

# Disputed health law rule would broaden transgender rights

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Big companies are pushing back against proposed federal rules they say would require their medical plans to cover gender transition and other services under the nondiscrimination mandate of President Barack Obama's health care law.

Civil rights advocates representing transgender people say the regulation, now being finalized by the Health and Human Services Department, would be a major step forward for a marginalized community beginning to gain acceptance as celebrities like Caitlyn Jenner tell their stories.

The issue mixes rapidly changing social mores and subtle interpretations of complex federal laws, including the Affordable Care Act. Obama has been recognized as the first president openly supportive of transgender rights.

The latest dispute over the health care law may have to be resolved by the courts. The law's nondiscrimination section applies federal civil rights protections to programs under the health overhaul. The legal text refers to entities "receiving federal financial assistance," interpreted to include insurers, state Medicaid agencies, hospitals and other service providers. It doesn't mention major private employers that run their own health plans.

A group representing big employers said its members don't have particular qualms about gender transition. But large employers do object to what they see as an overreach by the Obama administration, since

their health plans don't get federal financial assistance.

There's nothing in the health law "that says 'large employers, you are subject to this'," said Gretchen Young, health policy vice president for the ERISA Industry Committee. "People are getting concerned there will be a whole body of things that will come up in the future." Another concern: that a bar against discrimination on account of nationality could mean having to provide translation in up to 15 languages.

ERISA is a 1970s federal law that governs big-employer benefit plans. Employers design their own plans and set aside money to cover the expected medical costs of their workforces. They usually hire an insurance company as a "third-party administrator" to handle claims and run the day-to-day operations.

That's where the connection to the health law's nondiscrimination rule comes in.

Insurance companies that sponsor plans sold under the Obama law, or available through Medicare Advantage, do receive federal payments, what the law terms "financial assistance."

In a formal explanation, HHS said the regulation would apply to such an insurer "for all of its health plans, as well as when it acts as a third party administrator for an employer-sponsored group health plan."

The insurance industry doesn't relish the role of middleman enforcer.

It would be an added burden for insurers who participate in federal programs, said Clare Krusing, spokeswoman for America's Health Insurance Plans. A large employer might be reluctant to hire such insurers as administrators if that undermines control of their health plans—and raises costs.

"It creates an uneven playing field" for insurers, said Krusing.

An increasing number of large employers are voluntarily covering transgender treatment, following medical recognition that it can lead to healthier outcomes overall for the individuals involved. The number was up to 418 last year, from none in 2002, according to HHS. Medicare began covering medically necessary sex-reassignment surgery in 2014. Traditionally its medical necessity was questioned, and it carried a social stigma.

Costs are hard to assess because relatively few individuals pursue gender transition and the degree of medical intervention can differ dramatically in each case. Individual costs can range to tens of thousands of dollars.

Dru Levasseur, director of the Transgender Rights Project for the civil rights group Lambda Legal, said the proposed regulation would be "a sea change for the insurance industry." But if Medicare and plans sold under the health law cover gender transition treatments, so should large employers, he said.

"These exclusions are not in line with the medical community's understanding, and it's time for them to be removed," said Levasseur.

With the Obama administration in its last year, officials are under pressure to finalize the health law's nondiscrimination rule. The legislation itself is six years old.

Jocelyn Samuels, head of the HHS civil rights office, said in a statement that the agency is reviewing feedback on its proposal. "This is another example of this administration's commitment to giving every American access to the health care they deserve," she said.

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