

# Don't Risk, Don't Dwell: How Employers' ERISA Benefit Plan Offerings, or Lack Thereof, Routinely Fail LGBTQIA+ Employees and Solutions for Employers

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# Today, we are going to be talking about:

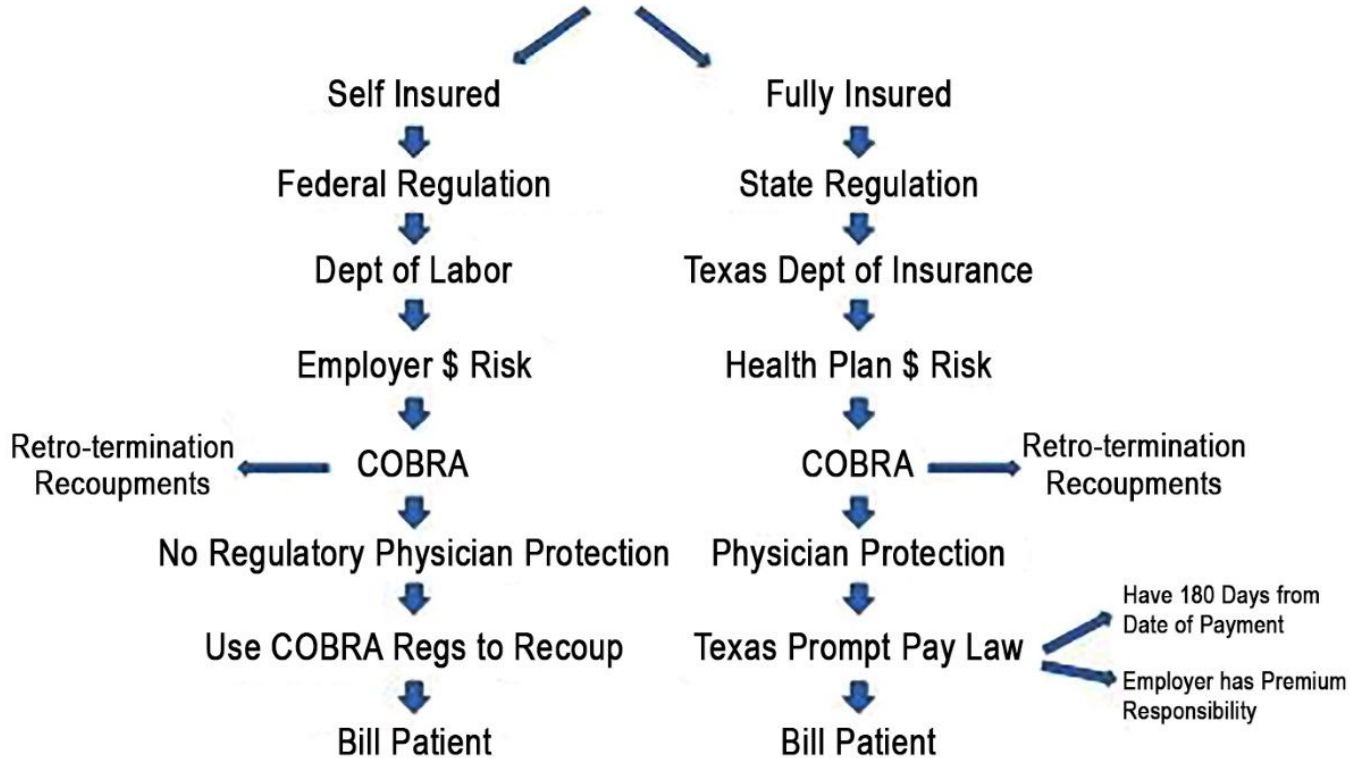
- What federal employment protections do LGBTQIA+ employees have?
- What LGBTQIA+ specific healthcare and insurance issues exist?
- How do ERISA and healthcare discrimination intersect?
- How can employers ensure they have equitable ERISA plans?
- How does this impact the employer's desire to contain costs?
- Why should this matter to estate planners?

