

Healthcare protections for LGBTQ persons may broaden under Biden administration

March 2 2021



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Healthcare sex discrimination protections for the LGBTQ community may be expanded under the Biden Administration, including safeguards against verbal abuse, physical abuse and the denial of bedside care,

according to West Virginia University College of Law experts.

In a report published in *California Law Review*, Professor Valarie Blake and students Ashley Stephens and Amy Post examined whether [gender identity](#) and [sexual orientation](#) should be included in healthcare sex discrimination laws, on the heels of the historic 2020 Supreme Court case *Bostock v. Clayton County*.

In that case, the Court ruled that sex discrimination includes gender identity and sexual orientation when it comes to employment standards. Yet the interpretation of whether it extends into healthcare access is vague.

Bostock's reach will be litigated frequently in the coming months, Blake said, and the Biden administration will likely introduce a new rule broadening LGBTQ rights that will inevitably lead to further legal challenges.

Ultimately, the Supreme Court may need to decide the matter, Blake and her co-authors wrote. *Bostock* necessitates the view that health care entities receiving federal funds cannot discriminate against individuals on the basis of LGBTQ identity, they said.

The *Bostock* decision had prompted Stephens and Post to discuss those implications in the *West Virginia Medical Journal*. Blake then partnered with the students to produce a deeper dive into the issues surrounding sex discrimination in the *California Law Review* paper.

"In any context, he (Justice Neil Gorsuch) basically says that if you discriminate on sex, you are always discriminating based on sexual orientation or transgender status, because those are intrinsically linked with sex," Blake said. "And so looking at that, the Court only decided on employment law, but we have other areas—like healthcare—where sex

discrimination has still been not defined. And in which Gorsuch's opinion appears to resolve any uncertainty that LGBTQ discrimination is sex discrimination and must be forbidden under the law."

The authors believe discrimination in a healthcare setting can have a lasting impact on an LGBTQ person. Someone with a negative experience at a care facility is likely to avoid seeking [medical help](#) in the future, they said.

Healthcare protections were first introduced under the Obama Administration in 2010 with Section 1557 of the Affordable Care Act, banning sex [discrimination](#). However, they weren't solidified for the LGBTQ community until 2016 when the Department of Health and Human Services stated that the statute included the community in a broad sense.

The inclusion of gender identity and sexual orientation sparked backlash among several religious organizations and some states that argued that healthcare professionals could deny services based on religious exemptions.

Additionally, in 2020 the Trump Administration stripped gender identity and sexual orientation from Section 1557, leaving the LGBTQ community unprotected. However, according to Post, the Bostock case essentially challenges this action by the Trump administration.

"Those things shouldn't preclude you from receiving [healthcare](#) and it's kind of just like the way that we may think it's inherently obvious that a doctor shouldn't say, well, they're male, so I'm not going to help them out because I don't like men," Blake said.

"We think it should also be as inherently obvious that it doesn't matter if you identify as LGBTQ-plus, you are deserving of the care that

everybody else is."

Moving forward, Stephens suggests that legislation should be explicitly written and include gender identity and sexual orientation to ensure that the LGBTQ community is covered on all platforms.

Additionally, the researchers emphasized patient advocacy and said that in order to avoid any discriminatory practices, a patient can ask if a care facility is LGBTQ friendly. This helps to ensure a positive experience and relationship between patient and provider, they said.

"What I would say is to those people who feel that they've been discriminated against, you know, show up, get your care met," Blake said. "Take care of yourself and expect that you will get that care met because you have rights and you deserve them."

More information: Valarie Blake et al, Sex Discrimination in Healthcare: Section 1557 and LGBTQ Rights After Bostock, 11 *Calif. L. Rev.* Online 545 (Jan. 2021), www.californialawreview.org/section-1557-and-lgbtq-rights-after-bostock

Provided by West Virginia University

Citation: Healthcare protections for LGBTQ persons may broaden under Biden administration (2021, March 2) retrieved 26 April 2024 from <https://medicalxpress.com/news/2021-03-healthcare-lgbtq-persons-broaden-biden.html>

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