

# Ensuring Public Employee Health Benefits Are Inclusive

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International Foundation  
OF EMPLOYEE BENEFIT PLANS 

# Defining "Inclusive" Health Benefits

# Inclusive Benefits

- Coverage for a wide range of services
- Accessibility for all employees
- Consideration of cultural, social and economic factors

# Case Study—CalPERS

- Challenges
  - Diverse members, health disparities, and retirement security for non-traditional career paths
- Strategy
  - Broad compressive healthcare
  - LGBTQ+ programs
  - Wellness programs
  - Financial and retirement wellness
- Results
  - Improved health outcomes
  - High member satisfaction
  - Enhanced retirement security

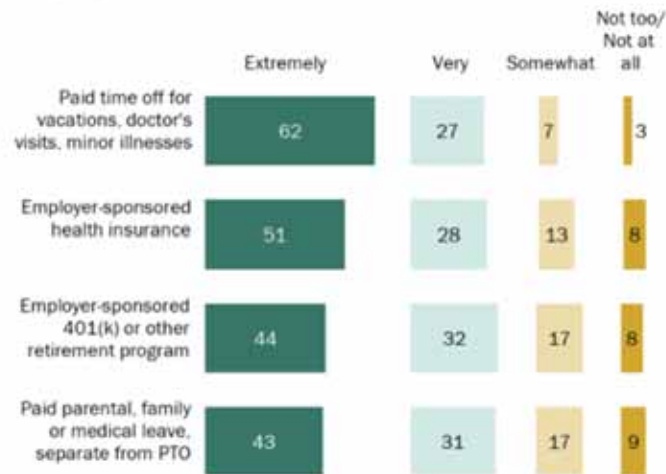
# Employer of Choice

- Strengthened recruitment and retention
- Boosted satisfaction and employee engagement
- Decreased absenteeism rates
- Enhanced workplace productivity
- Better health and well-being outcomes
- **Inclusive workforce representation**
  - LGBTQ+
  - Diverse relationship statuses
  - Income levels
  - Ages

<b>Generations at a glance</b>	<b>BOOMER</b>	<b>X</b>	<b>Y</b>	<b>Z</b>
<b>Born<sup>1</sup></b>	1946-1965	1966-1980	1981-1996	1997-2012
<b>Ages<sup>1</sup></b>	77-58	57-43	42-27	26-11
<b>% of global population<sup>2</sup></b>	14%	19%	23%	25%
<b>% of U.S. workforce<sup>3</sup></b>	18%	31%	36%	15%
<b>Aspirations<sup>4</sup></b>	Job security	Work-life balance	Freedom and flexibility	Security and stability
<b>Motivated by<sup>4</sup></b>	Company loyalty, teamwork, duty	Diversity, work-life balance, personal-professional interests over company interests	Responsibility, quality of their manager, unique work experiences	Diversity, personalization, creativity, individuality
<b>Worldview<sup>4,5</sup></b>	Achievement comes after paying one's dues; sacrifice for success	Diversity; quick to leave if needs unmet; resistant to change at work if it impacts their personal lives	Seeking growth and development; fun environment; work-life balance; quick to leave if workplace unwilling to change	Independence, individuality, and diversity; innovative co-workers; concerned about the future
<b>Communication preference<sup>6,8</sup></b>	More formal; in-person or phone call	Informal but direct style; email and text messages	Frequent and timely feedback; text/chat messages	In-person preferred; video calls

**Most workers say it's extremely important to them to have a job that offers paid time off for vacations, doctor appointments, minor illnesses**

*Among employed adults, % saying it is \_\_\_ important to them personally to have a job that offers each of the following, regardless of whether their current job offers it*



