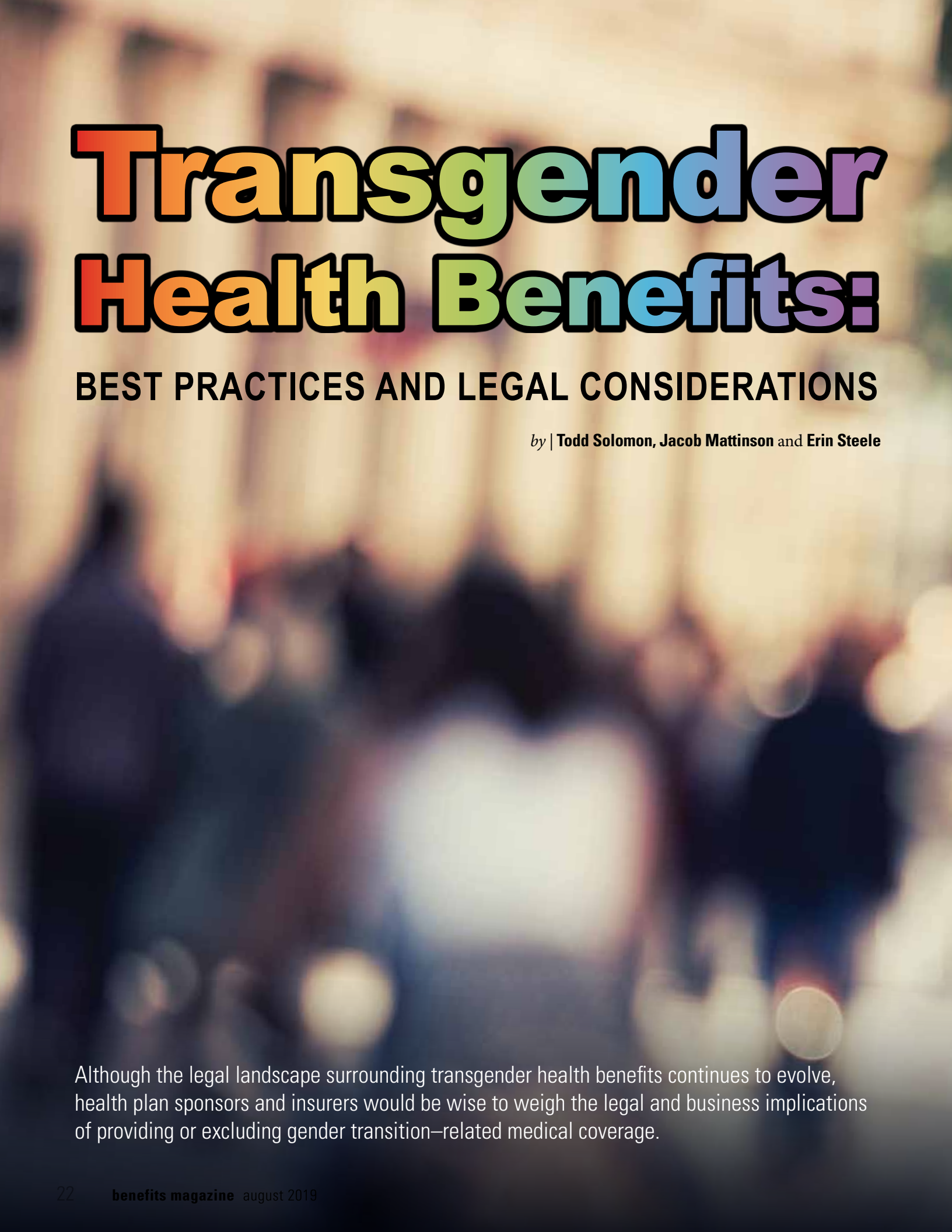

Transgender Health Benefits:

BEST PRACTICES AND LEGAL CONSIDERATIONS

by | **Todd Solomon, Jacob Mattinson** and **Erin Steele**

Although the legal landscape surrounding transgender health benefits continues to evolve, health plan sponsors and insurers would be wise to weigh the legal and business implications of providing or excluding gender transition–related medical coverage.

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In recent years, employers and insurers have increasingly considered providing transgender workers with comprehensive health care benefits. Many transgender individuals choose to undergo various medical treatments in order to more closely align their physical bodies with their gender identity. Historically, most health plans and health insurers explicitly excluded these types of procedures from coverage, considering them to be cosmetic and/or not medically necessary, including those that would be covered if undergone by someone of the "appropriate" gender (such as hysterectomies, for example).

