

PUBLICATION

4 More Things to Know About Transgender Rights in the Workplace

Authors: Marisa Rosen Dorough

October 20, 2016

1. **"Bathroom Bills" Apply to All Public Facilities, Including Showers and Locker Rooms.**

Despite being commonly referred to as "bathroom bills," the laws and policy statements regarding transgender individual's bathroom access apply equally to locker rooms and showering facilities. Bathroom bills are laws that seek to restrict access to *public* facilities on the basis of the sex that an individual was assigned at birth. These regulations, whether merely proposed or actually enacted, are intended to apply to facilities other than just bathrooms.

Whether or not your local guidance is impacted by federal, state, county, or local laws, please be advised that the same directives for restrooms will almost certainly apply to locker rooms and shower rooms. The law in this area is currently in flux and varies from state to state, so please consult with an attorney to confirm what regulations may govern your area.

2. **Use Care in Making Announcements Regarding a Gender Transition.**

Announcements in the workplace regarding the transition of a transgender individual should adhere as closely to possible to routine personnel announcements. In the case of *Bradley Roberts v. Clark County School District*, a transgender male police officer sued his employer in Nevada federal court for discrimination, in part because his commanding officers issued a department-wide email explaining that the officer was changing his name, that he wished to be referred to by his new name and using male pronouns, and that discrimination on the basis of gender identity violates Nevada law. A second department-wide email was sent to confirm that the officer had legally changed his name. The officer took issue with the email because, unlike other personnel matters that were normally announced to supervisors and managers only, this email was sent to the entire police department. The fact that these announcements were not handled like other personnel announcements was cited as evidence of harassment in the officer's EEOC charge of sex discrimination against his employer, for which the EEOC provided an right-to-sue letter.

An employee's transgender status should be considered confidential and should not be disclosed without the employee's express consent. In some instances, an employer or even a transgender employee may believe an announcement is appropriate to lessen the employee's and co-workers' discomfort, answer questions, and avoid harassment. Be thoughtful about both the content and tone of the message. It may be helpful to inform co-workers how to address the employee, including new name or nickname and pronouns, based on feedback from the transgender employee. In conjunction with an announcement, an employer may also want to provide additional training for Human Resources, managers, and/or coworkers regarding prohibitions on discrimination and best practices for dealing with possible discriminatory behavior.

3. **Dress Codes Should be Gender-Neutral.**

Gender norm-defying clothing or make-up can be one of the first outward signs of transgender status noticed by others. Many companies have adopted dress codes to project a professional or industry-relevant image for customers, and have concerns about the consequences of both enforcing or not enforcing a gender-specific dress code. The EEOC has taken the position that employees have the

right not to be subject to gender stereotypes in the workplace.

A funeral home in Michigan faced a federal lawsuit brought by the EEOC when it fired a female transgender employee for violating the dress code. At issue in *EEOC v. R.G. & G.R. Harris Funeral Homes* was a sex-specific dress code that required males to wear a pants suit and tie, and required females to wear a skirt suit. Although the court ruled that the funeral home's pre-existing dress code was not a defense to the wrongful termination claim, the funeral home ultimately prevailed due to an exemption in the Religious Freedom Restoration Act ("RFRA"). The judge determined that removing gender stereotypes in the workplace was a compelling government interest, but rejected the idea that allowing the transgender worker to wear a skirt suit was the "least restrictive means" of removing gender stereotypes. The Court suggested that a gender-neutral dress code would have been a less restrictive means.

Avoid litigation over a dress code before it begins. Employers are encouraged to explore changing or removing sex-specific dress codes and appearance rules. In addition, allow enough flexibility in the dress code to accommodate transition from one gender to the other. As explained in the prior installment, [5 Things to Know About Transgender Rights in the Workplace](#), gender transitions are not all the same and can take place in stages over years. Finally, dress codes should be enforced fairly and equally to avoid claims of special treatment.

4. **Recording Gender For Insurance Purposes**

It can be difficult enough to figure out how an employer's internal records identifying gender should be updated or amended to reflect transgender status. Regulatory and insurance reporting paperwork for employees – particularly fillable forms online – can present even trickier situations. Medical care and coverage is often gender-specific in nature. Employers are encouraged to consult with and defer to the gender that the transgender employee, in consultation with his or her medical provider, prefers to use for insurance purposes. However, any inquiry should be kept private and go no further than necessary. A transgender employee generally has the right to maintain the privacy and confidentiality of a gender transition, such as therapies, medications, or surgical procedures, under the Health Insurance Portability and Accountability Act (HIPAA).

Employers should also note that if a gender-transitioned employee was validly married prior to the transition, the transition does not affect the validity of that marriage. Benefits provided through spousal coverage generally should be extended or continued even though the transitioned employee has a new name and gender.