

Creating Policies to Protect Transgender Employees

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The statistics concerning the number of people in the United States who are transgender are either outdated, imperfectly calculated or both. For example, a 2011 study, conducted by the Williams Institute at the University of California-Los Angeles, compiled data from two surveys and estimated the number of transgender Americans at 700,000, or 0.3 percent of the United States population. In contrast, a 2015 Census Bureau paper concluded that between 1936 and 2010, 135,367 people in America were transgender and, in 2010, fewer than 100,000. (Benjamin Cerf Harris, "Likely Transgender Individuals in U.S. Federal Administrative Records and the 2010 Census.") This data, however, was based solely on the number of people who had changed their names or sex with the Social Security administration, which, through the summer of 2013, permitted a gender change in Social Security records only when supported by documentation of genital sexual reassignment surgery.

While more statistics are expected—the National Center for Transgender Equality just concluded the "2015 U.S. Trans Survey" and expects data to be available in mid-2016, see www.transequality.org—even without a firm number, it is clear that many transgender people must be between the ages of 18 and 70, which means that they are likely employed or seeking to become employed. While the legal obligations and workplace dynamics with regard to transgender employees have simply not been a focus for many employers, the law and society require employers to take note now. So, what should employers know?

(1) The common characteristic of transgender employees concerns gender identity.

The American Psychological Association defines transgender as an "umbrella term" for individuals whose gender identities are different from those assigned at birth. Indeed, the statistics cited above reflect the difficulty in attempting to define transgender in a more specific way. For example, while some transgender employees have celebrated name changes (either informally or through legal channels), others have undergone hormone therapy and gender reassignment surgery. Understanding transgender employees' commonality—gender identities distinct from those associated with their assigned sex at birth—and acknowledging that there will be differences among transgender employees (just as there are among any other class of

employees) are essential to understanding obligations the law imposes and policies and practices employers should embrace.

(2) Transgender employees are experiencing workplace discrimination and harassment.

Even though it is also a bit outdated, a survey of transgender employees reveals significant workplace issues. "Injustice at Every Turn, A Report of the National Transgender Discrimination Survey," from 2011, documented that 90 percent of survey participants reported harassment, mistreatment or discrimination; 47 percent reported an adverse employment action; and 26 percent reported a job loss, all due to being transgender or gender nonconforming. A majority either hid or delayed their genders or gender transitions. The survey reported even more specifically that offensive and harassing workplace conduct included supervisors/co-workers sharing information inappropriately (48 percent); repeated and intentional use of the wrong pronouns by co-workers and supervisors (45 percent); employers forcing transgender employees to present in a specific gender (32 percent); employers denying access to appropriate bathrooms (22 percent); and transgender employees being subjected to physical violence (7 percent) and sexual assault (6 percent) in the workplace.

Since January 2013, the Equal Employment Opportunity Commission has been tracking discrimination charges related to gender identity and/or sexual orientation. "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers," www.eeoc.gov/eeoc/newsroom. Of a total 2,461 charges tracked from January 2013 through March 2015, 461 charges were related to gender identity or transgender status. "Injustice at Every Turn," however, makes clear that the actual number of transgender employees experiencing discrimination or harassment is much greater.

(3) Gender identity and expression is protected under New Jersey and federal law.

Since 2007, the New Jersey Law Against Discrimination (LAD) has prohibited discrimination based on "gender identity or expression," which is defined as "having or being perceived as having a gender-related identity or expression whether or not stereotypically associated with a person's assigned sex at birth." N.J.S.A. 10:5-12; N.J.S.A. 10:5-5(rr). The law specifically states that employers "shall allow" employees "to appear, groom and dress consistent with the

employee's gender identity or expression." N.J.S.A. 10:5-12(p). Additionally, the LAD requires admission to public accommodations such as bathrooms and dressing rooms based on individuals' gender identities or expressions. N.J.S.A. 10:5-12(f)(1). While "transgender" was omitted from the final legislation, the broad definition of gender identity and expression clearly incorporates transgender status as well as employees' gender identities consistent with the genders assigned at birth.