A growing number of medical organizations, courts and administrative bodies have stated that transition-related medical care is medically necessary and should be covered by employer-sponsored medical plans. Access to employer-sponsored health care coverage for transgender workers has become an issue of focus for civil rights advocacy groups such as Lambda Legal and the American Civil Liberties Union (ACLU), and there has been an uptick in discrimination lawsuits filed against health plans and insurers denying such care. These trends highlight the importance of weighing the legal and business considerations that come with providing (or not providing) comprehensive health benefits for transgender workers.

The Legal Landscape

The legal consequences of excluding gender transition–related health coverage are evolving, but it is clear that many plan sponsors and health insurers that exclude transition-related medical care do so at the risk of violating antidiscrimination laws.

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Section 1557

First, Section 1557 of the Patient Protection and Affordable Care Act (ACA) prohibits certain covered entities from discriminating in the provision of health care on the basis of race, sex, color, national origin, age or disability. Section 1557 applies to health programs or activities that receive federal funding, so it covers essentially all insurance providers, and even plan sponsors with self-funded plans to the extent that those plans receive federal funding (such as Medicare).

In May 2016, the Department of Health and Human Services (HHS) released final regulations clarifying that *sex discrimination* under Section 1557 includes discrimination based on sex stereotyping, gender identity and termination of pregnancy. The HHS Office of Civil Rights (OCR) began enforcing the regulation by bringing claims for health coverage on behalf of transgender employees.

However, the impact of these regulations is quite uncertain. On December 31, 2016, the federal district court for the Northern District of Texas issued a nationwide preliminary injunction prohibiting OCR from enforcing the parts of the regulation prohibiting discrimination on the basis of gender identity and termination of pregnancy. The injunction arose from a suit brought by the Franciscan Alliance (a Catholic hospital system) and five states challenging the OCR and HHS interpretation of Section 1557 and its final regulations. The plaintiffs argued that OCR exceeded its authority and that the rule violated the Franciscan Alliance's religious freedoms by forcing it to provide health care services against its medical and religious judgment.

In early 2017, HHS began revising the regulation, and on April 5 of this year, the Department of Justice (DOJ) filed a brief on behalf of HHS in the *Franciscan Alliance* case stating that the United States has "returned to its longstanding position that the term 'sex' in Title VII does not refer to gender identity, and there is no reason why Section 1557 . . . should be treated differently."[1]

On May 24, HHS released a proposed rule that, as was widely expected, removes sex stereotyping, gender identity and termination of pregnancy from the definition of *sex discrimination*. The rationale for this aspect of the proposed rule largely rests on the reasoning of the Northern District of Texas in the *Franciscan Alliance* case. HHS now takes the position that the protections for gender identity and termination of pregnancy were the result of "novel and inconsistent" interpretations of existing federal civil rights laws and that

removing them will reduce confusion and increase consistency with other federal laws and agencies.[2] HHS wants to apply Congress's words "using their plain meaning when they were written, instead of attempting to redefine sex discrimination to include gender identity and termination of pregnancy."[3]

In addition to changing the definition of sex discrimination, the proposed rule includes significant changes to the scope of Section 1557, including scaling back the scope of covered entities so as not to apply the rule to self-funded group health plans and other "health programs and activities."[4] The proposed rule still has to go through the rulemaking process but would become effective 60 days after implementation of the final rule. For now, though, the current regulation from 2016 is still in effect, as is the nationwide injunction prohibiting OCR from enforcing the regulation's protections for gender identity.

Although OCR is currently prohibited from enforcing the regulation, plaintiffs have still been able to file suit in federal court against hospitals, health care providers, health plan sponsors and health plan administrators under the Section 1557 private right of action, which is a provision allowing private parties to bring a lawsuit even though no such remedy is explicitly provided for in the law. Courts that have considered the question have increasingly held that the statutory language of Section 1557 prevents discrimination on the basis of gender identity, indicating that transgender employees can still turn to the judicial system to defend their right to coverage under the statute regardless of what happens with the regulation.

takeaways

- In the past, many health plans and insurers excluded coverage of gender transition procedures, considering them to be cosmetic and/or not medically necessary.
- A growing number of medical organizations, courts and administrative bodies have stated that transition-related medical care is medically necessary and should be covered by employer-sponsored health plans.
- Failure to cover transition-related medical care may lead to liability under Section 1557 of the Patient Protection and Affordable Care Act (ACA) and Title VII of the Civil Rights Act of 1964.
- Less than 1% of the U.S. population is transgender, so costs related to providing gender reassignment surgery and other services should be relatively low for individual health plans.
- Creating a transgender-inclusive workplace may help employers attract and retain talented employees and boost engagement and productivity.

