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Demystifying Employers' Obligations to Transgender and Non-Binary Employees

New legislation coupled with publicized transitions from male to female has created awareness and sparked conversation about gender identity and gender expression. Many managers want to do the right thing but find themselves struggling with how to properly handle workplace issues relating to transgender employees and those who have identified themselves as non-binary (a description referring to those who do not identify as being male or female). As such, employers must ensure the proper treatment of employees who choose to identify with or express a gender different than that assigned to them at birth, or no gender at all, to minimize negative publicity and/or litigation.

The Legal Landscape

The federal Equal Employment Opportunity Commission (EEOC) has issued guidance stating that discrimination and harassment based on gender identity or gender expression violates Title VII's prohibition of sex discrimination. Notwithstanding the EEOC's guidance, federal courts are split regarding whether the scope of Title VII's prohibition of discrimination on the basis of sex includes gender identity. The U.S. Supreme Court is slated to end this dispute this year in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*. when it is expected to rule on whether an employee's discharge on the basis of transitioning or transgender status violates Title VII's prohibition against sex discrimination.

Federal trial courts also have started to grapple with the difficult determination of whether the Americans with Disabilities Act (ADA) requires employers to accommodate employees suffering from gender identity disorders. In doing so, courts are ruling on whether Section 12211(b)(1)'s carve-out from the ADA, which states that "gender identity disorders not resulting from physical impairments, or other sexual behavior disorders" are excluded under the ADA. In a 2018 case, *Doe v. Massachusetts Department of Corrections*, a Massachusetts federal court held that gender dysphoria and related disorders may qualify as a disability under Title II of the ADA. The court reasoned that gender dysphoria has a physical etiology and thus would not fall under Section 12211(b)(1)'s carve-out. Employers must remain mindful that even if an employee's gender identity or expression does not necessarily entitle the employee to ADA accommodations, other conditions (e.g., stress, anxiety and depression) sometimes associated with the difficulty of being transgender or non-binary may qualify an employee for accommodations under the ADA.

In addition to federal law, employers must be aware of their obligations under state and local laws. Twenty-one states including Connecticut, Massachusetts, New Jersey and New York, as well as the District of Columbia, have adopted laws explicitly prohibiting discrimination based on gender identity. The New York City Commission on Human Rights also has issued legal enforcement guidance stating gender discrimination prohibitions of the New York City Human Rights Law (NYCHRL) cover gender identity and gender expression. Such guidance makes clear that an employer's using a name or pronoun other than that with which an employee identifies, mandating that transgender or non-binary employees use a single-occupancy restroom or the facility that does not align with their gender identity, or imposing different dress code requirements on its employees based on gender violates the NYCHRL.

In light of the myriad of anti-discrimination requirements, employers should take certain actions to minimize their litigation risk.

Anti-Discrimination and Anti-Harassment Policies

Employers should begin by reviewing all their anti-discrimination and anti-harassment policies. Anti-discrimination and anti-harassment policies should cover "gender identity" and "gender expression." In addition to advising the workforce that the company's anti-discrimination and anti-harassment policies cover gender identity and gender expression, employers should be proactive and establish policies and best practices that protect their transgender and/or non-binary employees. For example, including policies that invite employees to confidentially speak to Human Resources, management or a designee regarding gender identity or gender expression issues or concerns may help an employer avoid accusations of discrimination due to the employee disclosing such issues or concerns to another colleague who is untrained in how to respond. It is important that such a provision assures confidentiality but also permits the employee to choose when, how and to whom in the organization they wish to disclose their true gender identity and/or expression. Allowing the employee to engage in an open dialogue will help the employer understand the employee's needs and the best ways to accommodate those needs.

Use of Preferred Names

Employers should also consider allowing employees to use their preferred name instead of their legal name, unless use of the legal name is required due to the nature of the document (e.g., payroll, tax forms, benefit forms). In NYC, employers must use the employee's preferred name. Employees who have a gender identity other than that assigned to them at birth or who do not associate with a gender often feel comforted by not having to use the name on their birth certificate, which may "out" them as a different gender and does not correspond to their true identity. Employer forms should also be reviewed and amended to permit applicants/employees to use alternative names (where legally permitted) and self-identify as the gender or non-binary gender designation of their choice instead of limiting the gender classification to "male" or "female." Employers should permit transgender employees to use their chosen name on business cards, e-mail addresses, nameplates, company ID cards, schedules and other documents that their co-workers may access. Once the employee legally changes his/her name, his/her W-2 and benefits forms can be updated. Importantly, employers must not request documentation from their transgender and non-binary employees that they do not request from other employees.

