

Insights, News & Events

AN INDUSTRY IN TRANSITION: GENDER IDENTITY ISSUES IMPACTING HEALTHCARE

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Employment law has always been on the cutting edge when it comes to emerging societal issues. Like little microcosms, the workplace reflects society as a whole. The healthcare industry is no exception. All people, regardless of their color, creed, or other protected status, are consumers of healthcare at some point. In the midst of this Gender Revolution (a term used recently by National Geographic as the title of its January 2017 issue), it should surprise no one that questions surrounding gender – more specifically, deviations from the heteronormative understanding of gender – have permeated the healthcare workplace.

One such question concerns the transgender community: what are healthcare providers' obligations when it comes to transgender patients and employees? Typical of the practices of both law and medicine, the answer depends on a variety of factors. Although no "black-and-white" rule exists, there are a bevy of best practices that healthcare providers should keep in mind to minimize legal risk.

"EVERY GENERATION NEEDS A REVOLUTION" – THOMAS JEFFERSON

The likelihood that Thomas Jefferson anticipated LGBT rights would someday spark a future battle royale when

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he made his famous pronouncement is zero. Nevertheless, we find ourselves amid a Gender Revolution – a time where much attention is dedicated to rethinking the binary model of gender (i.e., man or woman). Many currently believe gender exists on a spectrum. Among the spectrum's non-binary identities is "transgender," an individual whose gender identity fails to correspond with the sex assigned at birth.

As public awareness and acceptance of the transgender community continues to grow, so does the expansion of transgender rights. Accordingly, if not a direct result, a greater number of transgender individuals are presenting themselves in conformity with their gender identities. The healthcare community gets a double dose; not only do providers have transgender employees, they also provide medical care to transgender patients.

DOES TRANSGENDER STATUS PRESENT A BARRIER TO QUALITY CARE?

Transgender individuals, like all others, are consumers of healthcare. Many of their needs are shared by broader society: wellness visits, emergency medicine, and palliative care. Others are specific to their gender dysphoria (the medical term for strong, persistent feelings of identifying with the opposite gender): counseling, hormone replacement therapy, cosmetic procedures, and gender confirmation surgery.

Despite this assortment of needs, transgender patients are regularly denied the same access to care as their cisgender (those whose gender identities correspond with the sex they were assigned at birth) counterparts. This ranges from an outright denial of services, to harassment – and even abuse – while in the healthcare setting. This type of ostracism can lead not only to depression, drug and alcohol abuse, and even suicide, it also deters transgender individuals from seeking care at all, thereby reducing overall healthcare outcomes in the long term. Recognizing that barriers to care exist, an increasing number of healthcare providers,

employers, and insurers are offering inclusive coverage to the transgender community.

Moreover, several states have taken steps to reduce discrimination against persons based on their gender identity. In some states, such as California, Colorado, Connecticut, Illinois, Massachusetts, New York, Oregon, Vermont, and Washington, as well as the District of Columbia, it may be unlawful to refuse to cover transition-related treatments. The Department of Health and Human Services (HHS) sought to build on these efforts when it published the final rule implementing Section 1557 of the Affordable Care Act (ACA). While there is ongoing debate about the full scope of transgender rights, healthcare providers should carefully consider their position before making decisions that might adversely affect the transgender community.

TRANS DISCRIMINATION TRANSLATES TO LITIGATION

Like transgender awareness, transgender advocacy is on an upward trajectory. Part and parcel of this advocacy is litigation, with various civil rights groups and governmental agencies actively fighting discrimination in the healthcare and employment arenas.

One of the more recent advocacy tools is Section 1557, which prohibits, among other things, “sex” discrimination in the administration and provision of certain healthcare programs. To eliminate any room for debate on the meaning of “sex,” HHS explained when it published a final rule in May 2016 that the definition includes gender identity.

While this portion of the final rule has been blocked, healthcare providers should not expect reliance on Section 1557 to go gently into that good night. After all, several courts had already interpreted “sex” to include gender identity before the final rule was issued. Of course, if the Trump administration makes good on the promise to eventually repeal the ACA, this tool would

go away with it. In that case, however, the antidiscrimination laws of certain states will surely pick up where the ACA leaves off.

EMPLOYEE RIGHTS ALSO PLAY A ROLE

Sometimes, however, the patient is also an employee, opening additional doors for relief. Title VII (in short) makes it unlawful for an employer to discriminate against any individual with respect to the terms, conditions, or privileges of employment based on an employee's sex. While differing legal opinions have been issued on the subject across the country, numerous courts and the Equal Employment Opportunity Commission (EEOC) have held that this proscription extends to discrimination based on gender identity. The message you should receive? Healthcare employers that deny coverage of the transgender male's hysterectomy but permit coverage for the cisgender female's hysterectomy could be on the hook for legal liability.

A sex discrimination claim is not the only vehicle available for a transgender employee to air a grievance. Healthcare employers must also educate themselves on other employment laws. The Family and Medical Leave Act (FMLA) provides job-protected leave for individuals suffering a serious health condition (among other things). Denying a transgender male's request for leave to heal from a gender confirmation surgery (e.g., a breast reduction) may be construed as FMLA interference, and terminating him for taking leave may constitute FMLA retaliation.

Further, the Americans with Disabilities Act (ADA) prohibits discrimination against a qualified individual with a disability. Although gender dysphoria (previously known as gender identity disorder) is expressly excluded from protections, the ADA may cover symptoms resulting from transgender ostracism, such as depression, drug addiction, and alcoholism. Background checks, pay practices, and language in

employee handbooks or policies can also trigger liability, depending on the circumstances.

It is important to note that the legal concepts discussed above are relevant even if the provider has a sincerely held religious belief or purpose. Although religious freedom laws are popping up across the country, and certain laws carry religious exemptions, the extent to which they provide immunity is not concretely established and immunity can be difficult to obtain. Accordingly, if a healthcare provider seeks to deny or limit medical care access to a transgender patient or employee (or otherwise treat transgender individuals adversely) based on religious beliefs, the provider should only do so after careful deliberation and with the blessing of legal counsel.

MINIMIZING LEGAL RISK IN A TIME OF TRANSITION

Although the heavily regulated healthcare industry is no stranger to legal issues, providers know that the best lawsuit is one that never arises. To avoid (or at least minimize) the liability associated with claims of gender identity discrimination, healthcare providers can take certain steps:

- Avoid purposeful misgendering, such as using incorrect pronouns or including the incorrect gender on the patient's hospital bracelet or forms;
- Train your workforce to treat transgender patients with respect and not to whisper, make indirect comments, or behave in a hostile or unfriendly manner regardless of any feelings of personal discomfort;
- Remind your medical staff that transgender patients deserve the same standard of care as cisgender patients – just because a physician is an independent contractor does not mean his or her conduct will not be imputed to the hospital system;
- Ensure that charts and other postings in general view in a patient's room do not disclose to non-medical

personnel (e.g., janitorial staff) the patient's transgender status (e.g., noting on a white board that a transgender male's attending physician is an OB/GYN);

- Monitor hospital bills for unnecessary or inadvertent denial of insurance coverage due to gender incongruent care (e.g., hysterectomies for transgender men); and
- Consider whether it is appropriate for your organization to include transition-related coverage as a healthcare benefit.

While some of these suggestions may seem trivial, a wholesale failure to implement them (along with other common sense practices) may result in a situation where seemingly innocuous "unprofessional behavior" is actually gender discrimination. While the law on this emerging issue continues to evolve, savvy healthcare providers should monitor new developments, not only to fulfill their obligation to "do no harm," but also to avoid suffering legal harm of their own in the process.

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