

Washington Steps Up Insurance Protections for Gender Affirming Treatments

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As some states make headlines for so-called “anti-trans” laws, the Washington state legislature rejected a bill designed to limit youth participation in sports based on their gender as assigned on a birth certificate and passed the new Gender Affirming Treatment Act. This Act prohibits health insurers from denying or limiting coverage for gender affirming treatment when that care is prescribed to an individual based on a protected gender expression or identity, is medically necessary, and is prescribed under accepted standards of care.

The Gender Affirming Treatment Act stops insurers from excluding the most commonly prescribed gender affirming treatments by classifying such procedures as cosmetic. Under the new law, beginning January 1, 2022, private insurers, the Health Care Authority (HCA), managed care plans, and providers through Medicaid programs may not deny or limit coverage for gender affirming treatment that is prescribed relating to the person’s gender expression or identity, is medically necessary, and is prescribed per accepted standards of care. The law also forbids insurers from applying categorical cosmetic or blanket exclusions to gender affirming treatment and excluding as cosmetic specified examples of medically necessary gender affirming treatment. And a health care provider with experience prescribing or delivering gender affirming treatment must review and confirm the appropriateness of an adverse benefit determination denying or limiting access to gender-affirming services.

The law generally defines “gender affirming treatment” as a service or product that a health care provider prescribes to treat any condition related to gender identity under generally accepted standards of care. It also clarifies that gender affirming treatment can be prescribed for “two spirit, transgender, nonbinary, intersex, and other gender diverse individuals.”

In line with the recent urging of the [American Medical Association](#) to provide minors with gender-affirming care to avoid tragic health consequences, Washington’s Gender Affirming Treatment Act includes no age restrictions.

The new law does not apply to self-insured medical plans; ERISA preempts any law that imposes these types of requirements on self-insured medical plans. But some large insurance companies

have announced expanded coverage for breast augmentation and other related procedures for some trans women. And because these companies often also provide administrative services to self-insured plans, their clients may choose to expand coverage for other gender affirming treatments under their self-insured plans even absent a legal requirement to do so.

The new law also raises federal tax issues because although the IRS agreed to abide by [a tax court decision](#) that hormone therapy and gender reassignment surgery are appropriate “medical expenses” under Code Section 213(d), the tax court reached the opposite conclusion regarding breast augmentation surgery. In its 2020 version of [Publication 502](#) (Medical and Dental Expenses), the IRS reaffirms its long-standing position that cosmetic surgery is not a deductible medical expense. But the IRS doesn’t clarify how that position aligns with its previous positions related to gender reassignment surgery. It is therefore unclear whether covering the state mandated gender affirmation treatments will or will not be considered qualifying medical expenses and thus whether payments by the insurer and premiums paid by the employer for these mandated benefits can be excluded from the employee’s wages. Employers should consult with tax counsel on this issue.

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