

Employee Benefits Report



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Title VII Nondiscrimination Protections Apply to LGBTQ Individuals

The EEOC has concluded “sexual orientation is inherently a ‘sex-based consideration’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.” Translation: Title VII nondiscrimination protections apply to people who identify as lesbian, gay, bisexual, transgender and queer.

No federal law expressly bars discrimination against people for their sexual orientation. In 2012, however, the EEOC’s Strategic Enforcement Plan (SEP), adopted by a bipartisan vote, lists “coverage of lesbian, gay, bisexual and transgender individuals under



This Just In

Taking a short-term view could improve retirement savings. For employers that offer a defined contribution plan, such as a 401(k), getting employees to participate becomes a concern. If only higher-paid employees participate, the plan could be deemed to discriminate in favor of “highly compensated individuals.” When that happens, the plan must make refunds to any highly compensated individuals who’ve contributed. This could make executives and managers very cranky, as they’ll have to pay taxes on that money.

A recent study by LIMRA suggests that employers might have been approaching retirement education all wrong. Instead of getting employees to focus on their needs in retirement, try getting them to

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Title VII's sex discrimination provisions, as they may apply" as an enforcement priority for Fiscal Years 2013-2016. Since then, the agency has begun to file LGBT-related lawsuits under Title VII challenging alleged sex discrimination.

Earlier this year, in a claim filed by an unnamed homosexual man against the Federal Aviation Administration, the EEOC interpreted Title VII of the Civil Rights Act of 1964 to apply to lesbian, gay, bisexual and transgender people. The complainant had worked as an air traffic control specialist. He alleged he was not considered for a promotion because of his sexual orientation, and provided examples of disparaging comments his supervisor had made in his claim to the EEOC.

Title VII of the Civil Rights Act of 1964 states:

It shall be an unlawful employment practice for an employer -

- 1** *to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or*
- 2** *to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of*

such individual's race, color, religion, sex, or national origin.

The EEOC concluded "sexual orientation is inherently a 'sex-based consideration' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." It said:

[T]he question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question...[is]...whether the ...[employer]...has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.

Implications for Employers

Federal laws prohibiting discrimination based on race, color, sex, religion, national origin, age, disability and genetic information, as well as retaliation for protected activity, apply to most employers with at least 15 employees (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered. The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages and benefits.

The EEOC, which has responsibility for enforcing these laws, has become more aggressive in filing LGBT-related lawsuits under Title VII. To avoid charges of sex discrimination, an employer must avoid discriminating against employees or applicants because they do not conform to traditional gender stereotypes.

focus on near-term goals. Near-term goals, such as saving half a year's salary by age 30, are more relevant and easier to achieve. Individuals can "ladder" this type of short-term goal to create a long-term plan. By achieving their short-term goals one at a time, employees can achieve their long-term goal of adequate retirement savings.

For example, it is illegal for an employer to deny employment opportunities or permit harassment because:

- ✱ a woman does not dress or talk in a feminine manner.
- ✱ a man dresses in an effeminate manner or enjoys a pastime (like crocheting) that is associated with women.
- ✱ a female employee dates women instead of men.
- ✱ a male employee plans to marry a man.
- ✱ an employee transitions from female to male or male to female.

Federal nondiscrimination law aims to put victims of discrimination in the same position (or nearly the same) that they would have been in if the discrimination had never occurred. Types of relief can include:

- ✱ Placement in the job and/or back pay and benefits
- ✱ Attorney's fees, expert witness fees and court costs
- ✱ Compensatory damages, to cover victim's out-of-pocket costs and to compensate them for emotional harm

- ✦ Punitive damages, if the employer has committed an especially malicious or reckless act of discrimination.

How much a sex discrimination case can cost you depends on the size of your organization.

- ✦ Employers with 15-100 employees can pay up to \$50,000.
- ✦ Employers with 101-200 employees can pay up to \$100,000.
- ✦ Employers with 201-500 employees can pay up to \$200,000.
- ✦ Employers with 500+ employees can pay up to \$300,000.

To avoid claims of sexual orientation discrimination, employers should examine their hiring practices, employment policies and manuals, benefits packages and benefits statements for any discriminatory practices or wording. Training managers and supervisors to be sensitive to matters of sex discrimination can also help. For information, please contact us.