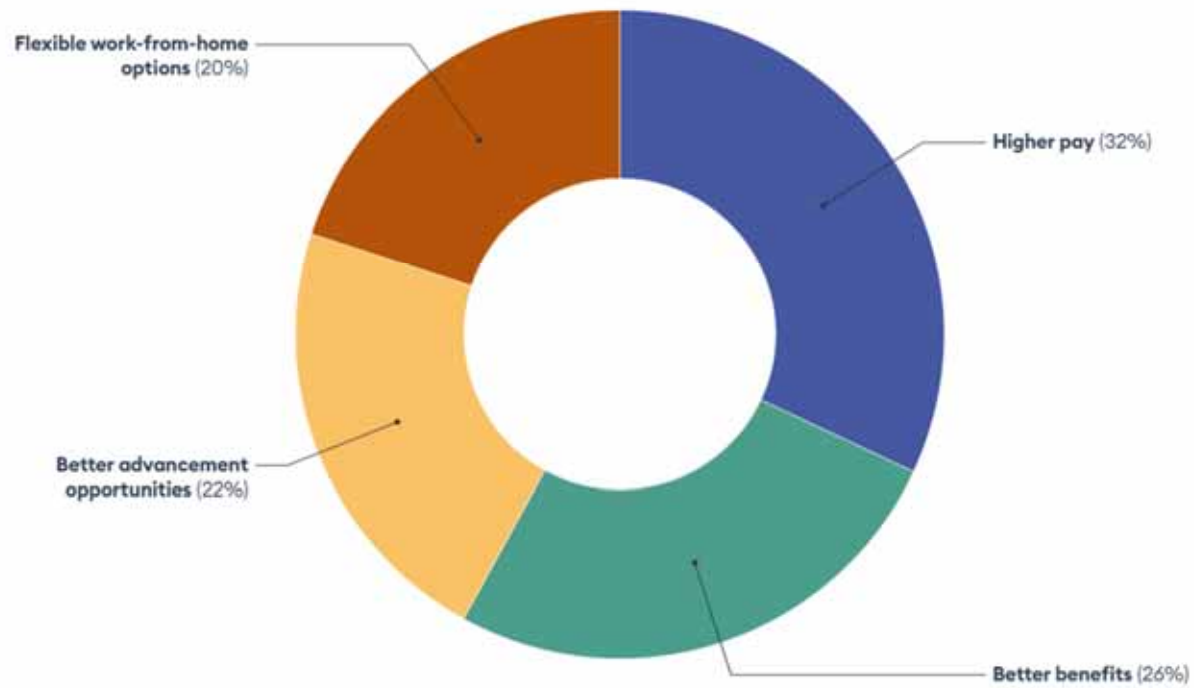
Note: Based on workers who are not self-employed. Share of respondents who didn't offer an answer not shown.

Source: Survey of U.S. workers conducted Feb. 6-12, 2023. "How Americans View Their Jobs"

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## Reasons Employees are Quitting

Employees would quit their current job for access to these benefits



Source: Forbes Advisor



# Meeting Member Needs

### Top 5 Benefits Employees Want From Employers

Forbes Advisor surveyed employees to find the most desired benefit offerings

- 1 Employer-covered healthcare
- 2 Life Insurance
- 3 Pension and retirement plans
- 4 Mandatory paid time-off
- 5 Mental health assistance

### Top Benefits Employers Provide

Forbes Advisor surveyed business owners to see which benefits they most commonly offer

- 1 Employer-covered healthcare
- 2 Life Insurance
- 3 Pension and retirement plans
- 4 Mental health assistance
- 5 Employee discounts

Source: Forbes Advisor

# Medical

- Personalized medical insurance
- Family planning
- Reproduction health
- Domestic partner
- Gender-affirming care
- Chronic disease management
- HSA vs. FSA vs. HRA—With matching

# PTO and Work Hours

- Flexible time
- Hybrid
- Work from home
- Compassionate leave
- Floating holidays

# Professional Development

- Job rotations
- Training and development courses
- Tuition reimbursement
- Professional networking and conferences

# Mental Health/Wellness

- Mental health support such as counseling or therapy
- Substance abuse treatment
- EAP—Expanded to include behavioral health
- Meditation apps and mindfulness programs
- Stress management courses
- Spa treatments
- Personal training sessions
- Nutrition counseling
- Wellbeing membership: Gym, meals, ClassPass

# Family and Childcare

- Family forming benefits
  - Doulas, midwives and birthing centers
- Parental leave
- Eldercare
- Childcare
  - Subsidized childcare services
  - On-site childcare facilities
  - Dependent care flexible spending accounts
  - Backup childcare

