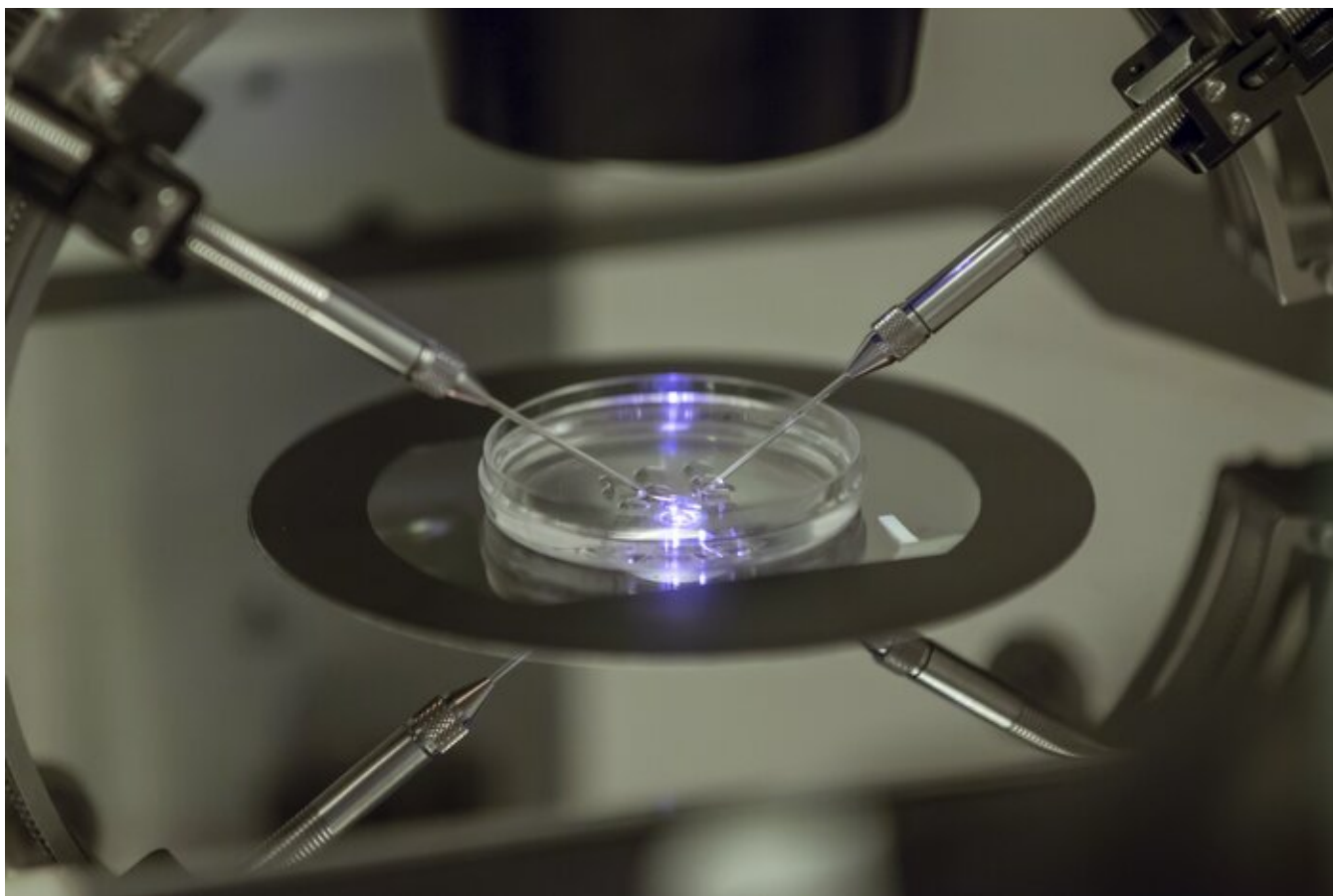


LGBTQ Bias In Fertility Benefits Is An Emerging Battleground

By **Anne Cullen**


Law360 (April 20, 2022, 9:47 PM EDT) -- A legal action against New York City has put the spotlight on employee medical plan rules that box LGBTQ workers out of fertility benefits, and experts predict more cases will follow as insurers and employers catch up with the ramifications of the U.S. Supreme Court's landmark Bostock decision.

A former New York City employee and his husband **fired off a charge** with the U.S. Equal Employment Opportunity Commission earlier this month, claiming that the city's health plan defines infertility in such a way that homosexual men can't qualify for coverage for in vitro fertilization.



A gay couple recently filed a charge alleging that New York City denies male workers in same-sex relationships IVF benefits offered to other employees. (AP Photo/Sang Tan)

The couple appears to be the first to try to take on an employer for alleged sexual orientation discrimination in its fertility benefits. Their legal battle also comes in the wake of **a pair of federal lawsuits** launched against insurance giant Aetna within the past year by gay women claiming that the company's policies, which feature essentially identical language to that of the New York City plan, put them at a disadvantage too.

