



Why Gender-Identity Nondiscrimination in Insurance Makes Sense

Kellan Baker and Andrew Cray May 2, 2013

**Author's note: This article has been updated to correct an omission. The California Department of Insurance was the first regulatory entity in the nation to specifically address insurance discrimination against transgender people.*

In America's increasingly expensive health care system, the costs of not having adequate insurance coverage are both financial and physical. Without coverage, many people must choose between struggling to pay exorbitant medical bills or going without the care they need.

Similar to millions of other Americans, many transgender people lack health insurance coverage. But even when they are able to find coverage, the promise of more secure access to care and protection from unaffordable medical bills often rings hollow. This is because the majority of U.S. health insurance plans deny coverage for medical procedures and treatments seen as specific to transgender people.

This brief provides an overview of insurance discrimination against transgender people; the impact of the Affordable Care Act on insurance discrimination; and how some state insurance regulators are taking action to stop gender-identity discrimination in insurance.

The problem of insurance discrimination against transgender people

Currently, most private insurance plans, as well as many state Medicaid programs, incorporate plan language that specifically targets transgender people by excluding, for example:

- “All services related to sexual reassignment”¹
- “Sex transformations”²
- “Any treatment or procedure designed to alter an individual's physical characteristics to those of the opposite sex”³

- “Care, services or treatment for ... gender dysphoria or sexual reassignment or change ... including medications, implants, hormone therapy, surgery, medical or psychiatric treatment”⁴

These categorical exclusions are based on the false premise that the health care services that transgender people need are not medically necessary and are never needed by nontransgender people. In fact, however, the health care services denied to transgender people under these exclusions are frequently needed by nontransgender people as well:

- Mental-health, medical, and surgical treatments that a health care provider may determine to be medically necessary for a transgender patient as part of gender transition are also often needed by nontransgender people for a variety of conditions. The hormone therapy used in transition, for example, is routinely provided to patients with endocrine disorders and to women with menopausal symptoms. Reconstructive surgeries needed by some transgender people, such as breast removal or augmentation, hysterectomy, orchiectomy, or vaginoplasty, are used for treating injuries and intersex conditions or for cancer treatment and prevention.⁵
- Cancer does not discriminate on the basis of gender identity. Unfortunately, the gender marker on a transgender person’s insurance identification card is frequently invoked to deny coverage for routine preventive services that are appropriate to the individual’s anatomy, such as screenings for breast, ovarian, cervical, or prostate cancer.
- Reports from transgender legal service organizations from across the country reveal that transgender exclusions are commonly expanded to deny coverage to transgender individuals for basic medical needs such as setting a broken bone or treating a heart condition.

The Affordable Care Act prohibits insurance discrimination against transgender people

The Affordable Care Act takes important steps toward eliminating insurance discrimination against populations that historically have been excluded from coverage, including transgender people. In particular, federal regulations implementing the law’s essential health-benefits concept will improve the comprehensiveness of benefits offered under health insurance plans.

As defined in Section 1302 of the law, the essential health benefits standard applies to all nongrandfathered plans sold in the individual- and small-group markets in every state. It is estimated that 68 million people will purchase coverage based on the essential health-benefits standard.⁶ These plans must offer coverage across 10 categories of care including prescription drugs, ambulatory care, and mental-health treatment.

Importantly, regulations implementing the essential health benefits prohibit the use of benefit designs and coverage determination techniques that discriminate against discrete classes of people by reducing the availability of any benefit in a manner that is not based on current clinical standards.⁷ The rules include explicit prohibitions on the use of benefit designs that discriminate on the basis of characteristics such as disability, health condition, or gender identity.⁸ This includes exclusions targeting transgender people since, as the American Medical Association noted, “the denial of ... otherwise covered benefits for patients suffering from gender identity disorder [the medical diagnosis associated with a transgender identity] represents discrimination based solely on a patient’s gender identity.”⁹

State regulators are primarily charged with enforcing these antidiscrimination protections, but federal officials will be monitoring compliance where states are not substantially enforcing¹⁰ them and for plans sold through federally facilitated marketplaces.¹¹