A Bitter Pill: The High Cost of Specialty Drugs

The good news: Pharmaceutical companies are developing a range of drugs to treat diseases that are chronic and/or rare. The bad news: Their high (some might say outrageous) cost.

Overall, prescription drug prices rose 12 percent in 2014. Sales of specialty drugs contributed greatly to the jump. Specialty drugs:

- ✦ Are usually self-administered, high cost, injectable or oral drugs
- ✦ Can require clinical training to administer
- ✦ Treat chronic conditions (e.g., cancer, multiple sclerosis, rheumatoid arthritis, hepatitis C)
- ✦ May need special storage and handling
- ✦ Aren't available from many retail pharmacies.

People are taking notice of the cost increases. In the August issue of the medical journal *Mayo Clinic Proceedings*, more than 100 oncologists signed on to an editorial titled "In Support of a Patient-Driven Initiative and Petition to Lower the High Price of Cancer Drugs." The physicians said that, due to cost, about 10-20 percent of cancer patients do not take their prescriptions as prescribed. The greater their out-of-pocket cost, the less likely they are to comply with prescription instructions.

That should come as no surprise, given the cost of cancer drugs. Consider the following facts:



- ✦ The cost of cancer drugs has increased an average of \$8,500 a year over the past 15 years.
- ✦ Treatment with new cancer drugs cost an average of \$100,000 per year in 2012.
- ✦ All new cancer drugs approved by the US Food and Drug Administration last year cost more than \$120,000 per year of use.

On top of that, copayments and deductibles have been increasing, leaving many patients paying 20 to 30 percent of their prescription drug costs. This has forced many to "make difficult choices between spending their incomes [and liquidating assets] on potentially lifesaving therapies or forgoing treatment to provide for family necessities," the doctors wrote.

These facts aside, some new, high-cost drugs might pay off. For example, a drug that prevents liver failure or averts probable heart conditions can save thousands of dollars in surgery, emergency room and lost life and productivity costs. However, the problem for employers is that employees might not stay around long enough for these long-run cost savings to materialize.

Solutions

The *Mayo Clinic Proceedings* editorial suggested the following fixes for the current system:

- ✦ Create a review mechanism to propose a fair price for new treatments, based on their value to patients and health care.
- ✦ Allow Medicare to negotiate drug prices (currently forbidden under Medicare reform).
- ✦ Allow the Patient-Centered Outcomes Research Institute, created by the Affordable Care Act, and similar organizations to include drug prices in their assessments of treatment value.
- ✦ Allow importation of cancer drugs across borders for personal use.
- ✦ Pass legislation to prevent drug companies from delaying access to generic drugs (pay-for-delay).
- ✦ Reform the patent system to make it more difficult to unnecessarily prolong product exclusivity.
- ✦ Encourage organizations that represent cancer specialists and patients to consider the overall value of drugs when creating treatment guidelines.

Until these things happen, employers can take some steps to control their prescription drug costs:

- ✦ Consider using a pharmacy benefit manager (PBM). You can do this by “carving out” prescription drug benefits from

your health plan. The PBM then manages your drug benefits. Volume buying allows PBMs to give participants retail and mail-order drugs at deep discounts. They also contract with manufacturers to obtain rebates that can be passed on to clients.

While PBM pricing is often more transparent than insurance company pricing, a PBM’s financial interests may not always align with those of their clients. Some PBMs retain the difference between the discount applied to the client’s invoice and the actual amount reimbursed to the retail pharmacy. With mail-order purchases, certain PBMs rely on their market power to generate revenue by purchasing volume-based brand and generic drugs at a deeper discount than the prices clients pay. And sometimes they refuse to reimburse for certain high-cost drugs.

- ✦ Consider plan design. Specialty drugs and biologics are often the subject of off-label, experimental or questionable uses. Some health plans link payments for a drug to its efficacy—in other words, a “pay for performance” system. Others are using evidence-based treatment guidelines and precertification requirements to reduce off-label prescribing of specialty drugs.