A growing body of federal court decisions has concluded that the Section 1557 prohibition on discrimination "on the basis of sex" includes gender identity.[5] Transgender plaintiffs in these cases generally allege that employer-sponsored health plans should have paid for certain procedures, like breast augmentation, hormone therapy and hysterectomies but did not because they excluded coverage for transition-related care, even though the plans would have paid for these procedures if they were needed by employees whose gender identity corresponds with their sex at birth (*cisgender*).

These decisions have been based on the language of the statute itself, so courts have not had to address the final regulations in reaching their conclusions, and in some cases explicitly stated that the outcome would not change based on the regulations. Plaintiffs have collected damages of up to hundreds of thousands of dollars to cover gender reassignment surgery and other related procedures and treatment. More cases have been filed in 2019 and are currently being litigated.[6]

Title VII and Beyond

In addition to Section 1557, excluding transition-related medical care may lead to liability under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of sex and has been interpreted by courts to include gender identity discrimination. In Texas, an employee brought a claim for benefits coverage under both Section 1557 and Title VII, and the court dismissed the Section 1557 claim while allowing the Title VII claim to proceed.[7]

The Equal Employment Opportunity Commission (EEOC) has taken the position that exclusion of transition-related medical care constitutes sex discrimination in violation of Title VII. The U.S. Supreme Court recently agreed to hear a case that will decide whether gender identity discrimination qualifies as prohibited sex discrimination under Title VII, which will not only provide clarity about the interpretation of Title VII but

Practical Tips for Health Plan Sponsors Reviewing Plans for Transgender Coverage

- **Review plan documents.** Items to look for include explicit transgender coverage exclusions, as well as any exclusions for cosmetic procedures to determine whether transgender care also would be prohibited under those exclusions.
- **Fully insured plans should talk to their insurance provider.** The plan sponsor should discuss any potential costs associated with adding or removing transgender coverage exclusions.
- **Think about tax treatment.** When evaluating a health plan's coverage of transgender care, plan sponsors should consider the impact of beneficial tax treatment for medically necessary gender-affirming procedures on plan costs.
- **Consider potential exposure under Section 1557 and Title VII.** Plans should be sure to closely follow legal developments in the area of transgender health care coverage, since the legal landscape and the way in which courts and federal agencies view employer obligations are rapidly evolving.
- **Consider workplace culture and industry trends.** Plan sponsors should evaluate how adding or removing transgender coverage exclusions will affect the organization's workplace morale and ability to attract and retain top talent. This will also necessarily involve evaluating how other companies are handling coverage of transgender care.
- **Notify employees.** Health plan sponsors should comply with notification requirements under the Employee Retirement Income Security Act of 1974 (ERISA) by ensuring that employees are timely and properly notified of the addition or removal of any plan benefits through updated summary plan descriptions and summaries of material modifications, as applicable.

also will likely inform judicial analysis of Section 1557, since it uses the same *on the basis of sex* language. It is also worth noting that 21 states, the District of Columbia,[8] and more than 225 U.S. cities and counties[9] prohibit employment discrimination based on gender identity, so lawsuits under those laws are possible as well. The Employee Retirement Income Security Act (ERISA) may very well preempt such claims, but they nevertheless can be very costly to defend.

In sum, the legal implications of not offering inclusive benefits to transgender plan participants is in flux but is likely to take more definite shape in the near future. Health plan sponsors and insurers should watch these developments closely and carefully consider the risks associated with not providing inclusive coverage. See the "tips" sidebar for issues to consider when reviewing health plans for transgender coverage.

The Business Case for Covering Transition-Related Medical Care

Another factor health plans should take into account in deciding whether to cover transition-related medical care is the potential cost and tax advantages of doing so. While many assume that expanding coverage to include comprehensive health benefits for transgender workers will be expensive, studies have shown just the opposite, indicating that plans may even save money over time. The *Journal of Internal Medicine* estimates that gender reassignment surgery is a one-time cost of between $20,000 and $30,000, plus the additional cost of hormone replacement therapy and other related services.[10] Given that transgender people make up a very small percent of the country's population (less than 1%, according to the most recently available data), these costs are relatively low.[11]

In addition, providing comprehensive transgender health benefits can potentially save plans money in the long term by preventing severe mental health issues that can stem from untreated distress due to the mismatch between a person's gender identity and their sex at birth, or *gender dysphoria*, which could cost a plan more than $10,000 per year due to the increased risk of depression and substance abuse.[12] For example, when the city of San Francisco began offering transgender health coverage to employees in 2001, it applied a small surcharge to all employees enrolled in the health plan in anticipation of increased costs. However, the city ended up using only $386,000 of the $5.6 million that was raised, leading it to eventually drop the surcharge altogether.[13] Ultimately, providing coverage of transgender health care treatment is highly unlikely to increase, and could possibly reduce, plan costs.

