

# Transgender Individuals in the Workplace

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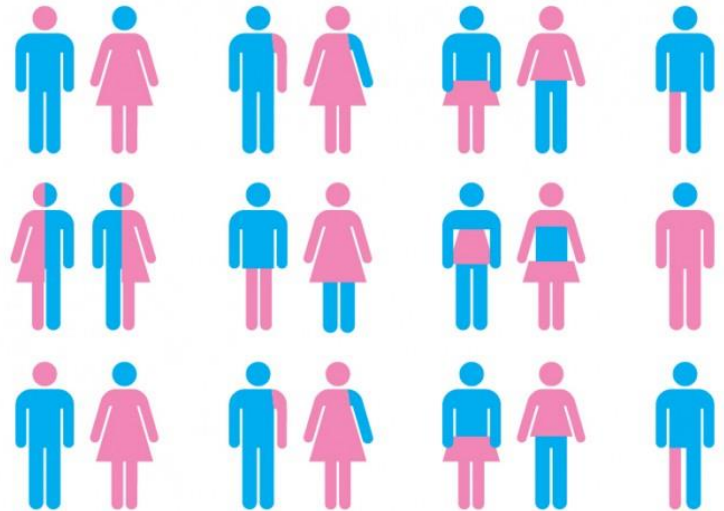
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# E.E.O.C. Charge Data

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- **FY 2014:**
  - 1,100 LGBT charges
  - \$2.19 million
- **FY 2015:**
  - 1,412 LGBT charges
  - \$3.3 million
- **28%** and **51%** increase in charges and monetary relief respectively.



# Definitions



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- **Transgender** is a term used to describe people whose gender identity differs from the sex the doctor marked on their birth certificate.
  - **Gender identity** is a person's internal, personal sense of being a man or a woman (or someone outside of that gender binary). For transgender people, the sex they were assigned at birth and their own internal gender identity do not match.
  - **Transsexual** is an older term that originated in the medical and psychological communities. Still preferred by some people who have permanently changed - or seek to change - their bodies through medical interventions (including but not limited to hormones and/or surgeries).
    - **Transgender ≠ Transsexual.** Unlike *transgender*, *transsexual* is **not** an umbrella term. Many transgender people do not identify as transsexual and prefer the word *transgender*.

# Definitions (continued)

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- **Transgender male (FTM)** means someone who identifies as male but was assigned the sex of female at birth.
- **Transgender female (MTF)** is someone who identifies as female but was assigned the sex of male at birth.
- **Transition:** The process of changing one's gender from the sex assigned at birth to one's gender identity. There are many different ways to transition. For some people, it is a complex process that takes place over a long period of time, while for others it is a one- or two-step process that happens more quickly. Transition may include “coming out” (telling family, friends and coworkers); changing the name and/or sex on legal documents; and, for many transgender people, accessing medical treatment such as hormones and surgery.



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# Laws Prohibiting Discrimination against Transgender Individuals



# *Price Waterhouse v. Hopkins (1989): Where It All Began*

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- A female employee alleged she was postponed promotion to partnership at the firm for two years in a row based on sex-stereotyping against gender nonconformity.
- Co-workers called her “aggressive, foul-mouthed, demanding” and “impatient.”
- “Talk and dress more femininely...”
- Court found she stated a claim for sex discrimination. Becomes known as the “sex-stereotype” theory.