More recently, federal law and federal agencies have also addressed transgender employees. In 2012, the Equal Employment Opportunity Commission concluded that a "complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII." *Macy v. Holder*, Appeal No. 01201208021 (April 20, 2012). In *Macy*, a transgender woman who was not hired for a position filed a claim of sex discrimination, asserting gender identity and sex stereotyping as the basis for her complaint. Citing the United States Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny for the proposition that Title VII of the Civil Rights Act of 1964 bars discrimination not only on the basis of biological sex, but because of gender stereotyping as well, the EEOC found that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on ... sex,' and such discrimination therefore violates Title VII." *Id.* at 14.

While the *Macy* decision did not change the state of the law for New Jersey employers, it did provide a jumping off point for a more recent EEOC decision that made headlines earlier this year and specifically addresses the details included in the LAD. In *Lusardi v. McHugh*, the EEOC considered the U.S. Army's refusal to use female pronouns and denial of access to female restrooms for a transgender employee who transitioned from male to female during her employment. Appeal No. 0120133395 (April 1, 2015). The EEOC concluded that the Army's conduct violated Title VII. With regard to bathroom access, the plan for the employee until she completed a surgery—to use the "single shot" or "executive" restroom rather than the common restroom for female employees—was deemed discriminatory based on sex. The EEOC made clear that the protection of the class of employees was paramount and that "supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment." *Id.* at 11. In addition, given the spectrum of transgender employees, the EEOC, citing the Office of Personnel Management "Guidance Regarding the Employment of

Transgender Individuals in the Federal Workplace," noted that gender reassignment surgery and/or legal sex designation are not prerequisites for equal opportunity and access to facilities. *Id.* at 9-10. Finally, the EEOC reiterated its prior holding that "supervisors and co-workers should use the name and gender pronoun that corresponds to the gender identity with which the employee identifies," and that failure to do so may constitute sex-based harassment. *Id.* at 15.

Yet another federal agency has also addressed access to bathrooms for transgender employees. In June 2015, the Occupational Safety and Health Administration published an advisory booklet entitled "Best Practices: A Guide to Restroom Access for Transgender Workers." The guidance is grounded in the Occupational Safety and Health Act's sanitation standard, which requires employers to provide toilet facilities, a standard which OSHA has "consistently interpreted" to require "prompt access to sanitary facilities" without the imposition of "unreasonable restrictions." The stated goal of the guidance is to have employees work "in a manner consistent with how they live the rest of their daily lives, based on their gender identity," including use of facilities that correspond with gender identity. OSHA asserts that "[t]he employee should determine the most appropriate and safest option for him- or herself." Similar to the EEOC, OSHA makes clear that segregated facilities are not acceptable, nor should medical or legal documentation be requested or required.

Certainly New Jersey's protections and the evolution of the federal law dictate that employers must strive for compliance now.

(4) Employers can take affirmative steps, through policies and training, to afford protection for transgender employees.

As a preliminary step, if they have not done so already, New Jersey employers should identify transgender employees as protected, even if they have already incorporated the "gender identity" class into a policy. The specific designation will create a more informed workforce. Employers should also review all policies to ensure that they are not gender-specific. For example, a dress code policy dictating "appropriate business attire" would be more inclusive than one requiring a blouse for a woman and a shirt for a man. Employers may also want to consider creating more detailed policies relative to transgender employees. These would

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address privacy, pronoun and first-name designations and name change, sex-segregated job assignments, bathrooms and locker rooms, dress code, and the like. Some employers may also wish to implement workplace transition plans with input from transitioning employees, addressing these same topics. While no policy or guideline can consider every situation, it can be a basis for an open, healthy discussion. Finally, once an employer has modified its policies and ensured that it has created equality for its transgender employees, it must incorporate transgender topics into its harassment and discrimination training. Without informed managers and co-workers, even the most well-crafted and compliant policy will not result in a workplace with equal opportunity and respectful treatment for all employees.