## Other Benefits

- Pet insurance
- Tuition or school loan reimbursement
- Rewards Program—Personalize
  - Monetary bonuses
  - Extra time off
  - Gift cards or vouchers
  - Company swag



# How to Determine What Members Need

- Engagement
  - Surveys
  - Focus groups
  - Regular feedback loops
- Education and awareness
  - Transparent communication
  - Training session
  - Informational material

# Barriers to Inclusive Benefits

- Public plans—Slow in the agile market
- Cost
- Stigma
- Political
- Legal
- Communication

# Inclusive Benefits vs. Carve-Outs

- Carve-out
  - Specific benefits separated from the main plan
  - High-cost or specialized service
  - Can create gaps in coverage—Lead to inequities
- Inclusive benefit
  - Comprehensive coverage for all employees
  - Holistic approach to health and wellness
  - Promotes equality and reduces disparities

# How to Develop Your Plan

- Review current program and budget
- Engage your employee feedback
- Remove exclusive language
- Review regularly—Be agile
- Develop robust communication—  
Multiple platforms
- Make part of your overall culture inclusivity



# Navigating Legal and Political Landscapes



# DEI—A Dirty Word?

## D.E.I. Programs Are Getting in the Way of Liberal Education

July 27, 2023



### Former FAA safety expert addresses airline DEI controversy, viral United comments

*'Diversity really has nothing to do with safe travel'* Kyle Bailey said

OPINION

## When Secret Service puts DEI first, its protectees are endangered

Worship at the unholy altar of DEI has become de rigeur within federal law enforcement's senior executive ranks



OPINION | By James Gagliano · Fox News

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## Civil rights groups call on Fortune 1000 companies to stop 'abandoning DEI'

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## The 'DEI Hire' Trap: How Biden Turned His VP Pick Into Fodder For Critics

Susan Harmeling, Ph.D. Former Contributor

Harvard-trained Prof. of Global Inclusive Leadership, Thunderbird/ASU

Column: The resignation of Harvard's Claudine Gay is touted as a DEI failure, but that's hardly the case

# DEI—A Dirty Word?

- In recent years, conservative critics have seized on “DEI” as a buzzword
  - “Reverse discrimination”
  - Reaction to perceived “woke” policies that gained popularity in 2020
- Pullback by some organizations
  - In July 2024, SHRM announced it would no longer use the term and instead refer to “Inclusion and Diversity”
  - The decision triggered a wave of negative reactions from HR professionals and others
  - “We cannot deny there has been a significant public backlash against the *E* which threatens to throw the baby out with the bath water.”

Source: <https://www.forbes.com/sites/sheilacallaham/2024/07/28/does-shrms-removal-of-equity-from-inclusion-equity-and-diversity-point-to-a-new-strategy-or-signal-something-much-bigger/>

# Special Considerations for Public Plans

- Different laws from private employers
  - US Constitution (Equal Protection Clause, 14th Amendment) and Title VII
  - Freedom of Information Act (FOIA) concerns
  - Public employer plans generally not subject to ERISA—  
No preemption of state laws
  - But they are subject to other parts of the Public Health Service Act
    - Consolidated Appropriations Act/No Surprises Act
    - Transparency in Coverage Rules
    - HIPAA, ACA, MHPAEA



## *Students for Fair Admissions v. Harvard*

- Unconstitutional for universities to consider race as a factor in the admissions process
  - Applies to public institutions under the Equal Protection Clause
  - Under Title VI of the Civil Rights Act of 1964, also applies to private entities that receive federal money
- No direct application to employers, but could lead to an increase in legal challenges to DEI initiatives

## Implications of *SFFA v. Harvard*

- Interview diversity requirements appear to be ok
  - e.g., the “Rooney Rule” in the NFL
- Affinity groups—Consider opening up to all
- Inclusive benefit carveouts
  - To the extent a program is facially available to all, it may be less likely to invite challenge
  - But labeling a benefit as primarily or exclusively for a particular group may present difficulties
    - Example: Fertility benefit programs—For LGBTQ or all?

