

# Legal Developments on Transgender Discrimination and Accommodation Issues

By Michelle Phillips and Christopher Repole

With national attention focused on North Carolina's House Bill 2 and other states' legislation involving transgender employees and public restroom access, employers across the United States are evaluating how their own policies impact transgender and transitioning employees and adopting best practices.

## Legal Developments

At the federal level, the Equal Employment Opportunity Commission (EEOC) since 2012 has interpreted Title VII of the Civil Rights Act of 1964 to prohibit discrimination and harassment on the basis of gender identity. The commission bases its interpretation on the trend of decisions in sex-stereotyping cases that began with *Price Waterhouse v. Hopkins* (490 U.S. 228 [1989]). While Title VII does not explicitly prohibit gender identity discrimination, the EEOC infers such a prohibition and has pursued discrimination and harassment claims accordingly, often filing cases in states that do not offer gender identity protections to residents.

On May 2, 2016, the EEOC issued guidance concerning transgender employees' restroom access rights that is consistent with that stance. Even in the face of contrary state or local laws, the EEOC has stated, denial of equal access to a common restroom corresponding to an employee's gender identity is considered sex discrimination. Furthermore, employers may not condition the right of equal access on an employee undergoing or providing proof of gender reassignment surgery nor any legal name change. Finally, the EEOC will find a violation of Title VII when an employer avoids the requirement of equal restroom access by restricting transgender employees to a single-user restroom. The

U.S. Department of Education has taken a similar position with regard to education institutions under its purview, holding that the prohibition against sex discrimination under Title IX of the Education Amendments of 1972 requires such institutions to give transgender students restroom and locker room access consistent with their gender identity.

Restroom access, however, is just one of many areas federal authorities have focused on when it comes to gender identity in the workplace. For example, in *EEOC v. Lakeland Eye Clinic*, which was filed in Florida on Sept. 25, 2014, and settled on April 9, 2015, the defendant employer was accused of terminating a transitioning employee after subjecting the employee to ostracizing comments from co-workers and managers and also of denying business opportunities to the targeted employee. As part of the settlement, the employer was required to provide back pay, implement a gender identity discrimination policy and train management and employees on stereotyping and other forms of gender and gender identity discrimination.

While federal courts are not required to follow the EEOC and other federal agencies in interpreting Title VII to cover gender identity discrimination, many courts have, taking their cue from the U.S. Supreme Court in *Price Waterhouse*. In deciding that case, the justices ruled that Title VII covered discrimination of the kind plaintiff Ann Hopkins's claimed in being denied consideration for elevation to partner because she failed to conform to her employer's gender stereotypes.

A number of federal trial and appellate courts have interpreted the *Price Waterhouse* decision as a precedent that gender identity discrimination is a type of gender-based discrimination prohibited under Title VII. Future court decisions are also likely to note that



the U.S. Department of Labor and numerous federal agencies such as the Occupational Safety and Health Administration and the Office of Federal Contract Compliance Programs have joined the EEOC in prohibiting gender identity discrimination.

In addition to federal authorities, many state legislative and regulatory bodies have acted to prohibit gender identity discrimination. As of this writing, 19 states and the District of Columbia explicitly prohibit gender identity discrimination, while courts in at least two more states have interpreted state antidiscrimination laws as covering gender identity discrimination. In New York, for example, the state Division of Human Rights on Jan. 20, 2016, adopted new regulations that ban discrimination and harassment against transgender individuals and affirm that transgender individuals are protected under the state's Human Rights Law. Under New York's antidiscrimination laws, "sex" is now defined to include gender identity and transgender status and the Division of Human Rights can pursue complaints against public and private employers for gender identity discrimination or harassment in the workplace.

Local governmental entities have taken similar actions, either explicitly prohibiting gender identity harassment and discrimination or interpreting existing laws and regulations as covering such behavior. The New York City Commission on Human Rights (NYCCHR), for example, has issued legal guidance stating it will pursue claims of discrimination or harassment based on actual and perceived gender identity, gender expression or transgender status under the New York City Human Rights Law.

On the other hand, some states and localities have passed explicitly anti-LGBT legislation. North Carolina's House Bill 2, for instance, requires individuals using public restrooms to use a restroom

designated for people of the sex assigned on their birth certificate. It also originally excluded gender identity discrimination as grounds for an employment case in state courts.