States are taking action to prevent discrimination against transgender people in insurance

California was the first state in the nation to specifically prohibit insurance discrimination against transgender people.* In 2012 the California Department of Insurance, or CDI, issued regulations implementing the state’s Insurance Gender Nondiscrimination Act that prohibited plans from “Denying or limiting coverage, or denying a claim, for ... health care services related to gender transition if coverage is available for those services under the policy when the services are not related to gender transition, including but not limited to hormone therapy, hysterectomy, mastectomy, and vocal training.”¹² The CDI regulations further clarify that plans may not exclude, deny, or limit coverage for “health care services that are ordinarily or exclusively available to individuals of one sex when the limitation is only due to the fact that the insured is enrolled as belonging to the other sex or has undergone, or is in the process of undergoing, gender transition.”

In the first few months of 2013, insurance regulators in Colorado,¹³ Oregon,¹⁴ Vermont,¹⁵ and the District of Columbia,¹⁶ as well as the CDI’s sister agency, the California Department of Managed Health Care,¹⁷ have all issued bulletins clarifying that their state laws prohibit insurance discrimination against transgender people.

These bulletins clarify that categorical insurance exclusions that discriminate against transgender people violate gender-identity nondiscrimination protections. They accordingly require carriers to eliminate plan language that excludes transgender consumers from coverage for medically necessary services. The elimination of transgender exclusions is a key step in ensuring that transgender people have equal access to the health care services they need.

State insurance bulletins prohibiting insurance discrimination against transgender people

California: *[California law] prohibits health plans from discriminating against individuals because of the individual's gender, including gender identity or gender expression. . . . If a health plan denies an individual's request for services on the basis that the services are not medically necessary or that the services do not meet the health plan's utilization management criteria, the health plan's decision is subject to review through the Department's Independent Medical Review (IMR) process. . . . The Department directs health plans to revise all current health plan documents to remove benefit and coverage exclusions and limitations related to gender transition services.*

Colorado: *For the purposes of applying [Colorado law], a carrier may not . . . deny, exclude, or otherwise limit coverage for medically necessary services, as determined by an individual's medical provider, if the item or service would be provided based on current standards of care to another individual without regard to their [gender identity].*

District of Columbia: *An example of [a discriminatory provision violating DC's Unfair Insurance Trade Practices Act] might include: "Any treatment or procedure designed to alter an individual's physical characteristics to those of the opposite sex."*

Oregon: *The public policy set forth in [the Oregon Equality Act] prohibits an insurer from denying coverage for any treatment solely on the basis that the treatment is related to gender reassignment or is treatment for [gender dysphoria or related condition]. If the treatment consists of a service provided for the treatment of other conditions or illnesses such as hormone therapy, hysterectomy, mastectomy or vocal training, and the treatment was deemed medically necessary, then the insurer could not deny coverage because in this instance it was for gender transition or treatment of [gender dysphoria or related condition].*

Vermont: *Medical necessity remains an important and controlling standard of care and legal requirement for treatment related to gender dysphoria including transition and related health conditions. Insurance companies . . . shall not exclude coverage for medically necessary treatments including gender reassignment surgery for gender dysphoria and related health conditions. . . . This is both a simple question of fairness and a matter addressed by existing insurance law and [Vermont Insurance Department] regulation.*

These actions by state regulators also make clear that transgender people are not only protected by gender-identity nondiscrimination laws but also by more broad prohibitions on unfair or discriminatory conduct in the insurance market. Several of the bulletins point to provisions of the Unfair Trade Practices Act—a piece of model legislation advanced by the National Association of Insurance Commissioners, the standard-setting organization governed by the chief insurance regulators in the United States. The Unfair Trade Practices Act prohibits unfair discrimination between individuals of the same class and risk in the benefits payable under a health insurance policy, among other provisions.¹⁸ This statute requires distinctions made by insurers to be “based on sound actuarial principles or related to actual or reasonably anticipated experience” rather than on arbitrary distinctions based on aspects of personal identity such as gender identity.¹⁹

Because they are based on state statutes, the bulletins take slightly different paths toward the same end of eliminating insurance discrimination against transgender people. Overall, however, there is a basic three-fold process that carriers will need to take under these bulletins to ensure that their plans do not discriminate against transgender consumers:

1. Ensure that transgender individuals have access to medically necessary care to the same degree as other plan enrollees.
2. Remove exclusions that deny or limit coverage based on gender, gender identity, or diagnosis of gender-identity disorder, including exclusions for services related to gender transition.
3. Provide transgender people with access to internal and external appeals processes to contest denials of coverage.

