16 asserting an advice of counsel defense.

17 The State Defendants, however, have never asserted that they relied on advice of  
18 counsel. Plaintiff and Magistrate Judge Bowman referenced the State Defendants’ Answer  
19 and their Interrogatory responses in arguing and finding that the State relied upon the advice  
20 of counsel. However, neither the Answer nor the Interrogatory responses support such a  
21 finding.

22 The State Defendants’ Answer nowhere mentions legal advice and the State  
23 Defendants did not assert an affirmative defense of advice of counsel. (*See generally* Doc.  
24 89.)

25 Plaintiff’s Interrogatory No. 1 requests “all reasons” why the State maintained the  
26 Exclusion. (Doc. 195-3, Ex. 3 at 2–3.) The State Defendants’ response identifies several

1 reasons for the Exclusion. (*Id.* at 3.) Admittedly, one of those reasons was the State’s  
2 determination that it was not required to provide such coverage under the then-existing law.  
3 (*Id.*) Magistrate Judge Bowman interpreted the State Defendants’ assertion of the attorney-  
4 client privilege in response to Interrogatory No. 1 as an implicit acknowledgement that the  
5 State Defendants received legal advice in 2016 regarding the legality of the Exclusion and  
6 relied on advice of legal counsel. (Doc. 213 at 5:23–6:7.) However, the State Defendants’  
7 response to Interrogatory No. 1 nowhere states who provided legal advice, what the legal  
8 advice was, or even that the State relied on the legal advice to make its determination. (*Id.*)  
9 Indeed, as the Order acknowledges, the State Defendants’ understanding of the law could  
10 be based on several non-privileged sources (such as newspaper articles). (*See* Doc. 213 at  
11 5:23.) The documents produced in this matter show that the State in fact did receive  
12 interpretations of Affordable Care Act (“ACA”) Rule 1557, and the legal impact of the  
13 Rule, from each of its insurance vendors, medical consultants, news sources, and public  
14 presentations. (*See, e.g.*, Declaration of Ryan Curtis in Support of Objection to Order  
15 Compelling Production (“Curtis Decl.”), filed concurrently, Exhibit 1 (summarizing  
16 interpretations of Rule 1557 received from “Consultant and one Medical Vendor”); *id.* at  
17 Exhibit 2 (medical consultant explaining “what [Rule 1557] is proposing and how it will  
18 impact employers”); *id.* at Exhibit 3 (news publication detailing the scope of Rule 1557 and  
19 its “potential applicability to employers”); *id.* at Exhibit 4 (legal interpretation of Rule 1557  
20 received from insurance vendor and including links to several news publications about Rule  
21 1557); *id.* at Exhibits 5–7 (legal interpretations of Rule 1557 received from insurance  
22 vendors).) The State Defendants’ response to Interrogatory No. 1 did not assert an advice  
23 of counsel defense and, thus, did not waive the attorney-client privilege.

24 Plaintiff’s Interrogatory No. 7 requests an identification of any documents  
25 “considered, reviewed, or relied on” by the State Defendants in their decision to maintain  
26 the Exclusion. (Doc. 195-3, Ex. 3 at 7–8.) The Order cites to the fact that the State

1 Defendants specifically referenced legal memorandum in response to Interrogatory No. 7.  
2 (Doc. 213 at 4:23–5:1, 6:2–6.) As a result, the Order concludes, “the State Defendants’  
3 understanding of the law was based in large part on advice from counsel.” (Doc. 213 at  
4 6:6–7.) Again, however, the Order reads too much into the State Defendants’ Interrogatory  
5 responses. The State Defendants’ response to Interrogatory No. 7 does not state that the  
6 State “relied” on either of the privileged memorandums. (Doc. 195-3, Ex. 3 at 7–8.) Indeed,  
7 the response actually states only that the State “considered” the two memorandums. (*Id.*)  
8 The State Defendants’ response further did not disclose any legal advice contained in either  
9 memorandum and did not indicate whether there even was a recommendation from legal  
10 counsel. (*Id.*) Moreover, the State Defendants’ response to Interrogatory No. 7 explicitly  
11 identifies several non-privileged documents that were gathered from “insurers and other  
12 entities” regarding coverage for transgender healthcare benefits. (Doc. 195-3, Ex. 3 at 7–  
13 8.) Nothing in the State Defendants’ response to Interrogatory No. 7 suggests that the State  
14 “primarily” or “in large part” relied on the advice of counsel for its understanding of the  
15 law. The State Defendants’ response to Interrogatory No. 7 did not waive the attorney-  
16 client privilege.<sup>1</sup>

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17  
18 <sup>1</sup> Plaintiff’s Motion also asserted that the State Defendants waived the privilege by  
19 identifying the attorneys who were present at certain meetings regarding the Exclusion.  
20 (*See* Doc. 195-3 at 4, 8.) The Order, however, does not address this argument and so the  
21 State Defendants will not address it in detail here. The State Defendants continue to assert  
22 that identifying attorneys consulted or present at a meeting does not waive the attorney-  
23 client privilege because such identification does not disclose the content of any underlying  
24 privileged communications. Indeed, the fact that counsel was consulted and the general  
25 subject matter discussed is not privileged in the first instance. *See, e.g., Colton v. United*  
26 *States*, 306 F.2d 633, 636 (2d Cir. 1962); *State v. Alexander*, 108 Ariz. 556, 568 (1972)  
 (“The privilege extends only to confidential [c]ommunications between the client and his  
 attorney. Thus, the fact that the client has consulted an attorney, the dates and places of his  
 visits, the identity of the client, and similar matters are outside the coverage of  
 the privilege.” (citation omitted)). As a matter of law and logic, disclosure of such non-  
 privileged information does not constitute a waiver of privileged communications. *United*  
 *States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989) (“An averment that lawyers have looked  
 into a matter does not imply an intent to reveal the substance of the lawyers’ advice. Where  
 a defendant neither reveals substantive information, nor prejudices the government’s case,

1 Quite plainly, neither the State Defendants' Answer nor their Interrogatory responses  
2 state: (1) what the legal advice was; (2) whether there was any recommendation from legal  
3 counsel; (3) whether they relied upon legal counsel's advice; (4) whether actions were based  
4 on or justified by legal advice; or (5) even which attorneys gave legal advice—outside legal  
5 counsel, in-house counsel at ADOA or the Governor's Office, or the Attorney General's  
6 Office. (Doc. 195-3, Ex. 3 at 3, 5, 7–8.) As such, the State Defendants did not affirmatively  
7 inject the legal advice into this matter or put the legal advice at issue. The State Defendants'  
8 Answer and Interrogatory responses did not waive the privilege.