*Ann Hopkins*

# E.E.O.C. Expands Title VII Protection to LGBT Employees

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- *Macy v. Dep't of Justice* (2012): EEOC says “gender identity/transgender discrimination necessarily involves sex discrimination.” Therefore, it violates Title VII.
- EEOC lists examples of discriminatory acts against transgender employees:
  - Firing an employee because he or she is planning/or made a gender transition.
  - Denying an employee equal access to a common restroom corresponding to the employee’s gender identity.
  - Harassment by continuously and intentionally failing to use the transgender employee’s name or gender pronoun that corresponds to his or her gender identity, and which the employee has communicated to management and employees.
  - Failing to hire an applicant because she is a transgender woman\*

## *Lusardi v. McHugh, EEOC Case No. 012013395 ( April 1, 2015).*

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- An employee transitioned from a man to a woman during the course of her employment. Had a transition meeting.
- She agreed to use the single-user bathroom rather than the common's women restroom.
- On occasion, however, she had to use the common's restroom.
- Supervisor:
  - “You’re making people uncomfortable.”
  - Prohibited her from using restroom until proof she underwent the “final surgery.”
- EEOC: Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity for transgender individuals, or anyone else. Gender reassignment surgery is not a fundamental element of a transition.





## What about Federal Courts?



- Despite the absence of any federal law expanding Title VII protection to gender identity and sexual orientation, the EEOC's "gender stereotype" theory is also being applied by district courts to protect LGBT employees from employment discrimination.

BUT...

- Courts - Price Waterhouse v. Hopkins has limits:
  - LGBT employees are unlikely to be protected if they did conform to gender stereotypes (i.e., if a gay male appeared and behaved masculine, etc.).
  - Example: Employer failed to hire a transgender employee by rejecting application.



# EEOC v. R.G. & G.R. Harris Funeral Homes, Inc. (E.D. Mich. filed Sept. 25, 2014)

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- A male funeral director has been employed with the company since October 2007.
- In 2013, this employee gave a supervisor a letter explaining that he would be transitioning from male to female, and would begin to wear clothes to fit her new gender identity.
- Two weeks later, the employer fired the funeral director and allegedly said that what “he” was “proposing to do was unacceptable.”
- The employee filed a Charge of Discrimination, and the EEOC agreed to file suit in district court alleging that the employer discriminated based on sex because the employee was transgender.



## *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* *(continued)*

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- Employer filed a motion to dismiss and argued that:
  - Gender identity is not a protected category under Title VII.
  - Gender identity is not the same as *Price Waterhouse* gender stereotyping.
  - Prior case law allows employers to fire employees for not following sex-designated dress code.
- The employer lost the motion. What does the court say?

## ***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*** ***(continued)***

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***[T]ransgender status is not a protected class under Title VII. Thus, if the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with the Funeral Home that the EEOC's complaint fails to state a claim under Title VII.***

***But the EEOC's complaint also asserts that the Funeral Home fired Stephens 'because Stephens did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes'...,[A]ny person— without regard to labels such as transgender – can assert a sex-stereotyping gender discrimination claim under Title VII, under a Price Waterhouse theory, if that person's failure to conform to sex stereotypes was the driving force behind the termination. This Court therefore concludes that the EEOC's complaint states a claim as to Stephens's termination.***

## *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* *(continued)*

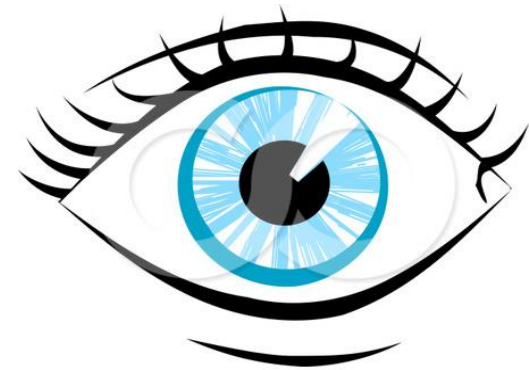
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- Outcome?
- Still pending!
- Both parties filed motions for summary judgment to dismiss the case.
- Court has not yet issued a ruling.
- The parties agreed to mediate should the Court deny the motions.
- Big take-away for employers is that lawsuits that allege some form of gender stereotype against transgender employees cannot be dismissed in early stages for failure to state a claim under Title VII.