# Mental Health Parity

- Mental Health Parity and Addiction Equity Act of 2008 (“MHPAEA”)
  - Prohibits group health plans that cover the treatment of mental health or substance use disorders (MH/SUD) from imposing treatment limitations unless such limitations are comparable to and applied no more stringently than those applied to medical/surgical benefits.
  - Applies to both Quantitative (QTLs) and Non-Quantitative Treatment Limitations (NQTLs)

# Mental Health Parity—Government Plans

- MHPAEA does not apply to:
  - Self-insured non-Federal governmental plans with 50 or fewer employees
  - Large, self-funded, non-Federal governmental plans that complete a HIPAA opt-out of the MHPAEA requirements
  - Non-Federal governmental plans offering only excepted benefits
  - Retiree-only plans
  - Plans that incur an increased cost to comply with MHPAEA.
- The CAA of 2023 amended the PHSA to eliminate the ability of self-funded, non-Federal governmental plans to opt out of MHPAEA requirements after December 29, 2022.
  - Prior elections expiring on or after June 27, 2023 cannot be renewed

# Mental Health Parity—2024 Final Rule

- Final Rule issued in September 2024 singles out limitations on applied behavioral analysis (ABA) treatment for autism and nutritional counseling for eating disorders as particular areas of concern for DOL
- NQTLs
  - Plans must conduct comparative analyses to measure the impact of NQTLs
  - Includes evaluating standards related to network composition, out-of-network reimbursement rates, and medical management and prior authorization NQTLs
  - Plans prohibited from using discriminatory information, evidence, sources, or standards that systematically disfavor or are specifically designed to disfavor access to MH/SUD benefits as compared to medical/surgical benefits when designing NQTLs

## *Dobbs v. Jackson Women's Health Org.*

- The Court voted 6-3 to uphold Mississippi's 15-week abortion ban
  - Explicitly overrules Roe & Casey and rescinds federal constitutional protection for the right to abortion
  - Holds that abortion restrictions are subject to rational basis review
  - Employers may look for ways to support employees who need to travel out of state to access services
- HIPAA Rule on Reproductive Health PHI

# Covering Travel Expenses After Dobbs

- Coverage of travel expenses under an existing plan
  - Coverage through plan or integrated HRA (required for ACA compliance)
- Coverage of travel outside of an existing plan
  - IRC Section 501(c)(9) permits a VEBA to pay for travel benefits
  - Excepted Benefit HRAs
  - Individual Coverage HRAs
  - EAPs
  - Health FSAs
  - HSAs

# Covering Travel Expenses After *Dobbs*

- Amounts received by members of a VEBA (health plan) are excluded from the recipient's gross income if they meet the statutory requirements of IRC §106. See IRM 7.25.9.8 (09-12-2014); 26 CFR § 1.501(c)(9)-6(b).
- IRS definitions of medical expenses (and limits)—IRS Pub. 502
  - Lodging—Can reimburse up to \$50 per person per night; can include lodging for a person traveling with person receiving medical care if accompaniment needed (subject to same \$50 limit; ex. parent and child travel lodging reimbursable up to \$100 per night).
  - Transportation—Can reimburse for bus, taxi, train or plane fares or ambulance services; if driving, can reimburse for out-of-pocket expenses such as gas and oil, mileage at standard medical mileage rate (\$0.22 per mile in 7/1/22), and parking and tolls.
  - Meals not included.
- Excess reimbursements would be taxable to recipient. If plan provides more than tax limits, plan will have to issue W-2s or 1099s for excess.



# ACA Non-Discrimination

- Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities
- Applies to insured plans and self-insured funds that receive federal assistance, e.g., retiree drug subsidies or an EGWP
- In *Bostock v. Clayton County* (2020), the Supreme Court held that Title VII prohibits discrimination on the basis of sexual orientation or transgender status.
- Builds on a series of EEOC rulings holding that discrimination because of sex includes sexual orientation and gender identity.

