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GENDER HEALTH BENEFITS IN WASHINGTON STATE

[Mariana Ancira, GBA](#) | Vice President, Account Executive



With the increased visibility and calls for equity for transgender and non-binary (i.e. individuals who do not identify with either male or female genders¹) individuals, many of our Washington State healthcare and nonprofit clients have recently received questions from employees about medical coverage for gender health services. Our laws are evolving in an effort to protect, respect, and care for transgender and non-binary individuals, and this has been adopted in recent years into our employer-sponsored health plans. When examining coverage for gender health services, it is important to understand

the compliance implications, coverage requirements, potential challenges with coverage that might occur, and finally how you can best support transgender and non-binary employees.

COMPLIANCE IMPLICATIONS

Federal

Affordable Care Act (ACA) Section 1557²

Applies to fully insured plans (the insurance carriers must comply) – “Individuals may not be denied, cancelled, limited, or refused health coverage on the basis of race, color, national origin, sex, age, or disability.” The U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) released a final rule for nondiscrimination in health programs and activities in 2016. The law included expanded protection for transgender individuals: “Insurers and group health plans cannot limit accessibility to health services typically or exclusively available to one gender.” In plain terms, specific health services must be fully available to everyone, regardless of an individual’s gender assigned at birth, gender identity, or recorded gender.

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Please note that 1557 can also apply to self-funded plans that are considered a “covered entity” under the rules. A covered entity is an organization that received federal funds related to the provision of healthcare administered by the Department of Health and Human Services (DHHS). Typically, this will only apply to self-insured plans sponsored by medical providers.

Mental Health Parity and Addiction Equity Act (MHPAEA)²

“The diagnosis of “gender dysphoria” (see below) is a behavioral condition for which limitations should not be applied. If there are limits around transgender benefits (e.g., transgender therapy), there is potentially a mental health parity issue if similar limits are not also applied to other medical conditions and benefits.”

The Equal Employment Opportunity Commission (EEOC)²

“Requires all employers (regardless of whether they are covered by Section 1557) to comply with similar nondiscrimination requirements under Title VII of the Civil Rights Act of 1964.” However, there is significant legal debate as to if the EEOC rules require any kind of coverage under a health plan.

Washington State³

The Office of the Insurance Commissioner in Washington State (OIC)

If a health insurer covers medically necessary services for its enrollees, it cannot exclude or deny those services for a transgender person because of the person’s gender identity. Health insurers must cover procedures that are part of a gender transition process if they’re covered for other policyholders for different reasons.

Examples include:

- Hormone therapy
- Counseling services
- Mastectomy
- Breast augmentation and reconstruction



COVERAGE UNDER FULLY INSURED PLANS

The common requirement for transgender coverage under fully insured plans is a diagnosis of “gender dysphoria.” DSM-5 (Diagnostic and Statistical Manual of Mental Disorders) defines it as⁴: people whose gender at birth is contrary to the one they express/experience. The critical element for gender dysphoria diagnosis is the presence of clinically significant distress associated with the condition.

Examples of fully insured plan coverage that would be utilized by individuals diagnosed with gender dysphoria include:

- Psychotherapy
- Hormone therapy
- Gender affirmation surgery - with additional criteria that must be met⁵:
 - » At least 18 years of age
 - » Patient has the capacity to make fully informed decisions and consent for treatment

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- » At least two licensed mental health professionals have diagnosed gender dysphoria in accordance with the DSM-5 criteria, and recommended surgical treatment
- » Application and documentation of continuous hormonal therapy to the individual for at least 12 months, unless there is a noted reason to withhold hormonal therapy
- » A period of twelve months where the individual has expressed the gender role congruent with their gender identity (WPATH [World Professional Association for Transgender Health] recommendation)

On most fully insured contracts, surgeries primarily for feminization or masculinization are considered cosmetic and are exclusions.

OPTIONS FOR SELF-FUNDED EMPLOYERS

Employers with self-funded health plans are subject to the EEOC non-discrimination rules and the Mental Health Parity and Addiction Equity Act (MHPAEA), and therefore are being advised to cover transgender services as a fully insured plan would, and to remove any existing blanket limitations for these services. Some self-funded groups may choose to offer additional benefits by covering WPATH-recommended surgeries and services, including services that are considered cosmetic under fully insured contracts. There is indeed a cost-related concern for self-funded plans, as costs and services will vary widely depending on where an individual may be in their transition and the desired services.

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CHALLENGES

Provider Contracting

Many of our clients report difficulties with medical provider contracting when their employees have sought services for transgender-related surgeries. A large number of surgeons who perform these services do not contract with any health plan networks, leaving the employee in a position where their provider is out-of-network. Even if the plan pays all services as in-network, there may still be the issue of balance billing.



Claim Denials Based on Gender-specific Services

Typically an employee record in an insurance carrier or TPA's claim system includes a gender indicator, "male" or "female." When the gender indicator in the claim system doesn't match the carrier's required gender for the service provided (e.g. mammogram when the gender indicator is male), this can cause an automatic claim denial. Requesting a case manager assignment at the insurance carrier or TPA can help to alleviate denied claims. Many carriers have recently adjusted their claim systems to accommodate these circumstances. In addition, Washington State has recently allowed the gender "X" on birth certificates for non-binary individuals; however issues still arise with medical services, as most electronic medical record (EMR) systems don't currently accommodate gender "X."

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HOW TO SUPPORT TRANSGENDER AND NON-BINARY EMPLOYEES

Kaiser Permanente offers the following suggestions⁶:

1. Learn all you can about gender identity. Here are the basics:
 - » "Gender identity is your inner sense of being male, female, both, neither, or some other gender." When an individual is transgender, this inner sense doesn't align with the gender they were assigned at birth.
 - » "The process for recognizing, accepting, and expressing your gender identity is called a transition." There are many healthcare options for transitioning, including medical, nonmedical, surgical, and nonsurgical options.
2. Learn to use the right pronouns ("he," "him," "she," "her," "they," "them," "ze," "zir"). Offer your pronouns first, for example, I would say: "I use "she" and "her" pronouns, which pronouns do you prefer?"
3. "If the person is changing their name, use that new name when you talk to or about the person."

As regulations continue to evolve and change, it is important to ensure that your benefits program is compliant, well communicated, and supported, especially in the case of gender benefits, which can be extremely complex. Call an experienced employee benefits broker to learn more.

To view a list of additional helpful resources [click here](#).

References and Resources

1. Understanding Non-Binary People: How to Be Respectful and Supportive, <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive>
2. Section 1557 of the Affordable Care Act Nondiscrimination Requirements, https://www.cigna.com/assets/docs/about-cigna/informed-on-reform/informed-on-reform-nondiscrimination-fact-sheet.pdf?WT.z_nav=health-care-reform%2Fsection-1557-nondiscrimination-requirements%3BBody%3BRead%20the%20Nondiscrimination%20Fact%20Sheet
3. Transgender medical coverage rights, <https://www.insurance.wa.gov/transgender-medical-coverage-rights>
4. Gender Dysphoria, https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf
5. Regence BlueShield of WA Medical Policy Manual # 153
6. Gender health program, <https://wa.kaiserpermanente.org/html/public/services/transgender>