## EEOC v. Lakeland Eye Clinic, P.A. (M.D. Fla. filed Sept. 25, 2014)

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- Employer was a clinic that performed refractive, corneal and cataract surgery to treat retinal diseases.
- It decided to open a hearing division.
- In July 2010, the clinic hired a male employee as Director of Hearing Services.
- At the time of hire, this employee presented as a male, “Michael.”
- He provided hearing services to patients who were referred to him by the employer’s existing physicians.
- Satisfactory performance.



© Geo Images \* www.ClipartOf.com/11905

## EEOC v. Lakeland Eye Clinic, P.A. (continued)

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- Nearly a year later, Michael began wearing feminine attire to work, including make-up and women's tailored clothing.
- Co-workers snickered and stopped interacting with the employee.
- A couple of weeks later, the employer requested a meeting with the employee to discuss her changing appearance. The employee stated that she was undergoing a gender transition from male to female and that she would change her name legally from Michael to Brandi.
- After this meeting, a few managers and co-workers called her derogatory names.
- Physicians working for the employer also stopped referring patients to her for hearing services-deprived her of her client base.



# EEOC v. Lakeland Eye Clinic, P.A. (continued)

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- Two months later, the employer fired Brandi and told her that the company was closing its hearing services division, and thus eliminating the position of Director of Hearing Services.
- In August 2011, the employer hired a male as Director of Hearing, “who conformed to traditional male gender norms.”
- Brandi filed suit and the EEOC intervened.
- After 7 months of litigation, the parties settled and entered a consent decree.
- The clinic agreed to pay Brandi **\$150,000.00** in damages:
  - \$75,000 in back pay
  - \$75,000 in emotional distress





# EEOC v. Deluxe Financial Services Corp. (D. Minn. filed June 4, 2015.)

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- Employee worked for Deluxe since October 2007. At the time she was hired, she presented as a male.
- In November 2010, the employee told her supervisor of her intention to present herself as a female at work.
- She underwent hormone therapy and legally changed her name to a traditional female name.
- Afterwards, she asked to begin using the women's restroom.
- She also asked that her sex-designation be changed in internal personnel communications, e.g., personal profiles, phone directories, etc.
- However, her supervisors refused to let her use the women's restroom out of "consideration for other employees."
- Supervisors refused to change her sex-designation without providing "proof of legal documentation showing her name change" and "completing the surgery portion of the gender change process."
- Supervisors asked invasive questions about gender-related surgeries.
- Employer only changed her name and sex-designation in some internal records, but not all, despite repeated requests by the transgender employee.

# EEOC v. Deluxe Financial Services Corp. (continued)

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- For months, she was denied access to women's restroom without medical proof.
- Manager even forbade her from using the women's restroom outside of its offices.



- An e-mail from the employer: **“honestly, I am not sure we can mandate her use of the bathroom outside of the call center, but let’s keep that to ourselves.”**
- Co-workers and supervisors purposefully used the wrong gender pronouns and called her: “boy” “Cheetah”.
- Co-workers made fun of her female appearance during staff trainings sessions.
- She reported these instances, but nothing was done.

# EEOC v. Deluxe Financial Services Corp. (continued)

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- Employee filed suit, EEOC intervened, alleging sex discrimination and sex-based hostile work environment.
- The case settled on January 20, 2016.
- The parties entered a 24-page consent decree in which the employer agreed to pay this employee **\$115,000.00 in damages**. The consent decree stated:
  - Employer provides employee a letter of apology.
  - Ensure that employee requests to change sex-designation or name information on internal records are done fully and promptly.
  - Employer would not make exclusions in their health care benefits plans for medically necessary care based on transgender status.
  - Revise employment policies including a commitment to preventing unlawful sex discrimination which includes transgender status.
  - Revise its internal policies that make clear employees are permitted to use restroom commensurate with their gender identity and will not be required to present medical documentation of gender reassignment surgery or other medical procedures before using restroom. (training for this). These policies are to be sent and approved by the EEOC.
  - In effect for three years.
- These terms were also found in Eye Clinic case. (minus the apology letter).