For a more in-depth discussion of how we might help you control prescription drug benefit costs, please contact us. ■

Coming to a City Near You: Mandated Sick Leave Benefits

More employers provide paid vacation time than paid sick leave time: 58 percent versus 52 percent, found a survey by the Society for Human Resource Management. Forty-one percent provided paid time off (a combination of vacation time, paid sick leave and general paid time off).

California became the first state to require employers to provide paid sick leave. Beginning in July 2015, employees who work at least 30 days per year must have access to a minimum of three paid sick days per year. Tacoma, Washington passed a law requiring employers to provide paid sick leave, making it the 16th city to do so.

Mandatory paid leave could become even more widespread. According to a recent AP report, President Barack Obama is considering signing an executive order that would require all federal contractors to offer paid sick leave to their employees. According to sources, the executive order would require

companies doing business with the federal government to allow workers to earn at least seven days of paid leave per year to care for themselves or a family member.

Why should an employer consider offering paid sick leave benefits? Sick or medically impaired employees are less productive than healthy ones. If suffering a contagious disease, they can spread it to others. An employee who is sick or in pain is also less alert, which could lead to mistakes, errors of judgments or lack of coordination that could cause an injury or other safety problem.

Proponents say paid sick leave prevents “presenteeism,” which a *Harvard Business Review* study defined as “the problem of workers’ being on the job but, because of illness or other medical conditions, not fully functioning.” A study in the *Journal of Occupational and Environmental Medicine* estimated that employees with chronic, contagious or other illnesses who show up and perform poorly account for two-thirds of health-related

productivity losses, versus one-third for sick employees who miss work. The *Harvard Business Review* estimated that presenteeism “... costs U.S. companies over 150 billion dollars a year—much more than absenteeism does.”

Economic conditions have made the presenteeism problem worse, as employees hesitate to take time off for fear of losing their



job. In fact, in a survey by EAP provider ComPsych Corp., 22 percent of employees see “being present” as their top priority at work, versus accomplishing their basic responsibilities or improving their performance.

Despite employer fears to the contrary, most employees will not abuse sick leave benefits. A study by the Institute for Women’s Policy Research found that the typical worker with access to sick leave benefits under San Francisco’s law used only three paid sick days during the previous year, while one-quarter of employees used none. This occurred despite the fact that San Francisco’s leave law provides up to either five or nine sick days per year, depending on hours worked.

Sick leave benefits provide all or part of an employee’s earnings if the employee is unable to work because of a non-work-related illness or injury. Sick leave typically is provided on a per-year basis, usually expressed in days, and is never insured. However, employers can buy short-term disability coverage. This type of insurance will replace a specified portion of an employee’s salary if he/she still cannot work due to a non-occupational illness after sick leave benefits run out. If you don’t currently offer sick leave and short-term disability benefits, please contact us for more information. ■

Out-of-Pocket Spending Rule Will Make Health Plans More Expensive

Guidance on out-of-pocket spending issued by the Departments of Labor, Health and Human Services, and the Treasury will make health plans more expensive for employees.

The Affordable Care Act places annual limits on employees' out-of-pocket expenses for certain "essential health benefits." For plan years beginning in 2016, limits equal \$6,850 for self-only coverage and \$13,700 for other than self-only coverage. Out-of-pocket expenses include deductibles, copayments and other expenses plan members must pay themselves before the plan will pay benefits. Limits apply to all non-grandfathered group health plans, including self-insured plans.

Earlier this year, HHS clarified that self-only out-of-pocket limits apply to each individual, regardless of whether he or she is enrolled in self-only coverage or in self-plus-spouse

or family coverage. Under this rule, after a family member's costs for essential health benefits exceeds the out-of-pocket limit for self-only coverage, the plan must pay all covered expenses for that individual for the rest of the policy year. This applies even if total costs for all family members have not reached the family coverage out-of-pocket limit. This will likely increase employers' coverage costs.

Three Congressional representatives—Reps. Paul Ryan, R-Wis., John Kline, R-Minn., and Fred Upton, R-Mich., are challenging the HHS on this clarification. "[T]he relevant statute is clear — these are two distinct and separate limits," they said in a letter to U.S. Health and Human Services Secretary Sylvia Burwell.

For more information on how the Affordable Care Act affects your healthcare costs—and what you can do to control them—please contact us. ■

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