9 Similarly, the deposition testimony of the State Defendants' witnesses did not waive  
10 the privilege. The Order relies on Ms. Isaacson's and Mr. Bender's statements that the  
11 "deciding factor" or "primary reason" for the State's decision to maintain the Exclusion was  
12 "that the law did not require gender reassignment surgery to be covered." (Doc. 213 at 5:1–  
13 9.) However, even the cited deposition testimony does not affirmatively state that the State  
14 relied on advice of counsel to make this determination. In her deposition, Ms. Isaacson  
15 testified that she did not make the decision to maintain the Exclusion; rather, Ms. Isaacson  
16 consulted with several persons, including "attorneys and the [G]overnor's office and the  
17 [D]irector's office." (Doc. 195-3, Ex. 6 at 18:8–17; *see also* Doc. 195-3, Ex. 6 at 80:10–15  
18 ("Q: Did anyone other than counsel determine that surgery for gender dysphoria was not  
19 required by the law? A: I would say it was a combination of legal counsel and the  
20 [G]overnor's office and the [D]irector's office and the Attorney General's Office.")) Ms.  
21 Isaacson never testified that the State relied upon advice of counsel. Indeed, when asked  
22 what the "deciding factor" for maintaining the Exclusion was, Ms. Isaacson ***did not identify***  
23 ***any legal advice***. (Doc. 195-3, Ex. 6 at 31:16–18.) As explained above, the State received  
24 interpretations of the legal requirements of ACA Rule 1557 from several non-attorneys,  
25 \_\_\_\_\_  
26 nor misleads a court by relying on an incomplete disclosure, fairness and consistency do  
not require the inference of waiver.").

1 including its insurance vendors and news sources. (Curtis Decl., Exhibits 1–7.) Similarly,  
 2 Mr. Bender testified at his deposition that there were several reasons for the State’s decision  
 3 to maintain the Exclusion. (Doc. 195-3, Ex. 7 at 167:12–24.) Although Mr. Bender testified  
 4 that the “primary reason” for maintaining the Exclusion was that the State was not required  
 5 to cover it, Mr. Bender never even mentions that the State *consulted* legal counsel—never  
 6 mind that the State *relied* on the advice of legal counsel. (*See generally* Doc. 195-3, Ex.  
 7 7.). As a result, the deposition testimony of the State Defendants’ witnesses did not  
 8 affirmatively inject the legal advice into this matter or put the legal advice at issue, and  
 9 therefore did not waive the privilege.

10 **II. DEPOSITION TESTIMONY FROM THE STATE DEFENDANTS’**  
 11 **WITNESSES DID NOT WAIVE THE PRIVILEGE.**

12 In addition to the fact that the deposition testimony did not assert an advice of  
 13 counsel defense, the Order fails to address that neither Scott Bender nor former employee  
 14 Marie Isaacson have authority to waive the attorney-client privilege. (*See generally* Doc.  
 15 213.)

16 When the client at issue is a corporation or other entity, only those with authority to  
 17 speak for the entity can waive the privilege.<sup>2</sup> *Commodity Futures Trading Comm’n v.*  
 18 *Weintraub*, 471 U.S. 343, 348 (1985). Only individuals “empowered to act on behalf of”  
 19 the entity can waive the attorney-client privilege. *Id.* “[W]hen control of a corporation  
 20 passes to new management, the authority to assert and waive the corporation’s attorney-  
 21 client privilege passes as well.” *Id.* at 349.

22 No statement by Mr. Bender or Ms. Isaacson can waive the privilege because neither  
 23 of them have authority to speak on behalf of the State Defendants. Mr. Bender is a Plan  
 24 Administration Manager for the Arizona Department of Administration (“ADOA”) (Doc.

25 \_\_\_\_\_  
 26 <sup>2</sup> Under Arizona law, governmental entities are not different than corporations or other  
 entities when it comes to the attorney-client privilege. *See* A.R.S. § 12-2234(B).

1 201-1, Ex. 15 at 16:20–17:12) and has no authority to speak on behalf of the ADOA or the  
2 State of Arizona (*see, e.g.*, Curtis Decl., Exhibit 8). In addition, Ms. Isaacson is a *former*  
3 employee of ADOA, who retired from employment with the State in 2018. (Doc. 201-1,  
4 Ex. 14 at 87:19–88:9.) As such, when she testified at her deposition in March 2021, she  
5 had no authority to speak on behalf of the State Defendants and could not waive the  
6 privilege. *Commodity Futures Trading*, 471 U.S. at 348–49; *Smith v. Ergo Sols., LLC*, No.  
7 CV 14-382 (JDB), 2017 WL 2656096, at \*4 (D.D.C. June 20, 2017).

8 **III. COMPELLING PRODUCTION OF THE PRIVILEGED DOCUMENTS**  
9 **VIOLATES IMPORTANT PUBLIC POLICY.**

10 “The attorney–client privilege is the oldest of the privileges for confidential  
11 communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383,  
12 389 (1981) (citing 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961)). Its purpose  
13 is to “encourage full and frank communications between attorneys and their clients and  
14 thereby promote broader public interest in the observance of law and administration of  
15 justice.” *Id.* The privilege is necessary because proper legal assistance can only be given  
16 when it is free from “consequences or the apprehension of disclosure.” *Id.* (quoting *Hunt*  
17 *v. Blackburn*, 128 U.S. 464, 470 (1888)). The privilege applies equally to individuals,  
18 corporations, and other entities, including government entities. *Id.* at 389–90 (citing *United*  
19 *States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915)); *Commodity Futures*  
20 *Trading*, 471 U.S. at 348 (inanimate entities can assert the attorney-client privilege just as  
21 an individual can); A.R.S. § 12-2234(B).

22 Allowing the government to engage in privileged communications with legal counsel  
23 is uniquely important. As the Second Circuit explained,

24 In the context of legal advice to government officials, the  
25 privilege furthers a culture in which consultation with  
26 government lawyers is accepted as a *normal, desirable, and*  
*even indispensable* part of conducting public business.

1 Abrogating the privilege undermines that culture and thereby  
2 *impairs the public interest.*

3 *Am. C.L. Union v. Nat'l Sec. Agency*, 925 F.3d 576, 589 (2d Cir. 2019) (internal quotations  
4 omitted) (emphasis added). The privilege applies with “special force” in the government  
5 context because the privilege encourages government officials formulating policies in the  
6 public interest to consult with counsel. *Modesto Irrigation Dist. v. Gutierrez*, 1:06-  
7 CV00453 OWWDLB, 2007 WL 763370 (E. D. Cal. Mar. 9, 2007).