# ACA Non-Discrimination—Rules and Litigation

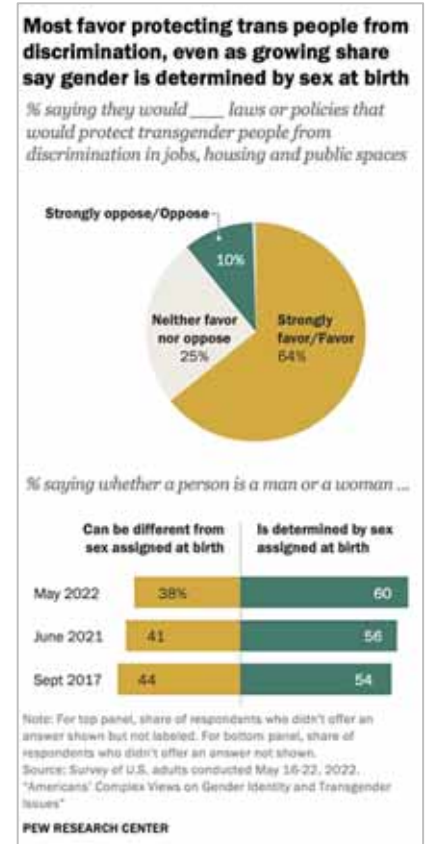
- 2016 Proposed Rule (Obama) defined sex discrimination to include discrimination on the basis of sexual orientation, gender identity and termination of pregnancy.
- 2020 (Trump) Final Rule removes these provisions, but courts in several states enjoin enforcement.
- 2024 (Biden) Final Rule applies nondiscrimination protections to sexual orientation, gender identity, and pregnancy and related conditions
  - Applies to all programs, including telehealth, not just those that receive federal money
  - Appears to signal that gender-affirming care coverage may be required
  - Currently subject to a nationwide injunction from the 5th Circuit

# *Bostock v. Clayton County*

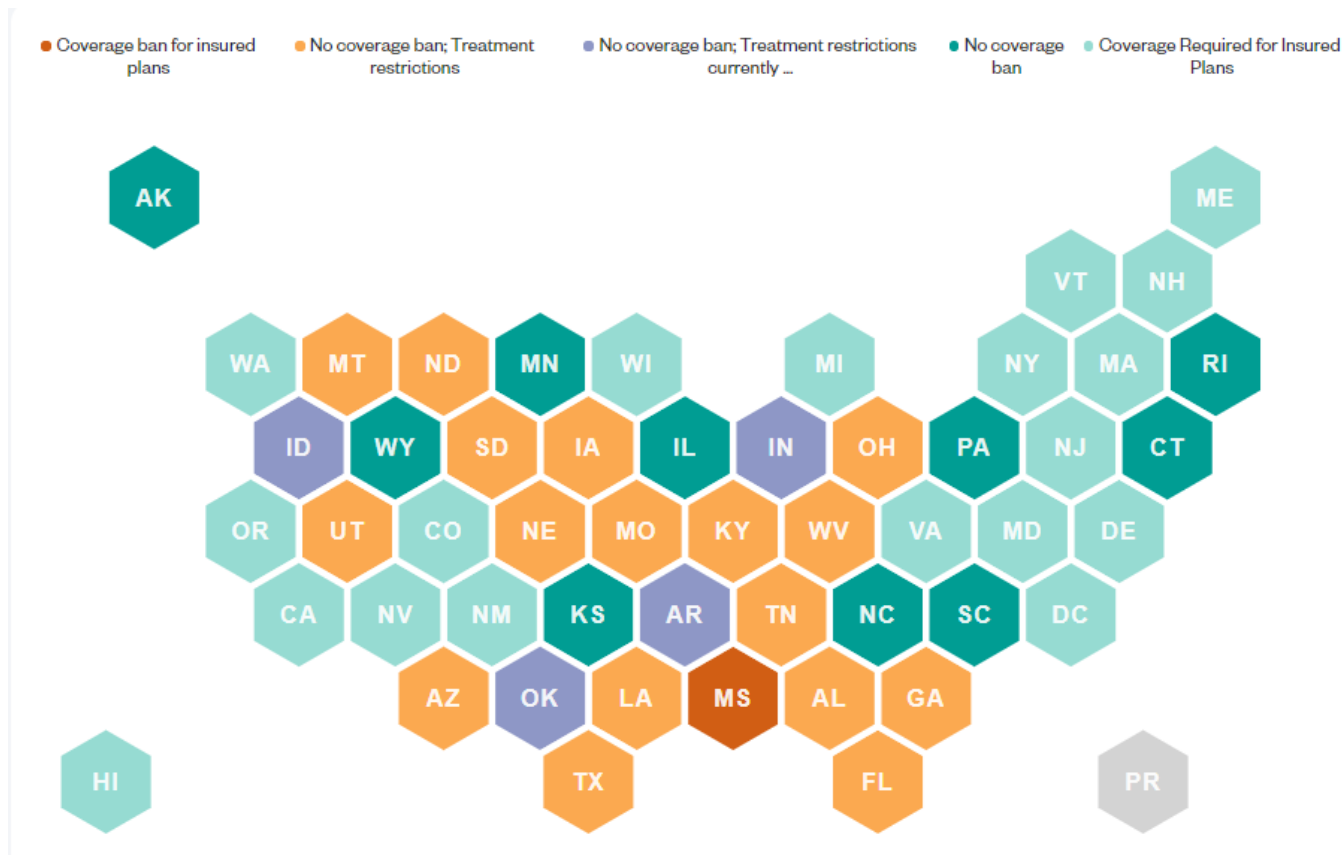
- Under Title VII, which prohibits workplace discrimination based on sex, religion, race, national origin
- Builds on a series of EEOC rulings holding that discrimination because of sex includes sexual orientation, gender identity
- Court rules 6-3 that discrimination based on gender identity or sexual orientation is necessarily also discrimination “because of sex”
- Employers accept a certain conduct (e.g., attraction to women, wearing a skirt to work) in one sex but not the other
- Opinion by Gorsuch rooted in the statutory text of Title VII
  - Some courts and agencies have interpreted the ruling broadly to apply to any discrimination based on sexual orientation or gender identity
  - But it is unclear how the reasoning would apply to a facially neutral law—e.g., a state law banning all gender surgery below a certain age