## *Broussard v. First Loan Tower LLC (E.D. La. Sept. 2015)*



- A manager-trainee was required to produce his driver's license while filling out employment paperwork.
- His license listed his sex as "F."
- When asked, the employee explained that he is a transgender man.
- A few days later, the VP of the company allegedly told him that he must dress and act as a female in the workplace because it was confusing to customers.
- As a condition of employment, the company required him to sign a statement agreeing to act and be treated as a female rather than a male.
- He refused. The company fired him.
- The employee filed a Charge of Discrimination. EEOC issued right to sue and later intervened in the civil lawsuit.
- In arbitration now.

# Is Having a Dress Code a Defense?

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## Creed v. Family Exp. Corp., (N.D. Indiana Jan. 5, 2009)

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- Before being hired by Family Express as a sales associate, the employee started her gender transition (to female).
- However, when she applied for the position, she presented as a man – Christopher Creed.
- She began changing her appearance to look more feminine: clear nail polish, trimming her eyebrows, and wore black mascara. Grew her hair out and began wearing in a more feminine style.
- She began using the name “Amber.”
- Supervisor met with her to discuss transition; employee said he was supportive.
- Received great reviews and awarded “Greeter of the Month” three times.
- The meeting with HR and Director of Operations. Allegedly told her not to dress feminine manner because of customer complaints. Employee told them she was going through a transition. In response, the HR person asked “whether it would kill [her] to appear masculine for eight hours a day” and asked her why she applied for a job if she knew she was undergoing gender transition.
- They told her if she didn’t report as a male she would be terminated. The employee asked that they apply the dress code standard for female to her instead of male. They refused.
- When she refused to conform to the dress code, she was fired.



## Family Creed's Dress Code Language

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- *Family Express requires all of its employees to maintain a conservative, socially acceptable general appearance, conceal all tattoos, take out all body piercing[s], and wear uniforms neatly, with shirts tucked in and belts worn.*
- *Males must maintain neat and conservative hair that is kept above the collar and prohibits earrings or any other jewelry that accompanies body piercing.*
- *Females also must maintain neat and conservative hair, which needn't be above the collar, and may wear makeup and jewelry so long as it is conservative and business-like.*
- Court: Dress code was not discriminatory because it did not impose an undue burden on male employees.
- Court, therefore, applied the male dress code standard to the employee who was a transgender female.
- **Minority view, however.**

# Alexia Daskalakis v. Forever 21, Inc. (April 1, 2015)

FOREVER 21®



- Started as a sales associate in Brooklyn in May 2011 and soon promoted to being responsible for setting up store displays.
- January 2014: Daskalakis began transitioning to present as a woman, she began dressing in a more traditionally feminine manner and started wearing makeup.
- August 2014: she began taking hormones to transition.
- One day she wore jeans, a crop top and leather jacket - she was told that her clothing was inappropriate and needed to change. However, other female employees were wearing the same thing.
- Supervisor responded, **“the male dress code is different from the female dress code, and you’re still a male until you change your birth certificate.”** He sent her home.
- She complained to her supervisor about the supervisor’s boss (District manager), who said out loud that her attire was disgusting and offensive. The supervisor defended his boss and said **“he just got used to people being gay, but this is totally different. He’s not used to guys becoming girls.”**



# Alexia Daskalakis v. Forever 21, Inc.

## (cont.)

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- She was fired after her manager began harassing her. She had tried to communicate with HR three times, but her calls and messages went unanswered.
- She filed a lawsuit under NY State Human Rights Law and New York City Human Rights law. She also filed a charge of discrimination.
- She had signed an employment agreement with arbitration clause.
- Still pending. Employer filed a motion to compel arbitration. Employee opposed the motion arguing that the enforceability of arbitration clause.