8 Although the privilege is not absolute, the conditions in which the privilege can be  
9 overcome are extremely limited. As explained in the State Defendants’ response to the  
10 Motion and above, none of those conditions are present here. Finding waiver here, where  
11 the State Defendants have disclosed only the fact that attorneys participated in the  
12 discussion but not the substance of the privileged communications, “would ill-serve the  
13 policies underlying the doctrine of implied waiver.” *United States v. White*, 887 F.2d 267,  
14 271 (D.C. Cir. 1989) (citing 8 J. Wigmore, Evidence § 2237 (McNaughton rev. 1961)). The  
15 attorney-client privilege is far too important to be deemed waived based on incomplete  
16 interpretations and implications. The State Defendants did not waive the privilege.

17 **IV. THE ORDER IS UNCLEAR AND AMBIGUOUS.**

18 Plaintiff’s Motion apparently requested production of all 85 documents withheld by  
19 the State Defendants on the basis of the attorney-client privilege. (*See generally* Doc. 195;  
20 Doc. 205 at 8:8–9:5.) However, not all of the documents withheld by the State Defendants  
21 include advice regarding the legality of the Exclusion that the State Defendants considered  
22 in 2016 when the State made the decision to maintain the Exclusion. (*See* Doc. 195-3, Ex.  
23 9.) Indeed, some of the documents sought discuss the instant litigation (*see, e.g.*, Doc. 195-  
24 3, Ex. 9 at Nos. 34–36 (2019 communications with prior litigation counsel Kate King), Nos.  
25 39-40 (2019 communications with prior litigation counsel Kate King titled “Toomey v.  
26 State of AZ”)), and still others primarily contain discussions regarding other topics (*see,*

1 e.g., Doc. 195-3, Ex. 9 at No. 1 (“Memorandum regarding leave, premiums, termination  
2 dates, and ACA Hours of Service”)).

3 The Order grants Plaintiff’s Motion and purports to compel the State Defendants to  
4 produce documents “they received on the legality of the Exclusion.” (Doc. 213 at 6:1720.)  
5 The Order does not specify which documents the State Defendants must produce. (*See*  
6 *generally* Doc. 213.) The Order also does not identify the relevant timeframe of documents  
7 which the State Defendants must produce. (*See generally id.*) Without such parameters,  
8 the State Defendants are unable to determine how to comply with the Order. Clarification  
9 is needed in the event the Court decides not to overturn the Magistrate’s Order.

10 Moreover, the Order is overbroad for the same reasons. As discussed, some of the  
11 85 documents withheld by the State Defendants relate to discussions regarding to the instant  
12 litigation. (*See, e.g.*, Doc. 195-3, Ex. 9 at Nos. 34–36 & 39-40.) These documents may  
13 contain discussions about the validity of Plaintiff’s claims and the legality of the Exclusion,  
14 and would, therefore, be compelled to be produced by the Order. However, these  
15 discussions bear absolutely no relation to the State’s 2016 decision to maintain the  
16 Exclusion. Production of documents relating to the instant litigation would also materially  
17 harm the State Defendant’s ability to defend itself and does not promote any “fairness  
18 principle.”

19 Although no production should be required, the State Defendants request that, at  
20 most-if any, the Court compel production of the following attorney-client communications  
21 which relate to the legality of the Exclusion and were exchanged prior to the State’s final  
22 decision to maintain the Exclusion in 2016: Nos. 3–5, 8–32, 51–60, 72, 75<sup>3</sup>, 78–82, 113,

23 \_\_\_\_\_  
24 <sup>3</sup> Doc. 75 further contains a communication to the Governor’s Office protected by executive  
25 communications privilege. The Governor’s Office asserted the executive communications  
26 privilege and deliberative process privilege in this action, which assertions are the subject  
of a separately pending motion to compel. (*See* Doc. 202.) This communication within  
Doc. 75 should continue to be withheld or redacted until such time as the Court resolves  
Plaintiff’s challenges to the Governor’s Office’s assertions of privilege.

1 126, 176–189, 191, 194–203, 207, 210–245, 224, 232. State Defendants noted this  
2 deficiency of Plaintiff’s Motion in State Defendants’ Response. (Doc. 201 at 17:12–19.)  
3 The Magistrate did not address this deficiency. It thus remains unclear what State  
4 Defendants must produce to comply with the Order. If the Court upholds the Order,  
5 clarification would be beneficial to all Parties and would prevent future disputes regarding  
6 the scope of the Order.

7 **V. CONCLUSION**

8 The documents sought by Plaintiff are protected by the attorney-client privilege and  
9 no action by the State Defendants waived the privilege. For these reasons, the State  
10 Defendants object to the Order and respectfully request that the Court deny Plaintiff’s  
11 Motion to Compel.

12 Alternatively, the Court should clarify the Order to specify which documents it is  
13 compelling the State Defendants to produce.

14 DATED this 12<sup>th</sup> day of July, 2021.

15 FENNEMORE CRAIG, P.C.

16 By: s/ Ryan Curtis

17 Timothy J. Berg

18 Amy Abdo

19 Ryan Curtis

20 Shannon Cohan

Attorneys for Defendants State of

Arizona, Andy Tobin, and Paul

Shannon

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1 FENNEMORE CRAIG, P.C.  
2 Timothy J. Berg (No. 004170)  
3 Amy Abdo (No. 016346)  
4 Ryan Curtis (No. 025133)  
5 Shannon Cohan (No. 034429)  
6 2394 E. Camelback Road, Suite 600  
7 Phoenix, Arizona 85016  
8 Telephone: (602) 916-5000  
9 Email: tberg@fennemorelaw.com  
10 Email: amy@fennemorelaw.com  
11 Email: rcurtis@fennemorelaw.com  
12 Email: scohan@fennemorelaw.com

13 *Attorneys for Defendants*  
14 *State of Arizona, Andy Tobin, and Paul Shannon*

15 UNITED STATES DISTRICT COURT  
16 DISTRICT OF ARIZONA

17 Russell B. Toomey,  
18 Plaintiff,  
19 v.  
20 State of Arizona, *et al.*  
21 Defendants.

No. 4:19-cv-00035

**DECLARATION OF RYAN CURTIS  
IN SUPPORT OF DEFENDANTS  
STATE OF ARIZONA’S, ANDY  
TOBIN’S, AND PAUL SHANNON’S  
OBJECTIONS TO ORDER  
COMPELLING PRODUCTION**

22 I, Ryan Curtis, submit this declaration under penalty of perjury pursuant to 28 U.S.C.  
23 § 1746 and declare as follows:

24 1. I am a Director at Fennemore Craig, P.C., am licensed to practice law in the  
25 State of Arizona, and am lead counsel for Defendants State of Arizona, Andy Tobin, and  
26 Paul Shannon (collectively, the “State Defendants”).

2. I submit this declaration in support of the State Defendants’ Objection to  
Order Compelling Production, filed concurrently.

3. I base this declaration on my personal knowledge and on information obtained  
in the course of the above-captioned matter.