The linchpin for all three legal actions is the U.S. Supreme Court's **2020 ruling** in **Bostock v. Clayton County, Georgia** , in which the justices adopted the position that Title VII barred discrimination based

on sexual orientation and gender identity.

"When Bostock first came out, the first thing that a lot of employers did was revisit their handbooks and make sure pronouns were included, and ensure their onboarding documents included all gender identities," said Susie Cirilli, a principal at Offit Kurman Attorneys At Law. "And now we're seeing the next step of it, which is benefits."

Here, Law360 zeroes in on pending bellwether legal battles over fertility benefits for LGBTQ workers, Bostock's continued reverberations and what employers should do to stay ahead of the curve.

NYC Facing Heat Over Benefits Plan

New York City was slapped with a class discrimination charge April 12 by a gay couple accusing the city of denying gay male workers in vitro fertilization benefits offered to other employees.

Corey Briskin, who was New York County's assistant district attorney from 2017 to 2022, and his husband, Nicholas Maggipinto, filed a charge with the EEOC contending that the city ran afoul of Title VII of the Civil Rights Act as well as state and city civil rights laws by denying gay male workers IVF benefits.

They're challenging a requirement in the city's benefits package that mandates policyholders show they're infertile to trigger an insurance provider's coverage of in vitro fertilization.

The city's policy construes being infertile as the inability to conceive a child after a year of unprotected sex, which is interpreted as intercourse between a male and a female, or after several rounds of intrauterine insemination, where sperm is placed directly into the uterus using a small catheter.

Cisgender men in same-sex relationships can't meet either requirement, forcing policyholders seeking IVF to foot the hefty bills that their heterosexual colleagues don't have to. On average, IVF costs upward of \$12,000 a cycle, according to the American Society for Reproductive Medicine.

New York state insurance law outlaws denying IVF coverage based on sexual orientation, and in early 2021, former Gov. Andrew Cuomo issued guidance directing insurers to provide this kind of coverage to same-sex couples.

However, while these changes afforded fertility benefits to lesbian couples by allowing them to get coverage for intrauterine insemination, Briskin and Maggipinto said that gay men are still left out.

Under the city's health plan, they said they still can't make the showing of "infertility" required to obtain coverage. The city doesn't give them an avenue to prove basic biology: that they cannot conceive through intercourse with their male partner or through intrauterine insemination.

One of their attorneys, Gupta Wessler PLLC principal Peter Romer-Friedman, said he was surprised the city refused to work with his clients on making their health plan more inclusive.

"It was shocking that New York City was not willing to talk with us about changing the policy," Romer-Friedman told Law360. "We approached them, and they didn't tell us there was any obstacle to change this policy."

A City Hall spokesperson said the administration under Mayor Eric Adams "proudly supports the rights of LGBTQ+ New Yorkers to access the health care they need" and said it's reviewing Briskin and Maggipinto's claims.

"New York City has been a leader in offering IVF treatments for any city employee or dependent covered by the city's health plan who has shown proof of infertility, and our policies treat all people covered under the program equally, regardless of gender identity or sexual orientation," the representative said. "The city will review the details of the complaint."

The charge was just recently filed with the commission, and those proceedings will move forward behind closed doors until the agency either makes a determination or gives Briskin and Maggipinto clearance to sue.

An EEOC spokesperson declined to comment on the filing, telling Law360 that "Title VII has strict confidentiality provisions" and the agency is "prohibited by law from confirming or denying the existence

of specific charges."

Gay Women Challenge Aetna's Policy

A pair of similar lawsuits are already playing out in federal court against Aetna, as two gay women have separately sued the insurance giant claiming this same definition of infertility in its policies makes it difficult and expensive for lesbian women to obtain coverage for infertility treatments.

Both women, Columbia University student Emma Goidel and Atlanta nurse Tara Kulwicki, say it's discriminatory that they can only qualify for fertility benefits after shelling out for six months or more of intrauterine insemination.

Kulwicki said Aetna's plan forced her to put off having a child. Goidel said it cost her and her spouse nearly \$45,000 to achieve a successful pregnancy because of the IUI requirement, paying over \$20,000 for several unsuccessful cycles of IUI before deciding to try IVF out-of-pocket. Goidel said her bill for IVF topped \$20,000.

Heterosexual women have a second, cost-free pathway to show infertility — unprotected sex with a male partner for a year — and Goidel and Kulwicki said this uneven playing field runs afoul of federal and state laws.

One of the lawyers representing Goidel, Michelle Banker, who heads up reproductive rights and health litigation at the National Women's Law Center, said the way Aetna's policy is crafted levies extra costs on LGBTQ individuals.

"The result is essentially a tax on queer policyholders," Banker said.

