

Week of **June 22, 2015**

## Restroom Access Should Be Consistent with Employee's Gender Identity, OSHA Says

OSHA's best practices guide on restroom access for transgender workers (<https://www.osha.gov/Publications/OSHA3795.pdf>), released June 1, endorses as a "core principle" that all employees, including transgender employees, should have access to restrooms consistent with their gender identity.

OSHA defines a transgender employee as one who has adopted an internal gender identity that is different from the sex assigned to him or her at birth. Thus, an individual born and raised female, but who now identifies as male, and an individual who was born and raised male, but who now identifies as female, should be accorded restroom access in accordance with their current identity, according to OSHA.

Altering one's birth sex is not a one-step procedure. The process is complex and takes significant time. The transitioning process "may involve social changes (such as going by a new first name), medical steps, and changing identification documents," said the agency. OSHA also noted that a 2011 UCLA study found that about 700,000 individuals in the U.S. now identify as transgender. "The employee should determine the most appropriate and safest option for him- or herself," the agency said.

OSHA described "model practices" adopted by some employers that respect the core principle, including additional options for access, such as single-occupancy or unisex facilities, which employees may choose to use.

"Under these best practices, employees are not asked to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities," OSHA said. "In addition, no employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status."

OSHA stakes claim to the issue by asserting such restroom access is a matter of safety and health. According to the agency, transgender employees may fear for their physical safety if they are limited to restrooms inconsistent with their gender identity or if they are segregated from other workers by being required to use gender-neutral or other specific restrooms.

There also can be health consequences, according to the agency. "Bathroom restrictions can result in employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness,... [including] urinary tract infections and bowel and bladder problems," OSHA said.

To add teeth to its guidance, the agency said its sanitation standard (29 CFR § 1910.141) has been "consistently interpreted" not only to require that employers provide employees with prompt access to sanitary facilities, but also that employers in no way impose unreasonable restrictions on employee use of toilet facilities. In addition, following court rulings, several federal agencies have interpreted bans on sex discrimination in federal statutes, including Title VII of the 1964 Civil Rights Act, to prohibit discrimination on the basis of gender identity or transgender status, according to the agency.

Jackson Lewis attorney Nicholas Murray explains that "some states have pro-actively adopted regulations that allow employees to use the restroom that matches their gender identities. In addition to complying with OSHA best practices, employers should consult state law and local ordinances on the topic." States with specific laws or regulations concerning restroom access include Colorado, Oregon, Delaware, Iowa, Vermont, and Washington, as well as the District of Columbia.

## Judge Dismisses Fair Notice Claim despite Inconsistent MSHA Enforcement

A contractor failed to convince a judge it lacked fair notice of enforcement intent by the Mine Safety and Health Administration, even though MSHA once vacated citations issued at the contractor's storage facility for lack of jurisdiction and then did not inspect the facility for the next three years.

Austin Powder Co. operates an explosives storage facility on property it leases from an adjoining quarry operator in Decatur County, Tennessee. Stored explosives owned by Austin are used to provide blasting services for the quarry, as well as for blasting at other facilities in the region covered by MSHA and the federal Occupational Safety and Health Administration.

In October 2008, MSHA issued eight citations to Austin for alleged violations at the facility, but vacated them after deciding it lacked jurisdiction, in part because the facility was not located on the mine site. For the next three years, MSHA did not inspect the facility, but, in a turnabout in February 2012, the agency cited the contractor for two alleged violations and proposed a \$2,600 fine. Based on its previous experience with MSHA enforcement at the storage site, Austin appealed. It argued in part that if MSHA had changed its mind about asserting jurisdiction, the contractor deserved fair notice before the agency took enforcement action.

Under legal precedent, the standard for fair notice is whether a reasonably prudent person familiar with the mining industry, the Mine Act, and its protective purposes would recognize MSHA's jurisdiction over the storage unit. In so doing, courts apply a variety of factors to determine if the agency has provided fair notice of its enforcement intent. In a June 12 decision ([http://www.fmsihrc.gov/decisions/alj/ALJo\\_6082015-](http://www.fmsihrc.gov/decisions/alj/ALJo_6082015-)

[SE2012-391-M](#)), Administrative Law Judge Kenneth Andrews ruled that MSHA had met this burden.

ALJ Andrews noted that one factor is enforcement consistency, which here weighed in favor of Austin Powder. But the judge stated that other criteria outweighed consistency, including the text of the Mine Act, its placement in the overall regulatory scheme, and public notices available to the regulated community about MSHA's jurisdictional boundaries. Andrews explained that, based on the language of the Mine Act and supporting case law, it is "plain" that Austin's site is a "mine" because it is engaged in mineral extraction. Further, the Mine Act is central to MSHA's regulatory scheme, providing the basis for MSHA's legal authority. Finally, adequate notice is provided by existing case law and from MSHA's *Metal and Nonmetal General Inspection Procedures Handbook*, which instructs enforcement personnel to inspect areas storing explosives on behalf of another federal agency with which MSHA has had a long-standing memorandum of understanding, he said.

"Together, these criteria outweigh the fact that MSHA officials were inconsistent in their application of the law in this single instance for a limited period of time," Andrews said.

Both sides had sought summary decision in the case. In denying Austin's motion and granting MSHA's, Andrews ordered the parties to confer on a settlement and either file a joint motion for approval within 30 days or provide him with a status report.

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