Designing Inclusi for LGBTQ+ Mem

by | **Allison Tremblay**

The needs of LGBTQ+ employees are often underserved in the design and administration of benefit plans. Employers and plan sponsors that proactively make their plans more inclusive—from enrolment forms to health supports, treatments and medications—may be able to minimize plan costs and maximize the health and abilities of LGBTQ+ members.

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LGBTQ+ people have always belonged to benefit plans, but their needs commonly are not considered in benefit design. From the initial contact with the plan to the specific benefits offered, LGBTQ+ people find barriers that do not exist for the straight and cis people for whom the schemes were designed. Given that increasing numbers of people are identifying as LGBTQ+, particularly among younger generations now entering workplaces that offer benefit plans, it is prudent for providers to consider these issues in the design and administration of their plans.

A Demographic Shift

The 2001 Canadian census recorded 34,205 same-sex couples. By 2011, that number jumped to 72,880. In the United States, surveys put the percentage of LGBTQ+ people at about 4.5% to 5.0% of the population, with higher numbers in the younger generations. Fueled by education, protective legislation and a shift in societal acceptance, there is no reason to believe this trend will not continue, at least for a while, before levelling off. If a workplace has not yet had an LGBTQ+ employee, it is only a matter of time.

Systems Design

New enrollees typically get their first impression of a benefit provider (and, by proxy, an early impression of their employer) from the new hire paperwork they receive.

Ren Hayes* is used to feeling awkward when filling out forms. They are non-binary and use they/them pronouns and have an "X" designation on their government identification, but most forms do not have a space for that information. They draw a "non-binary" box next to "male" and "female" and hope that whoever inputs their enrolment information will accept their form. Chances are, they will be assigned a binary gender. Letters will be addressed to "Mr. Hayes," or they will be addressed as "Ma'am" if they have to call customer service. Each time that happens, they will feel invalidated, unseen and frustrated.

Terra Nelson* worried about how to complete her form, too. She goes by Terra, but the name on her government identification is Kevin. She marks the "female" box but wonders if she should out herself as being transgender. Will she face awkward questions when her records show a prostate exam? Will the benefit provider accuse her of fraud?

To better serve their full member population, plan sponsors should start by asking themselves the following questions.

- Are our forms inclusive?
- Are our systems designed to correctly record the information gathered on the forms?
- Do administrators have access to the information they need to accurately address members and their needs?

Of course, providers must be mindful of their privacy requirements. In *Re: Edmonton Public School District No. 7,* 2016 CanLII 82100 (AB OIPC), a student complained that her teacher breached her privacy by disclosing her legal name rather than her chosen name, which revealed her transgender status. One of the factors that led to the disclosure was that the teacher used a computer system that did not have the capacity to record the student's legal and chosen names. The adjudicator upheld the student's complaint and ordered the district to amend its policies to protect the student's privacy. Benefit plans, which are undoubtedly required to collect legal names, must take great care to ensure that they do not carelessly disclose this highly sensitive information, as happened in the Edmonton School District.

Benefit Design

The possibility of discrimination does not end at the enrolment stage. LGBTQ+ people often have different and greater health needs than straight, cis people. For example, gay and bisexual men are disproportionately affected by HIV, leading to increased use of pre-exposure prophylaxis (PrEP) in that community. Transwomen and intersex people commonly use traditional oral contraceptives as hormone replacement therapy. Oral contraceptives are fairly common exclusions in benefit plans, and PrEP is sometimes excluded as a lifestyle drug. While it may be the case that a benefit provider might approve an application for excluded drugs in certain circumstances,

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filing an application—including providing sensitive and personal information to substantiate need—is a heavy burden and may discourage members from appealing an initial denial. Another common limitation is injection supplies, which are often specified in plans as being "for diabetics" but are also necessary for certain types of hormone therapy for transgender people.

Fertility support is another area benefit plans often limit or exclude. Many queer couples cannot conceive or carry children in the traditional manner. They may use fertility medications, donated gametes, artificial reproductive technologies or surrogacy. Even if the benefit plan covers the necessary treatments, some plans limit access by first requiring a period of unprotected sex to "prove" infertility—an absurd requirement for many LGBTQ+ families.

In *Toronto (City) v. Toronto Professional Fire Fighters' Association*, 2009 CanLII 28639 (ON LA), the employee benefit plan included coverage for fertility treatments. A gay couple sought coverage for the fertility medications they purchased for the use of their surrogate. A labour arbitrator, based on the language of the collective agreement, denied the employee's application for payment because the medications were prescribed for a third party, not one of the dependants under the policy. From this case, we can surmise that the parties bargained plan language without considering how it might affect LGBTQ+ people. We can also see that people are willing to challenge plan provisions they believe to be discriminatory.

Medical Necessity

Many, but not all, transgender people wish to have medical treatments to change their physical appearance to better match their true gender. The goal of these treatments is to reduce *gender dysphoria*, which medical experts define as a feeling of emotional distress one feels when one's gender identity does not match the sex one was assigned at birth. There is growing evidence in the medical community that many transgender people can significantly improve quality of life through aspects of medical transition that are beyond the standard hormone therapy and "top" and "bottom" surgeries. These aspects can include later improvements to cosmetic appearances of top and bottom surgeries, hair removal or transplantation, facial and body contouring, Adam's apple reduction and speech therapy.