The logo for Forever 21, consisting of the words "FOREVER 21" in a bold, black, sans-serif font, centered within a solid yellow square.

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# Common Issues for Transgender Employees

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- Restrooms
- Attire/Dress Code
- Updating Records to Correspond to Gender Identity
- Accommodations for Medical Procedures



# OSHA GUIDANCE ON RESTROOMS

- Not law, but failure to abide by this guidance could lead to a citation under the “general duty clause.”
- OSHA: It is “essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity.”
- All employees should be permitted to use the facilities that correspond with their gender identity.
- The employee, not employer, determines the most appropriate restroom for him or her to use.
- **Best practices:**
  - Single occupant gender neutral facilities; or
  - Multiple occupant, gender-neutral facilities with lockable single occupant stalls.
- Employer should not require an employee to provide medical or legal documentation of their gender identity before using the restroom.

# Applying Dress Codes to a Transgender Employee

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- Employers CAN have dress code, but whether it's discriminatory depends on its enforcement. Ex: If no employee is allowed to wear long earrings, then you do not need to make an exception for a transgender employee.
- However, enforce it consistently by gender identity. Ex: Apply female dress code to all females (including transgender females).
- May need to make exceptions during an employee's transition.
- EEOC recognizes applying dress code out of business necessity:
  - safety reasons
  - visibility (e.g. law enforcement)
  - business image (This is rarely a defense though).

# Family and Medical Leave Act



- Eligible employees may take up to 12 workweeks of FMLA leave in a 12-month period:
  - For the birth of the employee’s child and for bonding with the newborn;
  - For the placement of a child with the employee for adoption or foster care and for bonding with the newly-placed child;
  - To care for the employee’s spouse, son, daughter or parent with a serious health condition; or
  - **When the employee is unable to perform the essential functions of his or her job due to the employee’s own serious health condition.**
  - Examples: Gender-reassignment surgery requiring overnight hospitalization, continued hormone therapy or counseling

## Case to Watch: *Chavez v. Credit Nation Auto Sales, LLC* (N.D. Ga. Jan. 14, 2016)

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- EEOC did not intervene but only filed an amicus brief.
- Plaintiff was a mechanic who worked for a company that sells and repairs cars.
- In 2009, she informs her employer that she intended to transition from male to female.
- Months later, she was fired after a supervisor photographed her sleeping in a car during work hours.
- She filed an EEOC Charge, and employer moved for summary judgment. The employer won on the grounds that it had a legitimate reason to terminate her employment and it was not pretextual.
- Went to the 11<sup>th</sup> Circuit who reversed:
  - “She need not show that the legitimate reason was pretextual... it is enough that she show that discriminatory animus existed and was at least a motivating factor.”
- Set to go trial in the next few months.



# So What Kind of Evidence Did Chavez Present?

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- Mostly statements allegedly made by her boss that:
  - He felt nervous about her transition and said he did not want problems created for her or any other of his employees due to her “condition.”
  - She was going to negatively impact his business.
  - She should not bring up the issue of transitioning with other employees unless asked.
  - He told her not to wear skirts or mini skirts and that jeans and tops were acceptable.
- No prior disciplinary record.
- Told once not to use the unisex bathroom that other female employees use. She complained. Employer asked for legal advice. In the e-mail the lawyer said that management should focus on work and performance and if there are any concerns to write it up. It was argued that the employer tried to find a legit reason to terminate her employment.
- Progressive disciplinary structure, which employer said normally followed, was not.
- Sleeping on the job was not included in the list of behaviors warranting immediate termination.



Transgender auto mechanic Jennifer Chavez HANDOUT





# Current Tension between Federal and State Law



- North Carolina H.B. 2: requires transgender people to use public restrooms according to the biological sex assigned on their birth certificate and prohibits them from filing suit.
- Mississippi H.B. 1523: allows employers to decide whether to hire, terminate or discipline an individual whose conduct or religious belief are inconsistent with his or her sincerely held religious belief.
- So how does this affect federal law?



