

## Major Changes to Corporate Equality Index May Drive Benefit Plan Changes

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Employers that are rated on the annual Human Rights Campaign (HRC) Foundation's Corporate Equality Index should take note of changes the HRC is making to the criteria by which it will evaluate employers beginning with the 2012 Index. The new criteria for the 2012 Index will stress comprehensive employee benefits for same-sex spouses and partners, transgender-inclusive medical and short-term disability benefits, organizational competency on lesbian, gay, bisexual and transgender (LGBT) issues and public engagement with the LGBT community. These criteria and the ratings that result could affect an employer's ability to recruit and retain employees. (For more on same-sex marriage, see ¶377 of the *Handbook*.)

The HRC Foundation is the largest organization in the United States that seeks to advance the rights of the LGBT community. The index is a nationally recognized ranking of large employers throughout the United States on issues involving workplace equality for LGBT individuals. The annual index evaluates employers on a series of criteria that demonstrate the employer's commitment to equal treatment of all people regardless of their sexual orientation and gender identity or expression.

Employers generally are ranked on the index based on a survey that the employer submits to the HRC. The HRC has updated the criteria on which employers are evaluated several times since it first introduced the index in 2002. In 2010, 305 of the 590 employers evaluated received a perfect 100-percent ranking on the index.

Employers may want to take action soon to begin preparing for the new criteria for the 2012 index. Surveys for the 2012 Index will be distributed to employers in March 2011. Participating employers must demonstrate to the HRC that all new criteria other than those affecting employee benefits will be in place by July 29, 2011. For changes to an employer's benefit plans to count toward an employer's 2012 ranking, they must be effective no later than Jan. 1, 2012. In addition, the HRC requires employers to announce to employees any changes that will be made to their benefit plans to satisfy the criteria for the index before the HRC publishes the 2012 Index on Sept. 1, 2011.

### A Caveat

Following is a discussion of actions employers can take if they want to achieve a high rating in the HRC 2012 index. Employers should note that these are not changes and actions mandated by federal or state law — the actions described are steps employers should take in order to receive a high index rating from the HRC.

### Parity in Employee Benefits

To score highly on the index under the criteria previously in place, employers had to offer same-sex partners of employees and their legal dependents medical, dental and vision insurance coverage as well as continuation coverage equivalent to COBRA. Employers also had to offer at least three of the following benefits to employees' same-sex partners: FMLA-equivalent leave, bereavement leave, employer-provided supplemental life insurance, relocation/travel assistance, adoption assistance, qualified joint and survivor annuities, qualified

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pre-retirement survivor annuities, retiree health benefits or employee discounts. (For more on offering specific benefits to same-sex partners, see ¶374.)

For an employer to achieve a high index rating, the new criteria call for parity in all benefits extended to employees' opposite-sex spouses and the benefits extended to employees' same-sex partners, and under the same terms, to the extent permitted by law. These benefits include retirement benefits, medical and dependent coverage, COBRA-equivalent coverage, FMLA-equivalent leave and any fringe benefits. For purposes of the index, same-sex partners will include all state-registered domestic partners, civil union partners and same-sex spouses.

### **Retirement Plans**

Employers with qualified defined contribution (DC) retirement plans that seek a high rating will need to review their plans to ensure that same-sex partners are the default beneficiary of participants who die without naming a beneficiary and are included in hardship distribution provisions. To receive a perfect score on the index, plans must be amended to include an employee's same-sex spouse or partner as a default beneficiary.

In addition, many DC plans permit employees to take a hardship distribution from their plan accounts under certain specified circumstances. The HRC criteria will require plans that offer such hardship distributions be amended to take same-sex spouses and partners into consideration to the same degree as an employee's opposite-sex spouse in determining the employee's eligibility for the distribution. This change is legally optional under the Pension Protection Act of 2006; however, the HRC will require an employer to make this change if it wants to retain a perfect score on the index.

Employers seeking a high rating also may want to amend their defined benefit (DB) pension plans in order to extend qualified joint and pre-retirement survivor annuities to same-sex spouses and partners. Pension plans are required to permit an employee's benefit to be paid over the span of the employee's life or the joint lives of the employee and his or her opposite-sex spouse. For purposes of the HRC index, to achieve a high rating by 2012 an employer must amend its plan to offer a joint annuity that is payable over the lives of an employee and his or her same-sex spouse or partner.

In similar fashion, pension plans are required by law to offer a qualified pre-retirement survivor annuity that is payable to an employee's spouse in the event that the employee dies before beginning payment of his or her pension benefits. For HRC index rating purposes, plans

offering pre-retirement survivor annuities will need to be amended to include same-sex partners and spouses as recipient survivors of such annuities.