Most plans would exclude such treatments as cosmetic or not medically necessary; however, most of those who have the treatments do not consider them optional. Many physicians agree. In *Appellant v. Manitoba Health, Healthy Living and Seniors, Insured Benefits*, 2015 CanLII 94115 (MB HAB), a transwoman on government disability benefits sought coverage at public expense of costs related to hair removal. Her physician provided medical evidence that the procedure was in her "psychological best interest." Based on this, the Manitoba Health Appeal Board agreed that the hair removal was medically necessary and approved the claim. Clearly impressed by the importance of the matter, the board wrote:

> ". . . [T]he Appellant's physician made a compelling argument at the hearing for the provision of hair removal services as an insured benefit for transgender patients. We would encourage him to continue to advance this issue, with the appropriate parties, in a way that may allow this service to be provided as part of the package of health services provided to the transgender community."

The benefit may not be only psychological. Transgender people are at higher risk for violence, particularly when they display visible signs of being trans (the presence of an Adam's apple

Takeaways

- Increasing numbers of people are identifying as LGBTQ+, particularly among younger generations now entering workplaces, but they often find barriers in the design and administration of benefit plans.
- Plan sponsors should review their plans to make sure that enrolment forms are inclusive and that systems can correctly record information in order to accurately address members and their needs.
- Administrators should review their plan design to see if there are ways to remove barriers on certain supports, treatments and/or medications that are unnecessarily limited for the LGBTQ+ community.
- By reducing health disparities facing LGBTQ+ members, plans may be able to minimize plan costs and maximize a member's ability to remain productive in the workforce.
- Being proactive about the needs of LGBTQ+ plan members goes beyond legal questions of human rights. An inclusive plan that allows for necessary medical care can be a valuable recruitment and retention tool and can improve employee health and job satisfaction.

on a woman, for example). Transgender people are also at a higher risk for suicide, a risk that can be reduced by treating the underlying gender dysphoria.

Health Disparities

Studies have demonstrated that LGBTQ+ people generally have worse health and health outcomes. The risk is particularly high for transgender people, who often have difficulty accessing quality care and who are at particularly high risk for mental health concerns. A study conducted by Trans PULSE Canada in 2020 revealed that 45% of trans and non-binary survey respondents said they had an unmet health need in the past year, compared with just 4% in the general population. This can increase the length and severity of illness as well as the ultimate cost of treatment when the person eventually obtains medical care.

It is in the interest of plans and plan sponsors to ensure that plan members obtain necessary care early to both minimize cost to the plan and maximize the person's ability to remain productive in the workforce.

Polyamory

Polyamory is a multi-party intimate relationship entered into with the knowledge and consent of all parties. While people in polyamorous relationships do not have to also identify as LGBTQ+, commonly they do. Such relationships are becoming more common, or at least more commonly acknowledged, yet benefit plans and administrators are completely unprepared for dealing with their existence. As John-Paul Boyd wrote in *Polyamory in Canada: Research on an Emerging Family Structure:*

"If the number of people involved in polyamorous relationships is indeed growing, the potential economic and legal implications are significant, as almost all of Canada's most important social institutions are predicated on the assumption that adult relationships come only in pairs."

Benefit plans are certainly predicated on this assumption. Plan members are supposed to have only one named spouse as a dependant and beneficiary. For families that must make a choice as to which person should be granted this significant benefit, the choice is fraught. Some families are left making difficult decisions about living arrangements if the unnamed partner develops a significant illness and the plan member wishes to change the spouse designation to avoid financial disaster. For plans, the uncertain and unaccounted-for costs of such changes could be significant.

BIO

Allison Tremblay (she/her) is a labour, employment and human rights lawyer as well as a partner with Victory Square Law Office (VSLO). She represents a number of jointly trusteed and employee-trusteed pension and benefit plans. Tremblay also represents clients before the labour relations board, arbitrators, human rights and other administrative tribunals, mediators, and the British Columbia and federal courts. She advises unions on internal and constitutional matters. Tremblay has particular interest in assisting persons from historically disadvantaged groups, including LGBTQ2S and BIPOC. She is a member of the Canadian Bar Association, the Canadian Association of Labour Lawyers, and the Canadian Pension and Benefits Institute. Tremblay holds a B.A. degree from Simon Fraser University and an LL.B. degree from the University of British Columbia.

Human Rights Protections

Provincial and federal human rights legislation prohibits discrimination on the basis of prohibited grounds. In British Columbia, Section 8(1) of the Human Rights Code [RSBC 1996], c. 210, prohibits discrimination—without a bona fide and reasonable justification—by service providers on the basis of, among other grounds, family status, sex, sexual orientation, gender identity or expression. Subsection 8(2) allows discrimination in the "determination of premiums or benefits under contracts of life or health insurance," but only on the ground of sex. Similarly, Section 13 addresses discrimination in employment. Subsection 13(3) does permit bona fide group or employee insurance plans to discriminate based on certain grounds, but not on the basis of sexual orientation or gender identity. In other words, the human rights provisions that benefit providers and administrators have relied upon

to justify differential treatment of groups of insureds do not excuse differential treatment because a person is a member of the LGBTQ+ community.

It follows that if a plan has, and wishes to maintain, a provision that is discriminatory on its face, the plan must demonstrate a bona fide and reasonable justification for that discrimination. The obvious explanation would be cost, but sponsors and administrators wishing to rely on cost should take care to ensure there is a genuine cost concern, supported by actuarial data, rather than bias or simple oversight.

Why This Matters

Like any prospective employees, LGBTQ+ people are aware of their benefit needs and consider benefits packages in their assessment of job opportunities. A clearly inclusive plan could be a valuable recruitment and retention tool. For current employees, access to necessary medical care is a key element of worker health and contentment.

For modern, inclusive administrators and plan sponsors, being proactive about the needs of the LGBTQ+ community makes sense. At the very least, amending the enrolment forms is an inexpensive and quick way to signal to LGBTQ+ people that their needs have been considered.

**Names have been changed throughout this article to protect the privacy of individuals.*

Note: The author would like to express her gratitude to her spouse and thank them for their input and review of this article.