# EEOC Says: No Defense!

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- “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. These protections apply regardless of any contrary state or local laws.”
- “If a state and local law permits or does not prohibit discrimination based on sexual orientation or gender identity, the EEOC will still enforce Title VII’s discrimination prohibitions against covered employers in that jurisdiction because contrary state law is not a defense under Title VII.”



# The Hobby Lobby Decision

- Hobby Lobby and similar employers whose owners assert religious objections cannot be required to offer insurance coverage to their employees for contraceptive methods that conflict with the owners' religious beliefs.
- Applied to **closely-held corporations**. Court left open the possibility of publicly held corporations bringing RFRA claims.
- Scope of *Hobby Lobby* will likely be tested to determine whether employers can be compelled to, (for example):
  - Provide benefits to same sex spouses;
  - Recognize same-sex marriages;
  - Provide health coverage for sex reassignment surgeries for transgender employees; or
  - Hire homosexual or transgender employees



# What about the “Kim Davis” Employee?

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- Disputes arise when an employee claims a religious right to protest accommodating LGBT employees, which can cause tension and problems in the work place.
- Religious beliefs must also be accommodated.
  - Examples: change schedule, transferring an employee to a different position or exempting them from a dress and grooming policy).
- Must address religious concerns like any other accommodation, but cannot fire or otherwise negatively affect the transgender employee.
  - Perhaps limit interactions. But ask to be courteous like with all employees.
- Employers not required give employee’s requested accommodation.
- Employers do not have to tolerate business disruptions such as refusing to assist customers.
- Always think about the job duties, nature of your business and the size of the employer.





# Employer's Dos and Don'ts

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## Do's

- 1. Update/Revise antidiscrimination and harassment policies** and procedures to ensure that it protects against discrimination and harassment based on gender identity.
- 2. Conduct training and communicate** these policies to managers and supervisors, including how to handle complaints from transgendered employees on equal opportunity training programs to include sexual orientation, gender identity and gender stereotyping.
- 3. Review and revise other applicable policies** to include protections for LGBT workers e.g. **family and medical leave policies, or even dress code policies.**
- 4. Consider posting advertisements** or listings in “LGBT friendly” publications or job postings sites and working with LGBT organizations to attract/retain LGBT applicants and employees.
- 5. Consider gender neutral dress code or enforce dress code in a consistent manner.**

## Do's



6. If employee is comfortable, **schedule a meeting with an employees** undergoing a transition or who you are aware are transgendered. Discuss items such as: timing of gender reassignment procedure, employee's new name or whether co-workers should be informed of the decision.
7. Offer **Nondiscriminatory** Health Insurance.
8. Let workers choose own bathrooms. (Or implement unisex bathrooms for all).
9. **Ensure employee's privacy** re: his or her gender transition (only limited to HR/manager on need-to-know basis)
10. **Update personnel records and other internal records** upon a transgender employee's request (do so promptly!)
11. Check your **state and local laws** if stricter protections apply.

## Don'ts



1. Do NOT require an employee to wear clothes opposite of his or her gender identity.
2. Do NOT prevent a transgender employee from using a gender specific bathroom (even if unisex restroom is available).
3. Do NOT use his/her legal name if he or she has requested using a different name.
4. Do NOT ask invasive questions about medical treatment (raises ADA concerns).
5. Do NOT use derogatory terms to describe transgender employees such as “she/he” or “she-male”, incorrect pronouns.
6. Do NOT talk to other employees about transgender status without notifying employee first and asking consent.
7. Do NOT use quotation marks around the employee’s pronoun or name.

# More Employer Resources for Transgender Issues

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- [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)
- <http://transgenderlawcenter.org/resources/employment>.
- <http://www.hrc.org/resources/transgender-inclusion-in-the-workplace-recommended-policies-and-practices>



# Questions?

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