# Unisex Pricing In Employer-Sponsored LTCi Programs

Key points

1. If LTCi for employees is paid through a business, attractive tax savings result.
2. However, most people believe that Title VII of the Civil Rights Act of 1964 exposes employers to a civil rights complaint if they have anything to do with an LTCi product that is gender-distinct.
3. Therefore, when the LTCi industry moved to gender-distinct pricing, the executive carve-out market was hampered. Fewer insurers offer unisex pricing and there are participation requirements which can thwart sales which would previously have been made. Most executives are male, but unisex prices are higher for males than gender-distinct pricing and unisex pricing nudges higher because of gender anti-selection.
4. As you can see in the law (see page 4 below), it applies only to businesses which have had 15 or more employees for at least 20 weeks either in the current or previous years. (If a restaurant has 200 employees, but wants a carve-out for 4 employees, it is subject to the 1964 Civil Rights Act. That is, the issue is the number of employees, not the number of insured employees.)
5. Some insurers have unisex pricing for couples, even "on the street" (i.e., not through employers).

We are neither lawyers, nor tax advisors. We share our understanding of laws and ideas solely to help you or your client determine whether legal or tax issues are significant to a decision regarding buying LTCi. If such issues are significant, then your client should rely on professional legal or tax advice. We'd be happy to discuss such issues with you/your client's tax or law professional, but no one can rely upon me for legal or tax advice.

If we can get a good unisex program for an employer, that is the safest way to proceed, regardless of size because:

- State laws could apply even with fewer than 15 employees. We have been unsuccessful in seeking a review of state laws from insurers, partly because they fear that a review could get out-of-date fast. See https://www.workplacefairness.org/minimum. As best we can tell, the state requirements are as follows:

| # ees | States which ban gender discrimination by employers with this many employees or more |
|---|---|
| 1 | CO, HI, ME, MI, MN, MT, NC, NJ, ND, OH, OR, SD, VT, WI, WV |
| 2 | AK, WY |
| 3 | CT |
| 4 | DE, IA, NM, NY, PA, RI |
| 5 | CA, ID, KS |
| 6 | IN, MA, MO, NH, VA |
| 8 | KY, TN, WA |
| 15+ | AL, AR, AZ, DC, FL, GA, IL, LA, MS, NE, NV, OK, SC, TX, UT |
| Maryland varies by county. | |

- Municipalities pass laws restricting employers (such as minimum wage laws). Maybe an employer could be exposed at the municipality level.

- The Federal government sometimes makes mandates without Congressional approval. For example, the executive branch might restrict government contractors.
- If the employer grows in size, a gender-distinct program could get disrupted. The program might have to be changed at that point. Might an already-insured person file a complaint? It seems strange to allow a person to complain if her coverage was purchased when the employer was exempt. But there are on-going premiums and there seems to be no limit to what complaints and cases will be heard.
- If an invalid complaint is made against an exempt employer, the employer is likely to win, but it is a drain on time and resources.

An employer which can't get a good unisex program might opt for gender-distinct pricing. Below we've listed other reasons why an employer might feel comfortable with gender-distinct pricing.

With voluntary programs, another alternative is to do education on-site without a specified product. That is, the employer endorses the broker, not the carrier. No health concessions would apply, and payroll deduction would not be available. It is not clear whether product-specific discussions could be held at the place of employment.

- Some employers, such as universities, have public areas where an advisor could meet with a client.
- If there is an internet meeting, the advisor does not know where the client is, making it easy for the employee to violate a no-on-site-discussion rule. An employee should not be able to hold the employer responsible for that employee's behavior when that employee is violating an employer rule.
- Perhaps the advisor could have product-specific discussions if the employee signed a statement acknowledging that the employer had endorsed the advisor but in no way is endorsing any product that the employee might choose to purchase from the advisor. Maybe the letter announcing the program could have a notice of that type, in addition or in lieu of an individual employee signature.
- Before having gender-distinct discussions on-site at a place of employment, we suggest getting clearance from the employer.

Associations with business members are particularly tricky. In some situations, insurers offer association discounts from their gender-distinct street pricing. Hence prices vary based on gender. But many business association members are business owners or top executives who want to take advantage of the tax break by paying for the coverage through their business.

