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HRC Corporate Equality Index Expands Criteria for LGBTQ Benefits

Large companies seeking to demonstrate workplace equality to employees and consumers can consider seeking a high rating from the annual Corporate Equality Index from the Human Rights Campaign (HRC). For 2019 certification, HRC looks to 2018 survey responses that include expanded standards for benefit plans.

Background

The Human Rights Campaign's Corporate Equality Index (CEI) is an annual measure of how equitably large private businesses in the U.S. treat their lesbian, gay, bisexual, transgender, and queer (LGBTQ) employees, consumers, and investors. To earn the highest possible rating, a business must not only offer equal employment opportunities to LGBTQ employees, but it must also provide them with comparable benefits such as medical, dental, dependent coverage, and leave benefits.

Businesses invited to participate in the CEI include *Fortune* magazine's 1,000 largest publicly traded businesses (the *Fortune* 1000) and *American Lawyer* magazine's top 200 revenue-grossing law firms (the Am Law 200). In addition, private-sector employers with 500 or more full-time domestic employees may participate if they are not owned by a larger organization. Smaller firms and government employers are not rated.

In past years, the top scores on the CEI in terms of benefit plans were reserved for employers who offer the same benefits for same-sex domestic partners as offered to opposite-sex spouses, to the extent permitted by applicable law. In addition, at least one of the employer's medical plans had to include coverage for transgender-specific treatments.

New Criteria for 2019 Index

To obtain a 100% rating for 2019 (based on the 2018 survey), in addition to the previous criteria, employers now must:

- Offer benefits to both same-sex and opposite-sex domestic partners
- Remove any existing exclusions and offer comprehensive transgender benefit coverage to employees under *all* medical plans

The requirement that unmarried domestic partner benefits be offered to both same-sex and opposite-sex partners is intended to recognize that some LGBTQ individuals may not want to disclose their status due to ongoing discrimination. The CEI states that a company providing domestic partner benefits for same-sex couples must also make these benefits available for opposite-sex couples to avoid the risk of discrimination claims by opposite-sex couples.

Health Plan Implications

Rather than only requiring a single health plan to meet the CEI standards for transgender coverage, under the criteria for 2019, none of an employer's healthcare plans may include a blanket exclusion for transition-related care. In addition, at least one firm-wide available plan must provide explicit affirmation of coverage (meaning, not just the absence of an exclusion).

Transgender transition services (e.g., medically necessary services related to sex reassignment) and benefits available to other employees that must be extended to transgender individuals include:

- Short-term medical leave
- Mental health benefits
- Pharmaceutical coverage (e.g., for hormone replacement therapies)
- Coverage for medical visits or laboratory services
- Coverage for reconstructive surgical procedures related to sex reassignment

In addition, the CEI standards require uniformity of plan maximums and deductibles as well as eliminating any "serious limitations" that would be counterproductive to reassignment surgeries — for example, limitations on the time frame for, or number of, surgeries per individual.

Differences in tax treatment remain

Employers should be aware of the federal and state tax implications of domestic partner coverage. Employees must pay tax for imputed income based on the fair market value of employer-provided coverage for a partner. In addition, partners may not use tax-advantaged funds in FSAs, HRAs, and HSAs to cover partner expenses.

Retirement Plan Implications

Prior to the U.S. Supreme Court's *Windsor* decision (see our July 12, 2013 *For Your Information*), pursuant to which the terms "spouse" and "marriage" can no longer be limited to spouses of opposite sexes under federal law, employers wishing to offer health benefits that could be used by the LGBTQ population typically added domestic partner benefits for same-sex partners. These benefits included defined benefit plan qualified preretirement survivor coverage and automatic defined benefit and defined contribution beneficiary status for domestic partners, generally on par with the status of spouses. After *Windsor*, some employers eliminated domestic partner benefits on the presumption that the availability of spousal benefits for same-sex partners would obviate the need for domestic partner benefits.

Recognizing ongoing concern about discrimination for those who marry and thereby make their LGBTQ status public, HRC's new CEI criteria demonstrate employer support for anonymity by continuing domestic partner benefits — for same-sex as well as opposite-sex domestic partners. Frozen defined benefit plans, however, would not be subject to this mandate for scoring.

> **Comment:** Although employers can equally subsidize the cost of death benefit coverage for both spouses and domestic partners, some differences remain. Plans may not give domestic partners consent rights because the law, unchanged by *Windsor,* only allows an exception from anti-alienation restrictions for "spouses." Likewise, the maximum benefit limitations based on an exception for a qualified joint and survivor annuity is only available for spouses.

The CEI perfect score mandate goes beyond death benefit coverage for defined contribution plans. Plans would need to mirror for domestic partners the hardship and rollover rights provided to spouses. The Pension Protection Act of 2006 supports this requirement for domestic partners (and unmarried participants, generally) to the extent the participant names the domestic partner as their primary beneficiary.

In Closing

Employers wishing to obtain a top rating on the HRC's CEI should assess the expanded requirements for 2019, evaluate costs (such as the additional cost for survivor benefits under defined benefit plans), then amend and communicate any resulting changes to employees.

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