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UPDATE: Transgender Employees in the Workplace

By Warren E. Buliox

In the wake of the attention surrounding Caitlyn Jenner this month and an uptick in the national discussion about gender identity, it seems appropriate to revisit some of the issues surrounding gender identity and transgender employees in the workplace. I originally wrote on this topic [back in 2008](#), explaining that while federal anti-discrimination laws did not expressly forbid employment discrimination on account of gender identity, some courts have held that employees or applicants may have a cause of action for gender/sex discrimination under federal law if an adverse employment action is taken against them for engaging in conduct that is "non-conforming" with traditional expectations or stereotypes of how a man or woman should act. This would naturally include how someone dresses or otherwise presents themselves, and would apply in situations in which, for example, a male employee comes to work wearing a dress and makeup. Notably though, and as we have previously advised, some courts have drawn a distinction between discrimination based on sex stereotypes (which may run afoul of federal law) and discrimination based on someone simply being transsexual (which may not).

We advised that regardless of where federal courts stand on the issue, a few states and several counties and municipalities have enacted laws expressly prohibiting discrimination against transgender employees, and that regardless of the legal landscape in their respective states, employers would be well served by treating transgender employees equally and with respect.

Since that article, there has been quite some development in this area. For one, several additional states (Connecticut, Delaware, Hawaii, Maryland, Massachusetts, and Nevada) have enacted laws prohibiting discrimination on the basis of gender identity, and a few other states (Indiana, Kentucky, Michigan, Pennsylvania, and New York) have executive orders in place that extend protections to transgender employees who are public workers.

As recent as last year, President Obama [signed Executive Order 13672](#), which added "gender identity" as a protected class in previous executive orders prohibiting employment discrimination within the context of civilian federal workforces and the employment practices of federal contractors and subcontractors. Notably, these contractors and subcontractors include companies that directly provide services to the federal government (for example, to build roads or maintain other infrastructure) as well as those that indirectly provide services to the government, as may be the case with companies that administer school cafeteria plans or other programs supported by the government.

Aside from federal and state courts and governments, administrative agencies have also delved into the issue. The Department of Labor's Occupational Safety and Health Administration ("OSHA"), for example, recently issued a 4-page ["Guide to Restroom Access for Transgender Workers."](#) In that guide, OSHA notes that:

Gender identity is an intrinsic part of each person's identity and everyday life. Accordingly, authorities on gender issues counsel that it is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity. Restricting employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out and may make them fear for their physical safety. Bathroom restrictions can result in employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.

The guide goes on to provide model best practices for restroom access for transgender employees, which generally involve allowing employees to use the restroom that corresponds with their gender identity, having unisex restroom facilities, and/or having restroom facilities with lockable, single-occupant stalls.

In addition to OSHA, and as one might suspect, anti-discrimination enforcement agencies within the federal government have continued to issue guidance on the application of existing law

to transgender workers. The Equal Employment Opportunity Commission ("EEOC"), for example, has noted that discrimination on the basis of one's gender identity can be unlawful discrimination on the basis of sex in violation of Title VII, and just this month the EEOC filed suit against a company for alleged discrimination against a transgender employee under Title VII. The Office of Federal Contract Compliance Programs ("OFCCP") issued a Final Rule, which went into effect two months ago, prohibiting discrimination on the basis of gender identity within companies doing business with the federal government. Both agencies (the [EEOC](#) and [OFCCP](#)) have recently opined on the restroom issue addressed by OSHA.

The bottom line in all of this is that across the board administrative agencies, courts, and local, state, and federal governments are expanding and/or clarifying rights for transgender employees. This trend is likely to continue and regardless of whether you are in a state or municipality that has expressly extended such rights, you are well served by working to implement policies and practices designed to ensure that all individuals, regardless of their gender identity, are treated equally and fairly. This would include, of course, taking steps to ensure discrimination and harassment on the basis of gender identity is not tolerated, but also observing certain social competencies - e.g., referring to people by the pronoun that corresponds with their gender identity and allowing transgender employees to dress in a manner appropriate for their gender identity (absent a uniform dress code that applies the same to everyone). Change is certainly coming and in many instances is already here. Be sure that you are ahead of the curve.

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