Medical necessity and the scope of coverage under gender-identity nondiscrimination

Removing exclusions is an important part of ensuring access for transgender people to a variety of medically necessary services. Similar to everyone else, transgender people need acute care when they are sick and preventive care to keep from becoming sick, including services that are traditionally considered to be gender-specific, such as Pap smears, prostate exams, and mammograms. Transgender people may need a mix of such screenings: Medically necessary preventive screenings for a transgender woman, for example, may include both a mammogram and a prostate exam.

Transgender people also need access to medically necessary care related to gender transition. In fact, access to transition-related services is integral to the meaning of gender-identity nondiscrimination in insurance. For many transgender people, their identity—the essence of who they are—is closely connected with a medical condition.²⁰ The medical diagnosis that correlates with a transgender identity is most frequently referred to as gender identity disorder, or GID, which the American Medical Association,²¹ the American Psychiatric Association,²² and the World Health Organization²³ all recognize as a serious medical condition. According to the American Medical Association, “GID, if left untreated, can result in clinically significant psychological distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death.”²⁴ As such, treatments for this condition cannot be considered cosmetic for transgender people.²⁵

According to the “Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People,”²⁶ maintained by the World Professional Association for Transgender Health, gender transition does not constitute a uniform, fixed-treatment protocol that is appropriate for every transgender person. Instead, as discussed above, the treatments that may be involved in gender transition include a range of mental-health and medical and surgical procedures that are the same services provided to nontransgender people for a variety of conditions.²⁷

Gender-identity nondiscrimination is thus not a mandate to cover a specific service or set of services. Rather, it is a reflection of the understanding that what is at stake for

transgender people in insurance coverage is not simply a failure to cover any particular treatments for a particular diagnosis but a broader failure to provide access to medically necessary care for a vulnerable population that is uniquely dependent on medical treatments to realize their identities and to live healthy, authentic lives.

The question of costs

In resisting compliance with federal and state law regarding gender-identity nondiscrimination, some claim that premiums will rise if transgender exclusions are eliminated. Research has clearly debunked this cost argument, however. The California Department of Insurance, for example, released an economic-impact assessment in April 2012 comparing the costs and benefits of a California law prohibiting insurance discrimination against transgender people. The department concluded that removing exclusions that target transgender people has an “immaterial” impact on premium costs and that “the benefits of eliminating discrimination far exceed the insignificant costs.”²⁸

Inaccurate actuarial projections about the costs associated with gender transition and the size of the transgender population underlie many inflated estimates of the cost of equal coverage. The city of San Francisco, for example, charged \$1.70 in additional monthly premiums for each enrollee when it removed transgender-specific exclusions from the coverage it offers to its employees and introduced a rider for medically necessary care related to gender transition in 2001. Over the next five years, the city collected \$5.6 million in excess premiums and paid out only \$386,417 on 37 claims.²⁹ As a result, the premium surcharge was dropped in 2006, and the city affirmed coverage for medically necessary transition-related care as part of its core benefit package.

The experience of private employers overwhelmingly concurs. Kaiser Permanente recently removed transgender-specific exclusions from its employee plans and anticipates no resulting change to the cost trends of its health plans. The 2013 *Corporate Equality Index* reports that 25 percent of Fortune 500 companies, including giants such as Google, Nike, and the Coca-Cola Company, offer coverage with no transgender-specific exclusions.³⁰

What’s more, providing access to transition-related care improves health outcomes for transgender people, which may result in cost savings. The California Department of Insurance assessment found that eliminating gender-identity discrimination in health insurance plans reduced suicide risk, lowered rates of substance abuse, improved mental-health outcomes, and increased adherence to HIV-treatment regimens for many transgender patients.³¹ And since transgender people, like millions of other Americans, will benefit from the expansion of access to coverage under health reform, ensuring that transgender people have access to the services they need to stay healthy is both common sense and good financial sense.