Use of Preferred Pronouns

Has the employee provided designated pronouns? If so, only those designated pronouns should be used when referring to that employee. This also covers if an employee wishes to refer to himself/herself using the plural "they." Employers in NYC are required to use an employee's preferred pronoun. Employers may want to consider allowing employees to add their preferred gender pronoun to their e-mail signature so that each employee is referred to using the correct gender pronoun by those with whom they do business. Doing so also empowers employees to decide how, when and to whom to disclose their true gender identity and/or expression.

Appearance Policies

Employers would also be wise to update their appearance policies. Grooming and dress code policies are other examples of where transgender and non-binary employees likely will need some flexibility. Employers in NYC are prohibited from imposing different dress code requirements on employees of different genders. An employee should be permitted to dress in a manner that conforms with his/her gender identity. Moreover, employers should not (and in the case of NYC cannot) prohibit employees from using makeup, wigs or hairpieces based on their anatomy or gender classification at birth. While employers can still require that transgender and non-binary employees dress appropriately as long as the policy applies to all employees, they should consider eliminating gender-specific restrictions or requirements.

Restroom Usage

Use of facilities is another big issue employers need to contend with to ensure that transgender and non-binary employees are protected and comfortable at work. This is also the area where employers may receive the largest pushback from other employees. Regardless of how other employees feel, employers must be mindful that the Occupational Safety and Health Administration (OSHA) and certain states and/or municipalities, such as New York City, require that all employees have access to sanitary restroom facilities that correspond with the employee's identifying gender. Transgender and non-binary employees may request to use a restroom that corresponds with their identifying gender, which for non-binary employees may include a request to be able to use the men's room or the women's room on any given day at their own choosing, or an alternative unisex bathroom. To address employees' needs, some employers are offering all-gender restrooms, dressing rooms and locker rooms, rather than or in addition to gender-segregated facilities. Other employers offer single-occupancy

restrooms and changing areas. Employers should make clear that single-occupancy restrooms can be used by people of all genders. Employers (especially those in NYC) need to remain mindful that while having single-occupancy restrooms and changing areas may be preferable to those who are non-binary, forcing transgender and non-binary employees to use a single-occupancy restroom or changing area may violate the law. Other employers allow employees to use facilities that correspond with the employee's identified gender. In the event a co-worker is uncomfortable with using the same facilities as their transgender or non-binary co-worker, the employer may advise the co-worker to use separate facilities. If there are no separate facilities available to use, the employer should explain to the co-worker its and his/her responsibilities.

Education About Transitioning Employees

Because more transgender employees are transitioning while at their current job, as opposed to starting a new job after their transition has begun, more Human Resources professionals are assisting transgender employees with transition plans. Such plans focus on communication, education and accommodation of transgender employees who are beginning to physically express their true gender identity in the workplace. The transition plan should include guidelines that outline the expectations and responsibilities of transitioning employees, co-workers, supervisors and other staff. To be useful, the protocols should be flexible enough to adapt to each employee's needs but sufficiently specific to provide consistent management of employee expectations and requests. Having a designated point person who is an expert in the area for all gender identity and gender expression related issues can assist employers with overseeing and facilitating transition plans. Transition plans should include the name of the designated expert; the general procedure for incorporating transition-related changes, including communications adjustments for clients and co-workers; manager and co-worker expectations; and all resources that are required and/or necessary for the employee to be treated fairly and with dignity and respect.

Supervisory Training

All personnel involved in responding to gender identity and gender expression related issues also should be provided training regarding how to navigate such requests. The training should include an explanation of the difference between physiology and expression; a description and role-play of the initial conversation that each individual may have with the employee involved after such individual learns of the employee's true gender identity or how the employee wishes to express gender; best practices for those involved; handling day-to-day issues, such as the use of company facilities, dress codes, name changes and pronoun usage; how to address client and/or co-worker concerns; and the right to confidentiality. Human Resources personnel may also need training on leave benefits for transitioning employees, medical insurance coverage, and processing issues dealing with an employee's formal name change for payroll and benefits purposes. Conversations should be conducted with the involved transgender and non-binary employee about when he/she feels comfortable with training being provided to co-workers so that his/her co-workers are aware of their obligations under the circumstances. Once the employee has agreed to notifying and training their colleagues, it is recommended that management meet with the employee's co-workers, convey their support for the employee and remind the employee's co-workers that discrimination and harassment will not be tolerated.

Overall, employers must be sensitive to the needs of their employees and how they wish to express their gender identity. Employers must remain cognizant that failing to do so or requiring things that have been common in our society for some time (e.g., men cannot wear makeup at work) can lead to legal liability.

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Authors



Rachel A. Gonzalez

Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com