1           4. Attached as **Exhibit 1 (filed under seal)** is a true and correct copy of State  
2 Defendants' produced document, Bates numbered AZSTATE.085480-085492.

3           5. Attached as **Exhibit 2** is a true and correct copy of State Defendants'  
4 produced document, Bates numbered AZSTATE.006174-006176.

5           6. Attached as **Exhibit 3** is a true and correct copy of State Defendants'  
6 produced document, Bates numbered AZSTATE.006113-006116.

7           7. Attached as **Exhibit 4** is a true and correct copy of State Defendants'  
8 produced document, Bates numbered AZSTATE.005674-005676.

9           8. Attached as **Exhibit 5** is a true and correct copy of State Defendants'  
10 produced document, Bates numbered AZSTATE.009210-009211.

11           9. Attached as **Exhibit 6** is a true and correct copy of State Defendants'  
12 produced document, Bates numbered AZSTATE.005656-005657.

13           10. Attached as **Exhibit 7 (filed under seal)** is a true and correct copy of State  
14 Defendants' produced document, Bates numbered AZSTATE.144044-144057.

15           11. Attached as **Exhibit 8** is a true and correct copy of excerpts of the Scott  
16 Bender Deposition Transcript, dated March 31, 2021.

17 I declare under penalty of perjury that the foregoing is true and correct.

18 EXECUTED this 12th day of July, 2021.

19  
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21  
22  
23  
24  
25  
26

By:   
\_\_\_\_\_  
Ryan Curtis

18571381

**INDEX OF EXHIBITS**

**DECLARATION OF RYAN CURTIS  
IN SUPPORT OF DEFENDANTS STATE OF ARIZONA’S, ANDY TOBIN’S AND PAUL  
SHANNON’S OBJECTIONS TO ORDER COMPELLING PRODUCTION**

*Russell B. Toomey v. State of Arizona, et al.*  
*4:19-CV-00035*

<u>Exh. No:</u>	<u>Description:</u>
1	FILED UNDER SEAL
2	State Defs’ produced document, Bates numbered AZSTATE.006174-006176
3	State Defs’ produced document, Bates numbered AZSTATE.006113–006116
4	State Defs’ produced document, Bates numbered AZSTATE.005674–005676
5	State Defs’ produced document, Bates numbered AZSTATE.009210–009211
6	State Defs’ produced document, Bates numbered AZSTATE.005656–005657.
7	FILED UNDER SEAL
8	A true and correct copy of excerpts of the Scott Bender Deposition Transcript, dated March 31, 2021.

**EXHIBIT 1**  
**FILED UNDER**  
**SEAL**

# **EXHIBIT 2**

Message

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**From:** Chanelle Bergren [Chanelle.Bergren@azdoa.gov]  
**on behalf of** Chanelle Bergren <Chanelle.Bergren@azdoa.gov> [Chanelle.Bergren@azdoa.gov]  
**Sent:** 10/13/2015 8:47:28 PM  
**To:** Marie Isaacson [Marie.Isaacson@azdoa.gov]  
**Subject:** RE: UofA Question

I would also ask Buck review this topic as well. If what she is saying is true why are the carriers not covering the benefit on their commercial book?

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**From:** Marie Isaacson  
**Sent:** Friday, October 09, 2015 4:47 PM  
**To:** Chanelle Bergren  
**Subject:** FW: UofA Question

I just spoke with Leena in more detail. Basically if any of the vendors/TPA have a plan on the exchange, they are considered to be receiving federal dollars and can't have plans that discriminate against transgender – administer any plan that discriminates. So we would be forced to cover the benefit.

Also, we spoke about EGWP. Because we receive federal dollars through EGWP, our plan would also not be able to discriminate.

This is preliminary research and not an in depth analysis.

We can talk next week.

Marie

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**From:** Bhakta, Leena [<mailto:Leena.Bhakta@mercer.com>]  
**Sent:** Thursday, October 08, 2015 2:57 PM  
**To:** Giammona, Chris; Marie Isaacson  
**Subject:** RE: UofA Question

Marie,

I have been able to gather some more information about this proposed rule. The Department of HHS has proposed that if an entity in the health care business participates on the public exchange or otherwise is federally funded all of its activities may be subject to the non-discrimination provisions of ACA section 1557. The idea is, for example, if a TPA that is also an issuer offers a plan on a public exchange, the entire TPA may be subject to the law. So if the TPA of ADOA's self-funded plans also have fully insured options they sell on the exchange, ADOA would be impacted by these proposed rules.

Note that the proposed rule does not require plans to cover any particular benefit or service, but it cannot have explicit categorical exclusions in coverage for any of the above classes (sex, gender or gender identity). As an example, categorical exclusions in coverage for health care services related to gender transition, [HHS FAQs say](#), are facially discriminatory. The regulations address in particular two areas of discrimination in health care programs and activities – discrimination against individuals based on sexual identity (which it views as a type of sex discrimination) and failing to offer services to non-English speakers. Obviously these are proposed rules and a lot could change. Hope this helps.

Leena

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**From:** Giammona, Chris  
**Sent:** Thursday, October 08, 2015 1:11 PM  
**To:** Marie Isaacson  
**Cc:** Bhakta, Leena  
**Subject:** RE: UofA Question

Marie

Here is the link to the proposed rule

<https://www.federalregister.gov/articles/2015/09/08/2015-22043/nondiscrimination-in-health-programs-and-activities>

Leena is checking with our internal Washington Resource Group for Mercer's POV and possible comments.

Chris

**Chris Giammona**, Partner

Mercer | 17901 Von Karman, Suite 1100, Irvine, CA 92614, USA  
P: +1 949 222 1325  
M: +1 949 870 8721  
[Facebook](#) | [Twitter](#)  
[chris.giammona@mercer.com](mailto:chris.giammona@mercer.com)  
[www.mercer.com](http://www.mercer.com) | Mercer (US) Inc.

**Making a difference in the health, wealth and careers of 110 million people every day**

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 **MERCER** MAKE TOMORROW. TODAY

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**From:** Marie Isaacson [<mailto:Marie.Isaacson@azdoa.gov>]  
**Sent:** Thursday, October 08, 2015 11:32 AM  
**To:** Giammona, Chris  
**Subject:** FW: UofA Question

Good morning Chris. UA indicated that there is a new proposed ACA rule open for comment now through November, 2015 regarding mandatory coverage for transgender benefits. Can you tell me what the rule is proposing and how it will impact employers?

Please let me know if you want to discuss this further or need additional information.