Conclusion

The health care services that transgender people need are neither special nor suspect, and the growing body of legal protections prohibiting insurance discrimination against transgender people does not impose coverage mandates. Instead, federal and state laws are finally grappling with the consequences of discriminatory exclusions that arbitrarily deny transgender individuals equal access to the medically necessary health care services they need to lead full and healthy lives. And as studies of the economic consequences of removing transgender exclusions show, eliminating insurance discrimination against transgender people costs practically nothing. Rather, it's turning a blind eye to discrimination that racks up both financial and human costs.

Kellan Baker is the Associate Director of the LGBT Research and Communications Project at the Center for American Progress. Andrew Cray is a Policy Analyst with the project.

Endnotes

- 1 Kaiser Permanente, "Evidence of Coverage" (2012), available at http://www.staterforum.org/sites/default/files/co_kaisersmallgroup.pdf.
- 2 PacificSource, "PacificSource Group Health Plan" (2013), available at <http://insurance.oregon.gov/bulletins/2013-02-attachments/PacificSource-Med-RxHandbook.pdf>.
- 3 Groups Hospitalization and Medical Services, Inc., "BluePreferred PPO Evidence of Coverage" (2012), available at http://www.staterforum.org/sites/default/files/dc_ppo_booklet.pdf.
- 4 Health Advantage, "BlueChoice Open Access Point of Service Evidence of Coverage," available at http://www.staterforum.org/sites/default/files/ar_ehb_eoc.pdf.
- 5 American Medical Association House of Delegates, "Removing Financial Barriers to Care for Transgender Patients" (2008), available at <http://www.gires.org.uk/assets/Medpro-Assets/AMA122.pdf>.
- 6 Institute of Medicine, "Essential Health Benefits: Balancing Coverage and Cost" (2011), available at <http://www.iom.edu/~media/Files/ReportFiles/2011/Essential-Health-Benefits-Balancing-Coverage-and-Cost/essentialhealthbenefitsreportbrief.pdf>.
- 7 Department of Health and Human Services, "Patient Protection and Affordable Care Act; Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation; Final Rule," *Federal Register* 78 (37) (2013): 12834–12872, affordable at <http://www.gpo.gov/fdsys/pkg/FR-2013-02-25/pdf/2013-04084.pdf>.
- 8 45 C.F.R. 156.125(d)
- 9 American Medical Association House of Delegates, "Removing Financial Barriers to Care for Transgender Patients" (2008), available at <http://www.gires.org.uk/assets/Medpro-Assets/AMA122.pdf>.
- 10 Department of Health and Human Services, "Patient Protection and Affordable Care Act; Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation; Final Rule."
- 11 Centers for Medicare and Medicaid Services, "Letters to Issuers on Federally-facilitated and State Partnership Exchanges" (2013), available at http://cchio.cms.gov/resources/regulations/Files/2014_Letter_to_Issuers_04052013.pdf.
- 12 "AMENDED TEXT OF REGULATION," available at <http://www20.insurance.ca.gov/epubacc/REG/167830.htm>.
- 13 Colorado Division of Insurance, "Bulletin No. B-4.49: Insurance Unfair Practices Act Prohibitions on Discrimination Based Upon Sexual Orientation," March 18, 2013, available at <http://www.one-colorado.org/wp-content/uploads/2013/03/B-4.49.pdf>.
- 14 Oregon Insurance Division, "Oregon Insurance Division Bulletin INS 2012-01" (2012), available at <http://www.cbs.state.or.us/ins/bulletins/bulletin2012-01.html>.
- 15 Vermont Department of Financial Regulation, "Division of Insurance Insurance Bulletin No. 174" (2013), available at http://www.dfr.vermont.gov/sites/default/files/Bulletin_174.pdf.
- 16 District of Columbia Department of Insurance, Securities and Banking, "Bulletin 13-IB-01-30/15" (2013), available at <http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin13-IB-01-30-15.pdf>.
- 17 California Department of Managed Health Care, "Gender Nondiscrimination Requirements" (2013), available at <http://transgenderlawcenter.org/wp-content/uploads/2013/04/DMHC-Director-Letter-re-Gender-NonDiscrimination-Requirements.pdf>.
