

In Focus

Transgender Issues in the Workplace



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Employers are increasingly putting in place proactive policies to ensure that their transgender employees feel safe and welcome in the workplace. This primer highlights proactive policies addressing transgender issues that employers can incorporate in their workplaces to help increase diversity and inclusion while avoiding violations of relevant nondiscrimination laws that provide protections for transgender employees and applicants.

First, to understand the term transgender, it is important to differentiate between an individual's "sex," "sex assigned at birth," and "gender." "Sex" is defined as a combination of biological and physiological characteristics, including chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics. "Sex assigned at birth" is the classification of a baby as male, female, or intersex based on visible genitalia at birth. The visible genitalia at birth often is assumed to predict gender; however, gender is separate and distinct from the genitalia one has at birth. "Gender" refers to an individual's emotional and psychological sense of having a gender. The feeling that one is a man, a woman, both, or neither (gender nonconformity) is referred to as "gender identity." Gender identity does not necessarily align with an individual's sex at birth. Related to gender identity is the concept "gender expression." Gender expression refers to appearance, traits, and mannerisms an individual presents to communicate gender identity. Any traits (masculine, feminine, androgynous) can be present in people of any

gender or gender expression. As with gender identity, [gender expression](#) may or may not match a person's sex.

Individuals are transgender when their gender identity is different from the sex they were assigned at birth. “Gender transition” is the process by which individuals first identify as transgender and then change one or many aspects of their appearance, physical, sexual characteristics from those associated with their sex at birth. There is no one way to transition. Rather, transgender individuals transition in their own way. The transition process has both social and medical components.

Social transitioning is the process by which individuals tell their transgender status to the people in their lives (e.g., family, friends, and co-workers). In addition, the social transition process may include changing one's name and asking to be referred to by a different gender pronoun. For many transitioning individuals, the social transition will include adopting a gender expression that more closely matches their gender identity.

For some transgender individuals, a gender transition will include a medical component. Notably, a person does not have to undergo a medical procedure to be considered transgender. Transgender status relates to persons' gender identity (i.e., how they feel inside as a “man” or “woman” or something in between, or neither), regardless of what steps they take to make this decision public. Contrary to popular belief, there is no one “transgender surgery.” Indeed, many transgender individuals never take hormones or undergo any surgeries.

While many states expressly bar discrimination based on gender identity and expression, no federal law expressly prohibits workplace discrimination based on gender identity or expression. That said, the U.S. Equal Employment Opportunity Commission (EEOC) has promulgated [guidance](#) that interprets the prohibition of “sex” discrimination under Title VII of the Civil Rights Act of 1964 (Title VII) to prohibit discrimination based on gender identity and expression.

Despite the position of the EEOC, the current administration has taken the position that federal law does not prohibit discrimination based on gender identity and expression. As such, this area of the law will likely remain unsettled until federal law expressly prohibits transgender discrimination or the Supreme Court clarifies whether “sex” discrimination under Title VII encompasses transgender discrimination.

In order to avoid potential pitfalls and to increase the level of diversity and inclusion in a company, many employers are adopting a series of trans-inclusive policies. A nonexhaustive list of such policies is set forth below.

- **Nondiscrimination Policies:** Although the EEOC's position on the extension of Title VII to transgender claims is not binding, and there is no federal law which explicitly protects transgender employees from

discrimination, employers should consider revising internal equal employment, nondiscrimination, and anti-harassment policies to include gender identity and expression as protected categories.

- **Conduct Training:** Employers also should help managers and employees become more sensitive to gender identity and expression by incorporating these topics into EEO and harassment training programs. Training reduces the risk of misunderstanding by explaining what a gender transition is and by stressing the employer's non-discrimination policy. Part of training is explaining to employees that regardless of their personal beliefs about transgender individuals it is important that employees behave appropriately and continue to work cooperatively and respectfully with their transgender colleagues. It should be clearly stated that failure to behave in this manner towards transgender colleagues could result in discipline, up to and including termination. Employers also may consider conducting a more targeted training when transgender employees announce that they are transitioning. Such training will not only support the employees and help manage the specifics of the transition process, but also may foster respect, sensitivity, and understanding from other employees. In planning a targeted training, it is important to first check-in with transitioning employees to determine whether or not they would like to attend.
- **Dress codes:** Policies that require professional business attire irrespective of sex or gender are recommended. For employers who have a "male" and "female" version of a uniform, employees should be allowed to wear the uniform that comports with their gender identity.
- **Use of Pronouns:** Employers should be mindful to use the appropriate pronouns consistent with transgender employees' gender presentation. To the extent there is uncertainty about employees' gender, it may be appropriate to respectfully communicate with them regarding their preference in a confidential matter and agree with them on a communications plan for notifying coworkers and customers of any change to pronoun or name use.
- **Develop Guidelines for Managing Workplace Transition:** It is prudent for employers to develop guidelines and procedures to manage situations where employees announce that they will be transitioning. Such guidelines serve a number of functions, including: providing support and guidance to transgender employees; setting clear expectations for all employees to minimize the risk of a disruption in productivity when transgender employees transitions; and developing the administrative processes needed to ensure that when transgender employees transition their gender or name are modified in the company's systems, including those for employee benefits. Employers should approach employees' transition as an interactive process. This may involve, for example, designating a key human resources official or manager to serve as a liaison and point of contact for transitioning employees. Employers should have an open and continuous dialogue with employees and set clear expectations regarding how the transition will occur, the steps that need to take place (e.g. notification to clients, coworkers, and others), and the information employers will require from the transitioning employees.

- **Employee Privacy and Confidentiality:** Employers must be mindful that although a transgender employees' transition may become a matter of public knowledge in the workplace, personal details about any employee's transition are private and entitled to confidentiality.
- **Administrative and Personnel Records:** Employers should be prepared to update or change transgender employees name and gender in certain employee records. For example, employers should consider which records must reflect employees' name and sex at birth, and which records can be modified to assist employees in the transition (e.g., email addresses, name plates, business cards, security badges, etc.).
- **Restroom Access:** Employers should consider policies regarding access to restrooms, locker rooms, and other gender-specific facilities. Employers should consider employees' full-time gender presentation and identity when making decisions regarding restroom access. It should be explained to coworkers who take issue with sharing a restroom or locker room with transgender colleagues that transgender employees are entitled to use the facility that corresponds with their gender identity. If employers have a single occupancy restroom or privacy changing areas, objecting employees should be provided with the opportunity to use those facilities. In engaging in this discussion with objecting employees, a very helpful resource is the ["Guide to Restroom Access for Transgender Workers"](#) by OSHA.
- **Health Insurance and Benefits:** Employers are increasingly including in their benefits offerings coverage for transgender medical procedures, such as genital surgery. The limited studies to date reflect that employers who have expanded such coverage have seen very little increase in health premiums. Employers also may coordinate with their benefit plan administrator to remove limitations on gender-specific services (e.g., mammograms) based on gender at birth or gender of record. Finally, employers might consider revising eligibility restrictions for infertility coverage by creating exceptions or otherwise amending benefits provisions that require employees to try to naturally conceive for at least a year (or some other period of time) before becoming eligible for infertility coverage.
- **Leave Policy:** Employers should consider modifying their leave policy to cover transition related services. While such a policy is not clearly required under the federal Family and Medical Leave Act (or most state leave laws), many employers have decided to treat transgender medical procedures the same they treat any other medically necessary procedures.

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