Thank you,  
Marie

---

**From:** Chanelle Bergren  
**Sent:** Friday, September 25, 2015 2:21 PM  
**To:** Marie Isaacson  
**Cc:** Nicolette A Schultz  
**Subject:** RE: UofA Question

Mercer confirmed there are no current laws which require a plan to cover transgender benefits. As a result, the plan is not discriminating when excluding benefit coverage. The majority of their clients do not offer transgender coverage. The

State of California, State of Oregon, State of Colorado, State of Washington and the University of California do offer transgender benefits. I have provided links to applicable information below.

<http://ucnet.universityofcalifornia.edu/forms/pdf/uc-care-booklet.pdf>  
<http://www.plu.edu/human-resources/wp-content/uploads/sites/141/2015/03/transgender-benefits-article.pdf>  
<https://www.calpers.ca.gov/docs/2016-anthem-select-hmo-evidence-coverage.pdf>

**Chanelle Bergren**

Plan Administration Manager  
ADOA- Benefit Services Division | State of Arizona  
100 N.15th Ave Suite 103, Phoenix, AZ 85007  
p: 602-542-0395 | m: 602-689-7168 | f: 602-542-4048  
[Chanelle.Bergren@azdoa.gov](mailto:Chanelle.Bergren@azdoa.gov)  
<http://benefitoptions.az.gov/>

**How am I doing? Please take a few moments to answer a few questions.**

<https://www.surveymonkey.com/r/BenPlanAdmin>

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---

**From:** Marie Isaacson  
**Sent:** Friday, September 25, 2015 8:34 AM  
**To:** Chanelle Bergren  
**Cc:** Nicolette A Schultz  
**Subject:** Re: UofA Question

The claim will be the plan is discriminatory. What would be our response? Is this standard to exclude?

Sent from my iPhone

On Sep 24, 2015, at 4:12 PM, Chanelle Bergren <[Chanelle.Bergren@azdoa.gov](mailto:Chanelle.Bergren@azdoa.gov)> wrote:

We cover all standard benefits but currently exclude the following benefits:

Transgender Surgery including medical or psychological counseling and hormonal therapy in preparation for, or subsequent to, any such surgery.

**Chanelle Bergren**

Plan Administration Manager  
ADOA- Benefit Services Division | State of Arizona  
100 N.15th Ave Suite 103, Phoenix, AZ 85007  
p: 602-542-0395 | m: 602-689-7168 | f: 602-542-4048  
[Chanelle.Bergren@azdoa.gov](mailto:Chanelle.Bergren@azdoa.gov)  
<http://benefitoptions.az.gov/>

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# **EXHIBIT 3**

Message

**From:** Rodrigues, Helena A - (hrodrigu) [hrodrigu@email.arizona.edu]  
**on behalf of** Rodrigues, Helena A - (hrodrigu) <hrodrigu@email.arizona.edu> [hrodrigu@email.arizona.edu]  
**Sent:** 11/20/2015 1:26:45 PM  
**To:** Marie.Isaacson@azdoa.gov  
**Subject:** FW: HHS Issues Proposed Rule on ACA Section 1557 Nondiscrimination Rules Which May Affect Certain Employer-Sponsored Plans

Hi, Marie:

I found this as a helpful "summary." I highlighted the section on effective date.

Helena

**From:** Wilson, Staci R - (staciw)  
**Sent:** Thursday, November 19, 2015 4:49 PM  
**To:** Rodrigues, Helena A - (hrodrigu) <hrodrigu@email.arizona.edu>  
**Subject:** FW: HHS Issues Proposed Rule on ACA Section 1557 Nondiscrimination Rules Which May Affect Certain Employer-Sponsored Plans

**From:** Meyer, Michelle K - (mmeyer)  
**Sent:** Thursday, November 19, 2015 4:12 PM  
**To:** Wilson, Staci R - (staciw); Azuelo, Linda K - (azuelo)  
**Cc:** Salazar, Nicole J - (hinzen)  
**Subject:** FW: HHS Issues Proposed Rule on ACA Section 1557 Nondiscrimination Rules Which May Affect Certain Employer-Sponsored Plans

**From:** Eye on Washington [<mailto:EOW@adp.com>]  
**Sent:** Thursday, November 19, 2015 3:15 PM  
**To:** Meyer, Michelle K - (mmeyer)  
**Subject:** HHS Issues Proposed Rule on ACA Section 1557 Nondiscrimination Rules Which May Affect Certain Employer-Sponsored Plans

If you are having trouble reading this email, [read the online version](#).



**HHS Issues Proposed Rule on ACA Section 1557 Nondiscrimination Rules Which May Affect Certain Employer-Sponsored Plans**

The Department of Health and Human Services (HHS) recently published a proposed rule broadly prohibiting discrimination in health programs and related activities that receive funding from the HHS. The proposed rule directly affects health insurers, health care providers (including pharmacies and health clinics), and some employer-sponsored group health plans.

Specifically, the Office of Civil Rights (OCR) at HHS published a sweeping proposed rule implementing Section 1557 of the Patient Protection and Affordable Care Act (ACA). (“Nondiscrimination in Health Programs and Activities,” Proposed Rule, 80 Fed. Reg. 54172-54221.) The proposed rule broadly prohibits discrimination in health programs and activities on the basis of race, color, national origin, sex, age, or disability. Notably, Section 1557 is the first law to prohibit sex discrimination in health care programs, and the proposed rule includes significant requirements related to transgender individuals and the treatment of gender dysphoria. The proposed rule also includes requirements for language assistance for individuals with limited English proficiency (LEP) and accessibility and effective communication for individuals with disabilities.

In the proposed rule, HHS has interpreted the statutory requirements extremely broadly, potentially sweeping entire entities into the scope of Section 1557 when even only one plan or program receives any federal funds from HHS. Importantly for employers, this means that even self-funded plans that utilize health insurers as third-party administrators (TPAs) may be affected.

#### Background on Section 1557 and Proposed Rule

ACA Section 1557 provides generally that an individual shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination based on race, color, national origin, sex, age, or disability, under any health program or activity, any part of which is receiving federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the ACA or its amendments.

The proposed rule generally applies to any health program or activity, any part of which receives funding from HHS, health programs and activities administered by HHS, which would include health insurers participating in the Federal Marketplace, and entities established under Title I of the ACA, which would include State-based Marketplaces. The proposed rule defines “federal financial assistance” to specifically include subsidies for individuals receiving coverage through the Marketplaces. For health insurers that receive federal financial assistance, the rule appears to apply to the entire entity, so that health insurance products offered through the Marketplace, outside the Marketplace in the individual or group health insurance markets, and by the health insurer as a TPA for self-funded employer-sponsored group health plans would appear to be subject to the proposed rule.