- 18 National Association of Insurance Commissioners, "NAIC Model Laws, Regulations, and Guidelines" (2007), available at <http://www.law.uconn.edu/system/files/private/NAIC+Unfair+Trade+Practices+Model+Act.doc>.
- 19 Department of Consumer and Business Services, "Oregon Insurance Division Bulletin INS 2012-01" (2012), available at <http://www.cbs.state.or.us/ins/bulletins/bulletin2012-01.html>.
- 20 See, for example, *South v. Gomez*, 211 F.3d 1275, *1 (9th Cir. 2000) (noting that "gender dysphoria [is] more commonly known as transsexualism"); *Schwenk v. Hartford*, 204 F.3d 1187, 1193 (9th Cir. WA 2000) (referring to "gender dysphoria [as] the technical diagnosis for transsexuality."); *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) (using "transsexualism" and "gender dysphoria" as interchangeable); *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1304, n.5 (N.D. Ga. 2010) aff'd, 663 F.3d 1312 (11th Cir. 2011) (stating that "GID and transsexualism are closely related and are sometimes used as synonyms, with transsexuals characterized by an intention to undergo medical treatments to align their bodies with their gender identities").
- 21 American Medical Association House of Delegates, "Removing Financial Barriers to Care for Transgender Patients" (2008), available at http://www.tgender.net/taw/ama_resolutions.pdf.
- 22 American Psychiatric Association, "Transgender, Gender Identity, & Gender Expression Non-Discrimination" (2008), available at <http://www.apa.org/about/policy/transgender.aspx>.
- 23 The World Health Organization, "International Statistical Classification of Diseases and Related Health Problems: Gender identity disorders" (2010), available at <http://apps.who.int/classifications/icd10/browse/2010/en#/F64>.
- 24 American Medical Association House of Delegates, "Removing Financial Barriers to Care for Transgender Patients" (2008), available at http://www.tgender.net/taw/ama_resolutions.pdf.
- 25 The American Medical Association has specifically rejected classifying transition-related care as either experimental or cosmetic, and the U.S. Tax Court likewise has held that transition-related care is not cosmetic. In addition to the American Medical Association, expert authorities such as the American Psychological Association, the American Psychiatric Association, the American Academy of Family Physicians, the American Congress of Obstetricians and Gynecologists, and the Endocrine Society have also issued public statements about the importance of ensuring that transgender individuals have access to medically necessary services.
- 26 Eli Coleman and others, "Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People," *International Journal of Transgenderism* 13 (7) (2011): 165–232, available at <http://www.wpath.org/documents/IJT%20SOC,%20V7.pdf>.
- 27 Mastectomies and augmentation mammoplasty procedures, for example, are performed for the treatment of and reconstruction following breast cancer. Phalloplasty procedures are provided for the treatment of severe genitourinary injuries to correct hypospadias, or for reconstructive purposes following treatment of penile cancer. Likewise, vaginoplasty procedures are performed following treatment of vaginal agenesis, prolapse, or vaginal cancer.
- 28 California Department of Insurance, "Economic Impact Assessment" (2012), available at <http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf>.
- 29 City and County of San Francisco and Human Rights Commission, "San Francisco City and County Transgender Health Benefit" (2007), available at http://www.hrc.org/files/assets/resources/San_Francisco_City_and_County_Transgender_Health_Benefit_-_2007-08-10.pdf.
- 30 Human Rights Campaign Foundation, "2013 Corporate Equality Index" (2012), available at <http://www.hrc.org/corporate-equality-index>.
- 31 California Department of Insurance, "Economic Impact Assessment" (2012), available at <http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf>.