While more than 200 such bills have been proposed across the United States, many of the measures have met resistance, including from the federal government. The U.S. Department of Justice has filed a lawsuit against North Carolina, arguing that House Bill 2 violates Title VII. Although the EEOC does not recognize contrary state and local laws as a defense in Title VII gender identity claims, it is unclear if the North Carolina-based federal court that is hearing that case will endorse the U.S. agency's view. Given the varied and quickly changing legal requirements dealing with gender identity, employers in North Carolina and other locales may not know exactly what their legal obligations will be for some time.

## Best Practices and Recommendations

It is incumbent on employers to comply with best practices gender regarding identity in the workplace. The District of Columbia Office of Human Rights, NYCCHR and other governmental bodies have promulgated particularly useful guidelines. While no substitute for targeted legal advice, the following summary is drawn from those guides and is meant to assist employers without regard to geographic location.

### Know the Terminology

Familiarity with the relevant terminology is essential to responding effectively to workplace issues involving gender identity. First,

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“transgender” is an umbrella term for those whose gender identity and/or gender expression differs from the sex assigned on their original birth certificate. The EEOC has stated that a person does not need to undergo any medical procedure to be considered transgender. Consistently presenting a gender identity confers the status.

“Gender identity” is a person’s innate, internal sense of his or her gender and differs from “gender expression,” which is the way a person presents his or her gender to the outside world. A transgender person may or may not be “transsexual,” which refers to a person who changes his or her physical characteristics away from those of their birth sex and possibly undergoes a medical procedure to do so.

“Cisgender” refers to someone whose gender identity corresponds to their assigned sex at birth. Finally, “transitioning” is the process by which persons modify their external gender expression to be in harmony with their gender identity.

## Watch for and Address Discriminatory and Harassing Behavior

Employers should affirmatively prohibit discriminatory and harassing conduct on the basis of gender identity. For instance, require that all employees be referred to by their proper name and preferred personal pronoun (e.g., Mr./Ms., his/her/ze/hir). Likewise, invasive inquiries about medical history should be explicitly prohibited.

Employers should discipline employees who violate gender identity policies. Such discipline must be consistently applied and clearly connected with violation of the transgender policy. Policing discriminatory and harassing behaviors is essential.

## Develop a Gender Transition Plan

Employers should develop rules and procedures for addressing gender identity issues for employees who are transitioning from one gender to another. The plan should cover, at a minimum, restroom access, sensitivity training, appropriate norms of conduct, confidentiality of information, complaint and violation procedures, gender-neutral dress codes, name change procedures and security clearance rules. The plan should be implemented on a set timeline and call for training to ensure employees are well-versed in the policy. Employers should solicit and incorporate input from transitioning or transgender employees when preparing the plan.

## Create a Strong EEO Policy

Employers should make sure that existing equal employment opportunity (EEO) policies are strengthened and enforced. A strong EEO policy should provide for training and enforcement mechanisms while also stating that employment decisions will be made objectively, transparently and with documentation. The policy should facilitate creating wider and more diverse pools

of candidates for employment openings. Likewise, interviews, background checks and reference checks should be conducted without focusing on the gender identity of the applicant.

## Prohibit Retaliation

As part of the EEO policy and the gender transition plan, employers should protect employees from retaliation for raising concerns or complaints about discrimination and other policy violations.

## Evaluate the Impact of Policies

Once strong policies and procedures are in place, employers should regularly review the enforcement of those policies to ensure they do not disadvantage any particular protected group.

## Provide Training

It is critical to roll out diversity and inclusion training that addresses LGBT issues or to supplement existing training to include a section on LGBT issues. Training every employee ensures that workers of all backgrounds share a clear understanding of the organization’s expectations regarding what constitutes a respectful workplace and what types of behaviors, comments, unconscious biases and micro-inequities will not be acceptable. The absence of such training compounds the difficulties faced in the workplace by transgender employees.

## Foster Open Communication

Promoting communication fosters early dispute resolution by helping ensure misunderstandings do not escalate into bigger issues.

## The Path Forward

Employers may be understandably flummoxed by the societal and legal changes required to respect all gender identities. The debate over bathroom access in North Carolina illustrates how sensitive just one of the issues can become. Of course, it is essential that employers keep apprised of legal developments to ensure that their policies comply with applicable laws. While employers should seek legal advice on addressing jurisdiction-specific questions, implementing best practices that promote a respectful and fairer workplace will go a long way toward warding off employment lawsuits.

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