#### Potential Applicability to Employers

For health insurers that receive federal financial assistance, the proposed rule appears to apply to health insurance offered to employers through the group health insurance markets. It would also appear to apply to the health insurer when it acts as a TPA for an employer-sponsored group health plan, even if the plan is self-funded. If a TPA’s Section 1557 obligations apply to its self-funded clients, this rule will create an incentive for employers to self-fund using TPAs that do not receive federal funds.

#### Prohibited Discrimination

The proposed rule prohibits discrimination based on an individual’s race, color, national origin, sex, age, or disability under a health program or activity. Under the rule, discriminatory actions specifically include denying or limiting health coverage, denying a claim, employing marketing or benefit designs, and imposing additional cost-sharing on the basis of an individual’s race, color, national origin, sex, age, or disability, and automatically excluding coverage for all health services related to gender transition. The proposed rule does not provide any specific examples of benefit designs that would be discriminatory. However, one of the key compliance issues is likely to be the inclusion/exclusion and placement on formularies of drugs that treat conditions prevalent for protected individuals.

- **Sex Discrimination:** The proposed rule also makes clear that discrimination based on sexual orientation is prohibited under Section 1557. The proposed rule provides that individuals may not be subject to discrimination based on

sexual stereotyping or gender identity. For example, under the rule (1) individuals cannot be denied health care or health coverage based on their sex, including their gender identity; (2) individuals must be treated consistent with their gender identity, including in access to facilities; (3) sex-specific health care cannot be denied or limited only because the person seeking such services identifies as belonging to another gender; and (4) explicit categorical exclusions in coverage for all health services related to gender transition are facially discriminatory. It is not uncommon for large employers to limit gender identity coverage, and as mentioned previously, it is possible that self-funded health plans that use health insurance issuers as TPAs may be subject to Section 1557.

- **Language Services and Auxiliary Aids and Services:** The proposed rule includes requirements for language assistance for LEP individuals and provides guidance regarding the provision of language services, such as oral interpreters and written translations. In determining what the general standard requires, the rule provides that this will be a flexible standard and will be evaluated on a case-by-case basis, taking into consideration various factors, such as the nature of the communication, how often the entity encounters individuals who speak the language at issue, and the resources of the entity. Under the proposed rule, entities would be required to post a notice of consumer rights providing information about communication assistance, and post taglines in the top 15 languages spoken by individuals with LEP nationally, indicating the availability of such assistance. OCR will provide a sample notice and translated taglines, and will translate the notice into 15 languages.

For individuals with disabilities, the rule includes requirements for the provision of auxiliary aids and services, including alternative formats for written information and sign language interpreters. This requirement also includes a notice that entities must post that provides information about these services.

#### **Private Right of Action**

The proposed rule provides for a private right of action (meaning that individuals have the ability to file a lawsuit under Section 1557) and damages for violations of Section 1557. The rule is not clear about administrative exhaustion, except for age discrimination claims; OCR will require administrative exhaustion for claims of age discrimination.

#### **Effective Date**

OCR proposes that the rule will be effective 60 days after being finalized. This would be a very tight timeline for employer plans that may be indirectly subject to Section 1557 through health insurance issuers receiving Federal financial assistance acting as their TPA.

The proposed rule can be found at <http://www.gpo.gov/fdsys/pkg/FR-2015-09-08/pdf/2015-22043.pdf>.

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Updated November 19, 2015

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# **EXHIBIT 4**

Message

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**From:** Scott Bender [Scott.Bender@azdoa.gov]  
**on behalf of** Scott Bender <Scott.Bender@azdoa.gov> [Scott.Bender@azdoa.gov]  
**Sent:** 6/9/2016 2:46:29 PM  
**To:** Marie Isaacson [Marie.Isaacson@azdoa.gov]; Elizabeth Schafer [Elizabeth.Schafer@azdoa.gov]  
**Subject:** FW: Final rule - enhanced protection for transgender individuals

Here's UHC's interpretation of the recent ruling, more info to follow next week.

**From:** Martin, Stephanie A [mailto:stephanie\_martin@uhc.com]  
**Sent:** Thursday, June 09, 2016 12:12 PM  
**To:** Scott Bender <Scott.Bender@azdoa.gov>  
**Cc:** Gallegos, Heather K <heather\_gallegos@uhc.com>  
**Subject:** RE: Final rule - enhanced protection for transgender individuals

Hi Scott,

I am anticipating that we will have more information related to our position as an Insurer next week.

With that said, I can tell you the following information was released within UnitedHealthcare yesterday related to the Non-Discrimination Act and below information is specific to transgender benefits:

**Expanded Protection for Transgender Individuals**

Covered entities are not required to cover any specific item or service for transgender individuals. Categorical coverage exclusions or limitations for all health services related to gender transition are not allowed. Individuals may not be excluded from health programs and activities for which they are otherwise eligible based on their gender identity.

Covered entities may use nondiscriminatory limitations or restrictions on coverage. The same neutral, nondiscriminatory criteria used for other coverage determinations must be used when addressing gender transition. If certain elective procedures beyond those considered medically necessary are covered, then the same standards must apply to coverage of comparable procedures for gender transition.

The Office of Civil Rights will not second-guess a covered entity's neutral nondiscriminatory application of evidence-based criteria used to make medical necessity or coverage determinations. But it cautions that covered entities must use a nondiscriminatory process to determine whether a particular health service is medically necessary or otherwise meets applicable coverage requirements.

Some procedures are only appropriate for individuals of one sex and, therefore, coverage is not required for individuals for whom the procedure isn't applicable. Coverage for health services must be appropriately provided to individuals regardless of their sex assigned at birth, gender identity or recorded gender.

**Section 1557 and ASO Employers**

ASO employers' obligations under Section 1557 are determined independent of the status of the third-party administrator as a covered entity. The final rule acknowledges that third-party administrators are not responsible for the benefit design for the ASO plans they administer. As such, each ASO employer will need to evaluate their status as a covered entity under Section 1557 and other relevant laws such as Title VII of the Civil Rights Act.

Lastly, another item we will be monitoring closely is a lawsuit that was filed by the American Civil Liberties Union (ACLU) on Monday, June 6<sup>th</sup> against Dignity Health because it denies transition related healthcare under its benefits plan.

Listed below is a link to an ACLU announcement specific to a lawsuit filed by an employee of Dignity Health:  
<https://www.aclu.org/news/aclu-challenges-major-health-systems-denial-insurance-transgender-employee>

Below is another link to the same story published by Reuters:  
<http://www.reuters.com/article/health-transgender-idUSL1N1900CZ>

There are also a number of local news stories on this same issue as well- Fox 10, AZ Family (channel 3), KJZZ (NPR), Phoenix Business Journal.

I will provide additional information as it is released to us as well as updates to the ACLU/Dignity Health case.

Let us know if you have any questions.