# LGBTQIA+ employees have federal employment protections

- The Civil Rights Act of 1964
  - Title VII protects against discrimination in employment based on “race, color, religion, sex, or national origin”
- The Americans with Disabilities Act of 1990 (ADA)
- The Health Insurance Portability and Accountability Act of 1996 (HIPAA)
  - Addresses the historical insurance discrimination prevalent in the 1980s and 1990s
- Section 1557, Patient Protection and Affordable Care Act (ACA)
  - The first healthcare civil rights law
  - Enacted to combat provider discrimination
  - Incorporates other federal civil rights laws and their legal frameworks
- *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020)
  - Sexual orientation discrimination is sex discrimination

# ERISA

## Employee Retirement Income Security Act of 1974



# The intersection of ERISA and healthcare discrimination

- The Employment Retirement Income Security Act of 1974 (ERISA) is how the federal government regulates employee benefit plans.
- Self-insured (SI) plans v. fully-insured plans
  - SI plans have more control over plan design and coverages
  - Employer takes on benefit claims costs
- Trust law basis
  - A trust holds benefit premiums separate from other employer assets
  - Employer is a plan fiduciary
- The ERISA plan document
  - Governing documents that outline benefits, coverages, denials, appeals process, and appoint a fiduciary of the plan assets (usually the employer; sometimes an employer's representative)
- ERISA preemption
  - Impacts on estate plans

# Discrimination affecting LGBTQIA+ employees

- Lack of domestic partnership coverage
  - One of the most common ways that same-sex couples can add beneficiaries to their employee benefit plans is through domestic partnership
  - Impact of *Obergefell v. Hodges*
- Fertility benefits
  - Many ERISA plans provide fertility benefits to couples; however, the coverage conditions often unintentionally exclude same-sex couples and act as a financial barrier to starting a family
- Lack of transgender care coverage
  - Unless employers have explicit policies for covering claims of transgender individuals, that plan language is often either lacking or nonexistent

# How can employers ensure equitable ERISA plans?

- Ensure domestic partners are eligible for coverage
- Review ERISA plan documents for binary language
- Evaluate benefit coverages for language that could result in different requirements for same-sex individuals in comparison to heterosexuals
- Include medically necessary transgender care in plan documentation and coverages
- Train HR staff on benefits administration for LGBTQIA+ employees
- Update benefits procedures to ensure senior executives cannot access individualized employee medical records

# The employer's “two hats”: serving the beneficiary and containing costs

- The “two hats” problem in relation to ERISA’s exclusive benefit rule
  - The employer is a fiduciary to the plan/its participants yet has a desire to contain costs, even when it inherently contradicts the beneficiaries’ interests
- Cost and financial concerns
  - Providing equitable access to benefits is not actually cost prohibitive for the average employer
  - Average increase of less than 1% of costs



# Conclusion

- Everyone should be able to access equitable healthcare coverage
- *Equity*, not equality
- Employers have an obligation to help bridge the gap in health outcomes between those who identify as part of the LGBTQIA+ community and those who do not
- Lastly, estate planners need to be aware of ERISA and how more informed plans could mitigate conflicts with state probate law

Thank you!

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EMPLOYERS' ERISA BENEFIT PLAN  
OFFERINGS, OR LACK THEREOF, ROUTINELY  
FAIL LGBTQIA+ EMPLOYEES AND SOLUTIONS  
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ABSTRACT

Employers who make the choice to self-insure their employee benefit plans have the ability to customize the kind and level of benefits they provide. Employers often make choices, deliberate or not, that lessen or bar access, coverage, and quality of their self-insurance for LGBTQIA+ employees, as they are governed by federal antidiscrimination law in policy but not practice. Due to the Employee Retirement Income Security Act of 1974 (ERISA) preemption of state insurance law, employers who choose to self-insure are not governed by state antidiscrimination laws. This preemption can have unanticipated effects on the employee's estate plan and disrupt their intent. These plans have the potential to discriminate against certain employees, and employers have the authority, ability, and moral obligation to make equitable ERISA plans through simple changes in their plan documents. Change is needed to decrease LGBTQIA+ health care disparities and push for equitable health care outcomes for all. To encourage the business community to do so, Congress should act to incentivize or mandate such changes through legislation. This legislation could take various forms, such as implementing more thorough antidiscrimination rules under ERISA or creating tax breaks for those employers who make substantive changes to their plans. This Comment also addresses the ethical, financial, and other counterarguments to making these plans equitable for all. By ultimately arguing that employers must act to implement change, this Comment breaks new ground in the hope employers will recognize the decisions they make regarding their self-insured ERISA plan offerings have a direct correlation to the health of their workforce, and by denying equitable outcomes for certain employees, employers contribute to very real and unnecessary harm.

\* J.D. Candidate, Texas Tech University School of Law, 2023; Bachelor of Journalism, University of Texas at Austin, 2016. I would like to thank Aca Mitchell-Córdova for her editorial guidance and support, David LeFevre for his mentorship throughout my legal career and introducing me to ERISA law, and my family and friends for their encouragement throughout the writing process, especially Abigail and Rachel for their endless patience and feedback.