ABA JCEB Government Invitational
Employee Benefits in the Crossroads: Generational Distinctions?

Session II: Healthcare Focus
Section of Labor & Employment Law: Transgender Issues – Nondiscrimination

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I. Background Information and Statistics

A. Key Vocabulary

1. **Transgender:** A term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth

2. **Gender Identity:** An individual's internal sense of being male, female, or something else, and is not necessarily visible to others

3. **Gender Expression:** How a person represents or expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics

4. **Gender Non-Conforming:** A term for individuals whose gender expression is different from societal expectations related to gender

5. **Sex Affirmation Surgery:** Surgical procedures that change one's body to better reflect a person's gender identity, and may include different procedures, including those sometimes also referred to as "top surgery" (breast augmentation or removal) or "bottom surgery" (altering genitals), although not all people have surgery as part of their transition

6. **Sexual Orientation:** A term describing a person's attraction to members of the same sex and/or a different sex, usually defined as lesbian, gay, bisexual, heterosexual, or asexual

7. **Transition:** The time when a person begins living as the gender with which they identify rather than the gender they were assigned at birth, which often includes changing one's first name and dressing and grooming differently, but may also include medical and legal aspects, including taking hormones, having surgery, or changing identity documents (e.g. driver's license, Social Security record) to reflect one's gender identity

8. **Gender Dysphoria:** Marked incongruence between the gender an individual has been assigned (usually at birth) and that individual's expressed gender

(American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) ("DSM-V"))

B. **What is the Problem?** Health plans generally discriminated against transgender individuals by denying coverage for non-transgender care and care related to sex affirmation surgery

C. **Medical Necessity:** Treatments and services related to sex affirmation or reassignment are medically necessary when following the internationally accepted standards of care (see World Professional Association for Transgender Health's Standards of Care)

D. **Medical Standards**

1. **American Medical Association:** Supports public and private health insurance coverage for treatment of gender dysphoria as recommended by a physician

2. **World Professional Association for Transgender Health ("WPATH"):** The World Professional Association for Transgender Health promotes the highest standards of health care for individuals through the articulation of Standards of Care ("SOC") for the Health of Transsexual, Transgender, and Gender Nonconforming People, which are based on the best available science and expert professional consensus

3. **Other Medical Standards: What standards are most appropriate when evaluating a claim from a transgendered individual?**

E. **Statistics**

1. **Population Size:** 1.4 million or 0.6% of the population, which is double figures reported 5 years ago, but also varies greatly from state to state (0.3%-0.8%)

2. **Cost**

   i. **San Francisco City and County Data:** In July 2001, the City and County of San Francisco became the first major U.S. employer to publicly remove discriminatory transgender access exclusions in its health plans, including providing coverage for sex affirmation surgery, psychotherapy, and hormone therapy; and closely monitored/released data for the first five years of the program:

      - **No Premium Increases were Necessary**

      - **Cost was Low:** Average dollars spent per claimant ranged between $15,963.00 and $63,853.00, and averaged $25,542.00 per

claimant over the five year period, which represents a very small fraction of all claims submitted under the health plan

- **Utilization was Low:** Total number of claimants over five year period was at least 6 and at most 24, which equates to at least 1.2 and at most 4.8 per year; put differently, that equated to a rate of at least 0.0324 and at most 0.192 claimants per thousand employees per year, and least 0.012 and at most 0.0683 claimants per thousand enrollees

- **No Adverse "Magnet Effect:"** A disproportionately large population of transgender individuals did not start enrolling in the health plan as a result of this benefit

3. **Corporate Equality Index:** Number of major U.S. employers offering transgender-inclusive health care coverage has increased from 49 in 2009 to 278 in 2013 and a record 647 in 2017

II. Best Practices for Employers

A. **Relevant State Laws:** Fifteen states plus D.C. prohibit categorical exclusions of transition-related care (CA, CO, CT, DE, IL, MA, MI, MN, NY, NV, OR, PA, RI, VT, and WA (with more limited guidance available in MD)).

B. **Employment Studies:** District of Columbia Office of Human Rights conducted a study of employer responses to resumes from applicants perceived as transgendered, in which its key findings indicate that a large percentage of employers prefer less-qualified applicants over a more-qualified applicant perceived transgendered.

1. **Best Practices:** (a) Maintain Confidentiality (b) Use Proper Names and Pronouns (c) Ensure Access to Restrooms and Other Facilities (d) Implement Gender Neutral Dress Codes (e) Address Challenges With Other Employees and Coworkers (f) Update Company Discrimination Policy and Diversity Initiatives

2. **Create A Gender Transition Plan**

C. **Access to Competent and Comprehensive Health Care Study:** HHS conducted surveys in conjunction with the Network for LGBT Health Equity to determine the increased risk and difficulties that transgender people face in navigating health care system.

1. **Can these issues be overcome by plan design and network standards? What role can employer sponsors play in creating networks designed to minimize these problems?**

D. Plan Documents

1. Plan, Summary Plan Description, and Explanation of Benefits

E. Mental Health Parity Issues—should plans and insurers carve-out counseling from major medical maximums?

III. Litigation Update

A. Standing

1. *Tovar v. Essentia Health*, 187 F. Supp. 3d 1055 (D. Min. 2016)

B. ACA § 1557

1. *Robinson v. Dignity Health*, No. 16-3035, 2016 WL 7102832, 2016 U.S. Dist. LEXIS 168613 (N.D. Cal. Dec. 6, 2016)

2. *Franciscan Alliance, Inc., et al. v. Burwell*, No. 16-108, 2016 WL 7638311, 2016 U.S. Dist. LEXIS 183116 (N.D. Tex. Dec. 31, 2016)

3. *Baker v. Aetna* Life Ins. Co., No. 15-3679, 2017 WL 131658, 2017 U.S. Dist. LEXIS 5665 (N.D. Tex. Jan. 13, 2017)

4. *Conforti v. St. Joseph's Healthcare Sys., Inc. et al,* No. 17-50 (filed Jan. 5 2017, D.N.J.)