An additional incentive for plan sponsors to provide benefits is the favorable tax treatment they receive. Medical care related to the diagnosis, treatment or prevention of diseases, or for the treatment related to any part or function of the body, is generally exempt from employer payroll and income tax. Expenses related to cosmetic surgery are generally extended favorable tax treatment only if the procedures are medically necessary to treat a physical deformity existing at birth or arising by accident or disease. Thus, the taxation of medical care related to treatment of gender dysphoria can be confusing, since many of the treatments may seem cosmetic in nature.

In 2010, the U.S. Tax Court cleared up this issue by holding that hormone therapy and gender reassignment surgery were deductible medical expenses because they are well-recognized and accepted treatments for severe gender dysphoria.[14] Breast augmentation surgery was not deemed to be deductible because there was insufficient evidence that surgery was medically necessary for the individual involved in that particular case. But the ruling was based on the specific facts and circumstances involved and leaves open the possibility that breast augmentation could be medically necessary for another individual with gender dysphoria. Notably, the Internal Revenue Service (IRS) did not appeal the Tax Court's decision. Favorable tax treatment as reflected in the case provides an additional incentive for employers to cover medically necessary transition-related medical treatment. From a plan administration perspective, this essentially means making sure that transition-related medical treatment is included in the plan's definition of, or criteria for, *medically necessary*, which may or may not require a formal diagnosis, depending on how the particular plan determines medical necessity.

Workplace Culture and Morale

Beyond mitigating risks of legal claims and reducing employer and plan costs, creating a transgender-inclusive workplace may help employers attract and retain talented employees and boost engagement and productivity. Providing the right health benefits is a significant part of that effort. According to this year's *Corporate Equality Index* report by the Human Rights Campaign Foundation, 62% of Fortune 500 companies offer transgender-inclusive health care coverage, up from 0% in 2002 and 16 times as many businesses as ten years ago.[15] In addition, of the employers with at least one transgender-inclusive plan, the vast majority also eliminated all exclusions of transgender care across plans.[16] Generally, many of these employers have adopted benefits providing a base level of coverage for medical care, including mental health counseling, hormone therapy, medical visits, surgical procedures, and short-term or medical leave and paid time off for transitioning employees.

Large insurers have begun to address the issue by removing exclusions as well. Many insurance providers, including Aetna and UnitedHealth Group, have policies on gender reassignment and related procedures, although the amount of coverage can vary depending on which policy the employer selects. In 2018, MetLife removed its exclusions of transgender coverage across the board. Generally, it is up to employers to negotiate out exclusions for transgender-related health care in plans provided by insurers to their employees.

These expanded offerings align with the general trend toward employers offering an overall friendlier and more inclusive environment for transgender employees. For instance, 85% of Fortune 500 companies have gender identity protections as part of their nondiscrimination policies, and many employers have implemented gender transition guidelines.[17] As the overall commitment of employers to transgender inclusion in the workplace continues to grow, so does a focus on eliminating exclusions of coverage for transgender health care.

Transgender-Inclusive Benefits

The number of organizations providing transgender-inclusive health care benefit offerings is on the rise, according to the International Foundation report *Employee Benefits Survey: 2018 Results.* The report showed that 29% of organizations provide such benefits, up from 12% in 2016.

The report, which included responses from 598 multiemployer, public employer and single employer corporate plans, found:

- 22% offer gender-reassignment/affirmation surgery (up from 8% in 2016)
- 25% provide mental health counseling pre- and/or postsurgery (up from 11% in 2016)
- 24% cover prescription drug therapy (hormone replacement therapy, etc.) (up from 9% in 2016)
- 24% include physician visits (up from 10% in 2016)
- 23% cover lab tests (up from 9% in 2016)
- 13% cover birth-gender preventive care on a post-transition basis. This preventive care often includes prostate or gynecological exams.
- 3% include cosmetic surgery (facial feminization, Adam's apple reduction, etc.) (up from 2% in 2016)

Transgender-inclusive benefits are more commonly provided by large organizations (those with 10,000 or more employees). More than half (52%) of large employers offer such benefits, up from 27% in 2016.

Conclusion

The increased attention on transition-related medical coverage for transgender workers is part of a broader social and legal movement to prevent discrimination in employment and health care based on gender identity. Health plan sponsors and insurers should consider how the decision to provide or exclude transition-related medical coverage will affect their legal compliance, overall costs and workplace culture.

Endnotes

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bios

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