A spokesperson for Aetna said the insurer "provide[s] infertility coverage in accordance with an individual's benefits plan and coverage rules."

"We have a history of strong support for the LGBTQ+ community and continuously work to increase and enhance our benefits and services to meet the evolving needs of our members and customers," Aetna spokesperson Rebecca Ferrick said in an email.

Goidel, who is enrolled in Aetna's student health plan for Columbia University with her spouse, lodged her federal lawsuit in New York in September. Kulwicki, a labor and delivery nurse at Wellstar Cobb Hospital in Atlanta, filed hers in Connecticut federal court in February. Aetna is headquartered in Hartford, Connecticut.

Both lawsuits are in their early stages.

Bostock Reverberates

On top of state and city law claims, Briskin and Maggipinto contend that New York City is violating Title VII, a federal law barring discrimination in workplaces, while Goidel and Kulwicki claim Aetna's plan requirements violate Section 1557 of the Affordable Care Act, a federal law prohibiting discrimination in health programs and activities.

After Bostock came down in 2020, the U.S. Department of Health and Human Services **issued guidance** roughly a year later that squared Section 1557 with Bostock, declaring that bias based on sexual orientation and gender identity are also banned under the ACA.

Both the EEOC charge and Kulwicki's case cite this landmark ruling, and the NWLC's Banker said this interpretation was instrumental in the case they filed on behalf of Goidel.

"Getting that decision in Bostock made it absolutely clear that this is the law of the land, and it's not just applicable to Title VII, but it's applicable to civil rights laws broadly," Banker said.

However, it's not clear yet whether the EEOC will consider an insurance policy with the IVF prerequisites as a violation of Title VII. There is a dearth of federal guidance on the issue.

The EEOC has issued **guidance on Bostock** clarifying that Title VII bars employers from discriminating based on sexual orientation and gender identity in employment benefits, but its stance on discrimination

in fertility benefits is limited to a short blurb within its pregnancy discrimination manual.

In that section, the agency discusses whether it's illegal to forgo fertility benefits entirely in an employer-provided medical plan and notes that Title VII could be triggered if an employer decides not to include coverage of a treatment that only applies to one gender. But the agency doesn't discuss if boxing some workers out of fertility benefits implicates federal civil rights law.

Despite the lack of federal guidance specifically focused on this legal issue, Briskin and Maggipinto's lawyer said he believes the exclusion of his clients from in vitro fertilization coverage is a clear violation of the civil rights law.

"In our view, the discrimination claim is fairly straightforward," Romer-Friedman said. "If you were to change my client's gender or their sexual orientation, they and their spouse would be eligible for the benefits."

"That's a pretty classic form of discrimination," he said.

Foley & Lardner LLP partner Nick Welle, who chairs the firm's health benefits practice and advises providers of group health and welfare benefit plans, said it's possible there's a solid legal claim in these cases.

"Whether it was intentional or not, you can certainly see some discriminatory impact for homosexual couples, especially for homosexual male couples," he said. "Certainly, I think there's a legal basis for it."

Employer Takeaways

Offit Kurman's Cirilli said "it's an unknown" whether New York City's policy violates the law, but she said "it behooves employers to have a protocol to pick policies that ensures that it's not going to have a disparate impact."

"To safeguard against litigation, it really makes sense to revisit your policies," she said. "When it's time to re-enroll, ask your insurance brokers the right questions."

Aetna isn't the only insurer with the allegedly discriminatory requirements surrounding infertility treatment, as Briskin and Maggipinto's suit calls out New York-based insurer EmblemHealth for having the same provisos, and legal experts say the issue is industrywide.

The NWLC's Banker said that after they launched their lawsuit on behalf of Goidel, they realized how many LGBTQ policyholders have been affected by these requirements.

"We've heard just from so many people, nationwide on Aetna plans but also on other health insurance plans that have the same discriminatory requirements," Banker said. "This is a widespread industry problem and it's time for it to change."

Legal experts agreed that more litigation is on the horizon.

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Nick Welle

Foley & Lardner

"We're going to see a lot more legal issues considering fertility benefits for homosexual couples," said Foley & Lardner's Welle. "Insurance plans and employer-provided health plans are still trying to catch up and figure out the legal issues associated with that type of coverage."

Offit Kurman's Cirilli said she is advising her clients to take a fresh look at their benefits offerings to make sure they are fair to all their workers, as she said employee benefits will continue to be scrutinized in Bostock's wake.

"Bottom line, I think it puts employers on notice," Cirilli said.

But attorneys emphasized that these cases shouldn't scare company leaders off from adding fertility benefits to their packages, as they said comprehensive family planning benefits packages are key to hiring and retaining talent.

"Larger employers that want to compete in the marketplace, they're going to be at a disadvantage soon — if they're not already — if they're not offering infertility benefits, surrogacy benefits and adoption benefits," Welle said.

--Editing by Abbie Sarfo.

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