# Transgender Healthcare

- June 2022 Pew study—Most Americans favor protecting trans people from discrimination (jobs, housing, public spaces)
- However, the percentage who said man/woman is determined by the sex assigned at birth increased
- What does this mean for employee benefits?



# State Laws on Gender-Affirming Care



# Gender-Affirming Care—Litigation

- *Fletcher v. Alaska* (2020)—District Court rules that denial of coverage for gender affirmation surgery of a state employee violates Title VII
- *Toomey v. Arizona* (pending)—Class action against state of Arizona for its exclusion of “gender reassignment surgery”
- *Lange v. Houston Cnty.* (11th Cir. 2024)—Court vacates and agrees to rehear panel’s holding that an employer violated Title VII because its plan excluded coverage for gender-affirming surgery

## Gender-Affirming Care for Minors

- Over the past three years, 26 states have passed laws restricting gender-affirming care for minors
- A Tennessee law enacted in 2023 bans gender-affirming care such as hormone treatments and gender-transition surgeries for patients under 18
- SCOTUS will hear challenge to the Tennessee law in Fall 2024, with a decision likely by Summer 2025

# Fertility Coverage—An Emerging Issue

- Many medium/large employers have begun offering IVF and surrogacy coverage (Facebook, Apple, Salesforce, Spotify)
- “Infertility” requirement
  - 12 months of unprotected sex or 6-12 cycles of donor insemination
  - Requires same-sex couples to pay for costly procedures before they are eligible for the same coverage as a straight couple—“Queer tax”(?)
- Class action suit against Aetna
- Gay couple in NYC files EEOC complaint against the city and have filed suit in Federal court





# Key Takeaways

- Making benefits more inclusive can help attract and retain talent
- Public employers face unique structural and legal challenges in implementing and maintaining inclusiveness
- But there are many options for meeting member needs
- Recent legal trends highlight the importance of nuance in how DEI initiatives are communicated and implemented

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# Questions?