- If the business has fewer than 15 employees, perhaps using the gender-distinct pricing is OK.
- If the business has 15+ employees, it might be better to recommend a program with unisex pricing.

The following thoughts might be worth exploring with a tax advisor:

1. Title VII of the 1964 Civil Rights Act does not specifically address LTCi.
    a. However, Genworth, John Hancock, Mutual of Omaha and Transamerica have all said their attorneys (including outside firms) advise that it applies to LTCi policies.

b. We suspect that if the question went to court, the court would consider Title VII to apply to LTCi, but we are not aware of any such ruling having been made.
c. However, the last time we checked, two insurers accepted gender-distinct pricing with employer-sponsored applications. Caution is appropriate: an insurer told us that if a problem arises, it is not the insurer's problem; it is the employer's problem or might be the broker's problem for having advised the employer.
d. As noted above, there is an exemption for employers which have **not** had 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. States may have anti-discrimination laws with no such exemption.

2. Businesses might choose to proceed with a gender-distinct product for the following reasons.
    a. They are exempt from the Civil Rights Act.
    b. They may believe that Title VII does not apply to an LTCi benefit or does not apply to an LTCi benefit which is not part of an ERISA program (and that their LTCi program is non-ERISA).
    c. We understand that a violation of Title VII must be triggered by a complaint. That is, there is no violation unless an employee complains.
        i. An employer may believe that people won't complain because they got the benefit of LTCi. (We're concerned that people become disaffected and look for revenge.)
        ii. An employer may require that program participants "sign away" their right to complain ("Norris waivers"), in return for being included in the program. Such waivers may suggest to the employee that the employer is doing something shady, and they paint the path toward a complaint. What if the employee chooses to complain rather than sign? What if a female employee or spouse gets angry at a later date?
    d. An employer might feel they are in compliance because all participants are the same gender. However, future entrants could be a different gender. Might an employee be able to complain on behalf of a female spouse?
    e. An employer might feel they are in compliance because all single participants are the same gender and the program they've chosen has unisex pricing for couples. However, future single entrants could be a different gender.
    f. Consider the following scenario: Mr. Smith is the President of Smith Enterprises. He lives with one of his employees, Ms. Employee, but they are not married. He buys LTCi for both of them with gender-distinct pricing and pays through his business. Years later, they split up. Ms. Employee is bitter, so she files a Civil Rights complaint regarding the LTCi.
    g. They can't get a unisex-priced product.
    h. One insurer has said that the Civil Rights Act applies only if the employer contributes to the premium. Of course, that insurer won't give "tax advice".
    i. In contrast, another insurer has said that the Civil Rights Act applies only if the employer does NOT contribute to the premium. Exempting employer payment seems questionable to me because the female employee will be adversely affected if she terminates employment and becomes responsible for paying future premiums.

j. As mentioned above, on-site education without an identified carrier can be a solution for voluntary programs, but that does not help with employer-paid programs.

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# Title VII of the 1964 Civil Rights Act

http://www.eeo.noaa.gov/legal_regulatory_requirements/titlevii-civil-rights-act-of-1964.html

(b) The term ``employer'' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service. Note: includes labor unions and other organizations.

(f) The term "employee"' means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employmentrelated purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title *[section 703(h)]* shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(c) (3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on-

- (A) the interrelation of operations;

- (B) the common management;
- (C) the centralized control of labor relations; and
- (D) the common ownership or financial control, of the employer and the corporation.

## UNLAWFUL EMPLOYMENT PRACTICES

**SEC. 2000e-2. [Section 703]**

(a) It shall be an unlawful employment practice for an employer -

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(f) As used in this subchapter, the phrase ``unlawful employment practice'' shall not be deemed to include any action or measure taken by an employer, labor organization, joint labormanagement committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communistaction or Communistfront organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 [section 6(d) of the Fair Labor Standards Act of 1938, as amended].

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labormanagement committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any

labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k)(1) (A) An unlawful employment practice based on disparate impact is established under this title only if-

- (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
- (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
- (3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CT note: the web-site was identified as “full text” but it seemed to end here.