Thanks,  
Stephanie

**Stephanie A. Martin**

Strategic Client Executive, Client Management  
UnitedHealthcare National Accounts  
1 E. Washington St., Suite 1700, AZ009-17TE, Phoenix, AZ 85004  
(w) 602-255-8497 (m) 602-770-4711  
[stephanie\\_martin@uhc.com](mailto:stephanie_martin@uhc.com)

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**From:** Gallegos, Heather K  
**Sent:** Thursday, June 09, 2016 6:50 AM  
**To:** Scott Bender  
**Cc:** Martin, Stephanie A; Gallegos, Heather K  
**Subject:** RE: Final rule - enhanced protection for transgender individuals

Scott,

I wanted to acknowledge receipt and advise we are currently looking into this further. We will provide follow up once we have additional information.

Thanks,  
Heather

Heather K. Gallegos | Senior Account Manager, Client Management  
UnitedHealthcare  
Government, Labor & Education  
(office) 602.255.8525 (cell) 602.451.9867  
(email) [Heather\\_K\\_Gallegos@uhc.com](mailto:Heather_K_Gallegos@uhc.com)

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**From:** Scott Bender [<mailto:Scott.Bender@azdoa.gov>]  
**Sent:** Wednesday, June 08, 2016 6:17 PM  
**To:** Muth, Ken; Severns, Colette; Emmons, Erica 654; Eveleth, Ray G; Dash, Jay A; Gallegos, Heather K  
**Subject:** Final rule - enhanced protection for transgender individuals

Hi all,

Now that the HHS has issued a final rule on the nondiscrimination in health programs under the ACA, we need some guidance as to whether our plans as they exist will be compliant as of the effective date of July 18, 2016. The ruling expands protection for transgender individuals with respect to accessibility for health services that may not be denied or limited due to an individuals assigned sex at birth, gender identity or recorded gender. What's not clear is if our plans must now cover reassignment surgery, or other treatments required during a transition. Please advise how your organization is treating this ruling and how specifically the ADOA plans are impacted.

Thanks  
Scott

**Scott Bender**

Plan Administration Manager  
ADOA – Benefit Services Division | State of Arizona  
100 North 15th Avenue, Suite 260, Phoenix, AZ 85007  
p: 602-542-4958 | f: 602-542-4048 | [Scott.Bender@azdoa.gov](mailto:Scott.Bender@azdoa.gov)  
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# **EXHIBIT 5**

Message

**From:** Emmons, Erica 654 [Erica.Emmons@Cigna.com]  
**on behalf of** Emmons, Erica 654 <Erica.Emmons@Cigna.com> [Erica.Emmons@Cigna.com]  
**Sent:** 6/15/2016 11:41:41 AM  
**To:** Scott Bender [Scott.Bender@azdoa.gov]  
**CC:** Maddalena, Diana M 646 [Diana.Maddalena@Cigna.com]  
**Subject:** RE: Final rule - enhanced protection for transgender individuals

Hi Scott –

I sent your inquiry to Cigna’s healthcare legislation team. Below is Cigna’s response at this point:

Employers should be aware of whether they are considered a “covered entity” as defined in the final regulation. Employers such as hospitals or other provider types that receive Federal financial assistance are impacted by the rule in its entirety (that would include requirements for language assistance, disability accessibility - including in connection with building and facilities, and assuring equal access to services for persons in a protected class). Employers are also impacted if they operate a health program or activity which, in any part, receives Federal financial assistance or funding (examples include Medicare Part A, student health plans, advanced premium tax credits, and many more).

For the “average” employer, the primary impact will be the requirement to eliminate categorical exclusions or limitations for all health services related to gender transition. ASO clients, for whom Cigna is the TPA, will be responsible for making their own determination of how they will handle coverage or exclusion for gender transition.

Should an ASO client establish a benefit design that is defined as discriminatory – it either contains a categorical exclusion, or contains a difference in cost sharing (like a lifetime maximum or a higher copay) for gender transition services, they may be subject to investigation by the EEOC for such practices. These issues will not fall under the enforcement responsibilities of the Office of Civil Rights in connection with this Nondiscrimination rule, but may be referred to the EEOC for enforcement. Employers who have insured coverage with Cigna will see their plans modified at the first renewal on and after 1/1/2017 – to remove any outright exclusion for gender transition.

The industry, as a whole, is in the very early stages of analyzing this wide-ranging regulation, and additional clarification may be provided as that process continues.

Erica Emmons | Strategic Account Executive | Government and Education | Cigna | 5310 East High Street, Suite 200 | Phoenix, AZ 85054 | Direct: 480.426.6761 | Mobile: 480.622.0899 | [erica.emmons@cigna.com](mailto:erica.emmons@cigna.com)



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**From:** Scott Bender [mailto:Scott.Bender@azdoa.gov]  
**Sent:** Wednesday, June 08, 2016 6:17 PM  
**To:** Muth, Ken; Severns, Colette; Emmons, Erica 654; Eveleth, Ray G; Dash, Jay A; heather\_k\_gallegos@uhc.com  
**Subject:** Final rule - enhanced protection for transgender individuals

Hi all,

Now that the HHS has issued a final rule on the nondiscrimination in health programs under the ACA, we need some guidance as to whether our plans as they exist will be compliant as of the effective date of July 18, 2016. The ruling expands protection for transgender individuals with respect to accessibility for health services that may not be denied or limited due to an individuals assigned sex at birth, gender identity or recorded gender. What’s not clear is if our plans must now cover reassignment surgery, or other treatments required during a transition. Please advise how your organization is treating this ruling and how specifically the ADOA plans are impacted.

Thanks  
Scott

**Scott Bender**

Plan Administration Manager

ADOA – Benefit Services Division | State of Arizona

100 North 15th Avenue, Suite 260, Phoenix, AZ 85007

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# **EXHIBIT 6**

Message

**From:** Scott Bender [Scott.Bender@azdoa.gov]  
**on behalf of** Scott Bender <Scott.Bender@azdoa.gov> [Scott.Bender@azdoa.gov]  
**Sent:** 9/2/2016 9:59:36 AM  
**To:** Marie Isaacson [Marie.Isaacson@azdoa.gov]  
**Subject:** FW: Final rule - enhanced protection for transgender individuals

Hi Marie, for your meeting this morning, Aetna has confirmed this is the latest guidance from them on the Transgender benefits issue. No additional updates have been received since 6/22.

Thanks  
Scott

**From:** Eveleth, Ray G [mailto:EvelethR@aetna.com]  
**Sent:** Wednesday, June 22, 2016 12:58 PM  
**To:** Scott Bender <Scott.Bender@azdoa.gov>  
**Cc:** Dash, Jay A <DashJ@aetna.com>  
**Subject:** RE: Final rule - enhanced protection for transgender individuals

Hi Scott,

From Aetna legal:

Generally, employer self-funded plans are not affected. Exceptions relate to receipt of federal funding. If the employer does need to make a change, it would apply as of first plan year starting on or after Jan 1, 2017.