### **Health Benefits for Transgender Employees and Dependents**

To obtain a perfect score on the index, employer-sponsored medical and short-term disability benefits must now include comprehensive coverage of transgender-specific procedures. Employers had been able to achieve high ranking on the index by offering benefits covering counseling by a mental health professional, pharmacy benefits covering hormone therapy, medical visits to monitor the effects of hormone therapy and other associated lab procedures, medically necessary surgical procedures such as hysterectomy, or short-term disability leave for surgical procedures.

Many employers' medical and short-term disability benefit plans currently exclude transgender-specific treatments by classifying them as "cosmetic." The new HRC criteria will require employers that seek high ratings on the index to work with their insurance carriers and administrators to remove such exclusions and affirmatively extend coverage to any medically necessary treatments and procedures. Guidance on the treatments and procedures considered medically necessary is available under the standards of care defined by the World Professional Association for Transgender Health. To complete the survey for the 2012 Index, employers will be required to submit documentation to verify that medical and short-term disability benefits will provide coverage for transgender-specific treatments beginning no later than Jan. 1, 2012.

### **Organizational Competency and Public Commitment**

To obtain a perfect score on the index, employers must demonstrate a "firm-wide sustained and accountable commitment to diversity and cultural competency" through at least two of the following:

- Training for new employees that informs them of the employer's nondiscrimination policy that includes gender identity and sexual orientation and provides them with definitions or scenarios illustrating how the policy applies to each.
- Training for supervisors that includes gender identity and sexual orientation as discrete topics and provides definitions or scenarios illustrating how the policy applies to each.
- Integration of gender identity and sexual orientation in professional development, skills-based or

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other leadership training that includes elements of diversity and/or cultural competency.

- Development of gender transition guidelines with supportive restroom, dress code and documentation guidance.
- Implementation of senior management and executive performance measures that includes LGBT diversity metrics.

Employers also must demonstrate an “ongoing LGBT-specific engagement that extends across the firm” through at least three of the following:

- demonstrated efforts to reach LGBT applicants and recruit LGBT employees;
- supplier diversity program with demonstrated effort to include certified LGBT suppliers;
- marketing or advertising to LGBT consumers (for example, advertising with LGBT content, advertising in LGBT media or sponsoring LGBT organizations and events);
- philanthropic support of at least one LGBT organization (for example, financial, in kind or pro bono support); or
- demonstrated public support for LGBT equality under the law through local, state or federal legislation or initiatives.

### Important Considerations

Employers implementing the changes described for DB pension plans may want to consider whether the added administrative complexity of tracking an employee’s same-sex spouse or partner warrants extending joint and pre-retirement survivor annuities to any non-spouse beneficiary designated by the employee. While many employers have opted to implement non-spouse beneficiary annuities, doing so is more expensive than extending such annuities only to same-sex spouses and partners.

Thus, extending this coverage to domestic partners (see ¶370) could add administrative complexity. In addition, federal law and the federal tax code do not recognize nor provide for same-sex marriage, so any benefit coverage for same-sex spouses will add a certain amount of complexity for purposes of federal law and taxation.

Employers that want a high rating in the HRC index and that offer any insured medical, dental, vision and other welfare benefits to employees will need to review the contracts with their insurance providers if they want to meet the HRC requirement that same-sex spouses be included in the definition of “spouse” under the contract in those states where same-sex marriage is legal or recognized. Same-sex marriage is legal in Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and the District of Columbia. New York will also recognize same-sex marriages formed in any of these jurisdictions even though same-sex couples cannot legally marry in New York. California recognizes the same-sex marriages that were performed legally in the state between June 16 and Nov. 4, 2008, as well as out-of-state same-sex marriages performed before Nov. 4, 2008.

The HRC index’s new criteria call on employers to require the same “proof” of a same-sex couple’s relationship as they do for an opposite-sex couple’s relationship. This means if an employer requires a same-sex couple to provide a copy of their marriage certificate in order to be eligible for benefits, in order to achieve a high rating the employer must also require opposite-sex couples to provide the same documentation.

The HRC recently distributed surveys for the 2011 Index to employers. Although the 2011 Index will be evaluated based on the existing criteria, the HRC has provided employers previously included in the index with a preliminary score under the 2012 criteria in order to help employers prepare for the transition to the new criteria. Because implementing changes to an employer’s employee benefit plans can often be complex, employers should take action now to review their benefit plans and identify the changes that may be necessary for the 2012 Index. 🏠



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