***Employer Liability for Discrimination in Employee Health Benefit Programs***

The final rule generally does not apply to the employer-employee relationship. However, a covered entity (a health program or activity that receives federal financial assistance) may be subject to the rules with respect to its own "employee health benefit program" under certain circumstances.

➤ **Employee health benefit program** means health benefits or health insurance coverage, an employer- sponsored or provided wellness program (whether or not offered with a group health plan), an employer- provided health clinic, and long-term care coverage or insurance (provided for the benefit of an employer's employees).

*First*, if the entity is principally engaged in providing or administering health services, health insurance coverage, or other health coverage, the covered entity shall be liable for violations of this rule with respect to its employee health benefit program. For example, if a health insurance issuer provides health benefits to its employees, it will be subject to section 1557 not only for the coverage it offers to insureds, but also for the health benefits it provides to its employees.

*Second*, if the entity received federal financial assistance, a primary objective of which is to fund the entity's employee health benefit program, the covered entity shall be liable for violations of this rule with respect to its employee health benefit program. For example, if an entity receives federal financial assistance from HHS specifically designated to support its employee wellness program, section 1557 will apply to the entity's administration of that wellness program.

*Third*, if the entity is not principally engaged in providing or administering health services, health insurance coverage, or other health coverage, but operates a health program or activity (which is not an employee health benefit program) that receives federal financial assistance; except that the entity is liable under this part with regard to the provision or administration of an employee health benefit program, but only with respect to the employees in that health program or activity. For example, a pharmacy housed within a department store would be subject to section 1557, but only with respect to the employees in the pharmacy.

***42 CFR § 92.208 Employer liability for discrimination in employee health benefit programs.***

A covered entity that provides an employee health benefit program to its employees and/or their dependents shall be liable for violations of this part in that employee health benefit program only when:

- (a) The entity is principally engaged in providing or administering health services, health insurance coverage, or other health coverage;
- (b) The entity receives Federal financial assistance a primary objective of which is to fund the entity's employee health benefit program; or
- (c) The entity is not principally engaged in providing or administering health services, health insurance coverage, or other health coverage, but operates a health program or activity, which is not an employee health benefit program, that receives Federal financial assistance; except that the entity is liable under this part with regard to the provision or administration of employee health benefits only with respect to the employees in that health program or activity.

Be well,

**Ray Eveleth**

Senior Account Executive

Aetna Public & Labor Sector

4500 E. Cotton Center Blvd., Phoenix, AZ 85040

T 602-659-9238

C 480-220-5452

F 860-900-7050

[EvelethR@aetna.com](mailto:EvelethR@aetna.com)



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**EXHIBIT 7**  
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**SEAL**

# **EXHIBIT 8**

**In The Matter Of:**

*Toomey vs.*

*State of AZ*

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*Scott Bender, Videotaped*

*March 31, 2021*

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*Glennie Reporting Services, LLC*

*1555 East Oranewood Avenue*

*Phoenix, Arizona 85020*

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Scott Bender, Videotaped - 03/31/2021

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1 SCOTT BENDER,  
2 called as a witness herein, having been first duly sworn  
3 by the Certified Reporter to speak the whole truth and  
4 nothing but the truth, was examined and testified as  
5 follows:

6  
7 THE VIDEOGRAPHER: Please begin when ready.

8  
9 EX A M I N A T I O N

10 BY MR. WALL:

11 Q. Good morning, Mr. Bender. How are you?

12 A. I'm doing well, thanks. How are you?

13 Q. I'm doing all right.

14 Would you please state your full name and  
15 address for the record?

16 A. Yes. Scott Patrick Bender. My address is 893  
17 South Gardner Drive, Chandler, Arizona 85224.

18 Q. And, Mr. Bender, are you being represented by  
19 Mr. Ryan Curtis today at this deposition?

20 A. Yes.

21 Q. And have you ever been deposed before?

22 A. No.

23 Q. Have you ever testified at trial?

24 A. No.

25 Q. Okay. So I'm going to go over some ground

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1           A.     We understand that's part of the process, but,  
2 you know, whatever that committee feels is best for the  
3 State is -- or for the health plans is not necessarily  
4 our driving concern.

5           Q.     What about the opinion of the Arizona  
6 Governor's Office?

7           A.     The director of ADOA reports to the governor's  
8 office, and as part of the ADOA, we do as well. So they  
9 are the decision makers in this, so that is obviously  
10 considered.

11          Q.     So any change to the plan had to be approved by  
12 the Arizona Governor's Office?

13          A.     Correct.

14          Q.     Are there any changes to the plan that the  
15 director of the ADOA can make his or herself?

16          A.     Yeah, I think to some -- to some degree, the  
17 director of ADOA has -- has quite a bit of latitude. If  
18 there's small changes, you know, the selection of vendors  
19 is -- is fairly, usually, fairly simple. And that's  
20 typically not something that has to be approved by the  
21 governor's office. There's a procurement process for  
22 that.

23          Q.     Is there anything else that the director of the  
24 ADOA could approve without the governor office's  
25 approval?

1 STATE OF ARIZONA )  
2 COUNTY OF MARICOPA )

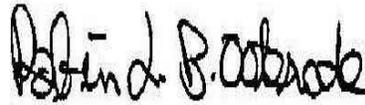
3 BE IT KNOWN that the foregoing proceedings  
4 were taken before me; that the witness before testifying  
5 was duly sworn by me to testify to the whole truth; that  
6 the foregoing pages are a full, true, and accurate record  
7 of the proceedings all done to the best of my skill and  
8 ability; that the proceedings were taken down by me in  
9 shorthand and thereafter reduced to print under my  
10 direction.

11 [X] Review and signature was requested.

12 [ ] Review and signature was waived.

13 [ ] Review and signature not required.

14 I FURTHER CERTIFY that I have complied with  
15 the ethical obligations set forth in the ACJA 7-206(F)(3)  
16 and ACJA 7-206(J)(1)(g)(1) and (2). Dated at Phoenix,  
17 Arizona, this 13th day of April, 2021.

18 

19 \_\_\_\_\_  
20 ROBIN L. B. OSTERODE, RPR  
21 CA CSR No. 7750  
22 AZ CR No. 50695

23 \* \* \* \* \*

24 I CERTIFY that Glennie Reporting Services,  
25 LLC, has complied with the ethical obligations set forth  
in ACJA 7-206(J)(1)(g)(1) through (6).

26 \_\_\_\_\_  
27 GLENNIE REPORTING SERVICES, LLC  
28 Registered Reporting Firm  
29 Arizona RRF No. R1035