

# **SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM)**

## **Employing Transgender Workers Guidance Document**

### ***Website Document***

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## **Overview**

This article focuses on workplace issues related to the employment of transgender individuals in an organization. Among the issues are those that may surface when an employee makes the transition from living as one sex to living as the other.

The term "transgender" is commonly used to refer to individuals whose gender identity and/or expression is different from their sex assigned at birth or with standard societal expectations of the male and female gender roles. Transgender people may be straight, lesbian, gay, bisexual, or asexual, just as non-transgender people can be.<sup>1</sup>

Transgender individuals often suffer discrimination in various aspects of their lives, including employment. This discussion sets forth reasons that employers should be knowledgeable and accommodating toward transgender workers and should tolerate no workplace discrimination against them. The article explains HR's role in helping an organization prepare for and meet its responsibilities in this area.

## **Background**

"Transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth," according to the APA. "Gender identity refers to a person's internal sense of being male, female, or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics."<sup>2</sup>

One of the transgender identities is that of transsexual—a person whose gender identity is different from the individual's assigned sex. "Often, transsexual people alter or wish to alter their bodies through hormones, surgery, and other means to make their bodies as congruent as possible with their gender identities," the APA explains. "This process of transition through medical intervention is often referred to as sex or gender reassignment, but more recently is also referred to as gender affirmation."<sup>3</sup>

It is important to note that while the APA website references transsexual people, they also state that, "the term "transsexual" is largely outdated, but some people identify with it; this term should be used only for an individual who specifically claims it."

Statistics on the numbers of transgender individuals are scarce. What is better documented is that many—perhaps most—transgender men and women are targets of discrimination and sometimes violence and hate crimes. Discrimination may be overt, such as denial of access to a workplace restroom, or it may be subtle, such as disapproving glances or privacy-invading questions from co-workers.

In some instances, a transgender person will make the change to the other gender while employed. The means of making such a transition may or may not include medical or surgical procedures, but it will result in the person living as a member of the other sex. In such circumstances, the employer should help the person with workplace concerns during and after the transition and should help the rest of the workforce deal with the transition.

## **The Legal Framework**

### **TITLE VII OF THE CIVIL RIGHTS ACT**

Title VII protects individuals against employment discrimination on the basis of race and color, national origin, sex, and religion; it applies to employers with 15 or more employees. Among the types of employers required to comply with Title VII are private-sector organizations (including employment agencies and labor organizations) as well as state and local governments and the federal government.

Although official rulings on complaints of discrimination against transgender employees have varied over the years, the [U.S. Supreme Court ruled on June 15, 2020](#) that sexual orientation and gender identity or expression are included in the definition of "sex", therefore, employers may not discriminate against transgender individuals in employment.

In addition to the federal interpretations of what constitutes sex discrimination under Title VII, legal protections are emerging for transgender employees at the state and local levels.

### **STATE AND LOCAL ANTI-DISCRIMINATION LAWS**

Numerous states and localities across the United States have enacted laws that expressly prohibit employment discrimination based on gender identity and expression. Employees working in [those states](#), regardless of where the employer is headquartered, are protected by those laws.

### **PATIENT PROTECTION AND AFFORDABLE CARE ACT (AFFORDABLE CARE ACT OR ACA)**

Section 1557 is the nondiscrimination provision of the ACA which prohibits sex discrimination in health insurance. The law was designed to reform the U.S. health care system by expanding the availability of health insurance, regulating coverage and restructuring health care delivery, including how it is paid for. In July 2012, the U.S. Department of Health and Human Services (HHS) stipulated that the law's prohibition against sex discrimination applies to transgender people.

On May 13, 2016, the HHS Office for Civil Rights issued the [final rule](#) implementing Section 1557.

However, on December 31, 2016, the U.S. District Court for the Northern District of Texas issued an opinion in *Franciscan Alliance, Inc. et al v. Burwell*, enjoining the Section 1557 regulation's prohibitions against discrimination on the basis of gender identity and termination of pregnancy on a nationwide basis. Then on June 12, 2020, the HHS released [final rules](#) eliminating anti-discrimination protections based on gender identity in health care and health insurance.

Whether or not Title VII's protections for LGBTQ individuals will affect the most recent HHS ruling remains to be seen. The ACA's protections were based on Title IX definitions of sex, not Title VII, but they are related, and more litigation is expected.

### **AMERICANS WITH DISABILITIES ACT OF 1990**

The Americans with Disabilities Act of 1990 (ADA), including changes made by the ADA Amendments Act of 2008, specifically excludes from its definition of disability "transvestism, transsexualism, pedophilia, exhibitionism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."<sup>4</sup> Nonetheless, some transgender individuals may suffer from depression or other medical conditions that could be covered under the law. Employers should consult with legal counsel before making any negative employment-related decisions related to a medical disability of a transgender worker.

### **STATE DISABILITY DISCRIMINATION LAWS**

Although the ADA excludes gender identity disorders from its definitions of disability, state disability discrimination laws may be broader and may not contain such exclusions. Employers should check with their attorneys regarding their states' laws on gender identity issues.

### **FAMILY AND MEDICAL LEAVE ACT OF 1993**

Some treatments and procedures for transgender employees may not qualify for employment leave under terms of the Family and Medical Leave Act (FMLA), but others may. Some that may qualify could include treatment related to gender dysphoria, overnight hospital stays related to sex-reassignment surgeries and continued counseling with a mental health professional. As with all requests for FMLA leave, the employer should follow normal notification procedures and review each medical certification to determine FMLA applicability.

### **STATE FAMILY AND MEDICAL LEAVE LAWS**

Some states' medical leave laws may be broader than the federal FMLA. For example, the FMLA does not include domestic partners in its definition of "spouse," but some state medical leave laws do. Employers should know the terms of their states' laws on family and medical leave.

## GLOBAL ANTI-DISCRIMINATION PROTECTIONS

Several countries have protections in place to prevent various types of human rights discrimination aimed at transgender individuals. For example, in the United Kingdom (UK) the [1999 Sex Discrimination \(Gender Reassignment\) Regulations](#) are applicable to all stages of employment. Both the UK and Spain allow transgender individuals to change their name and gender on official documents without undergoing surgical changes. In the European Union, a 1996 decision in the European Court of Justice provided workplace discrimination protections for workers undergoing gender reassignment.

South Africa and many states and territories in Australia also prohibit discrimination against transgender people.

In 2006 a group of international human rights experts met in Yogyakarta, Indonesia to outline international rules relating to sexual orientation and gender identity, known as the [Yogyakarta Principles](#). In 2017 additional rules were added to form the Yogyakarta Principles plus 10.

See [Employers in India Expand Inclusion to Cover LGBTQ Employees](#).

### Organization Policies

In light of the various legal protections and legislative initiatives pertaining to transgender employees, employers should update their policies and practices to make sure gender identity and gender expression are explicitly included. Following are some of the workplace policies that employers should examine:

- **Anti-discrimination policy.** As a commitment to equality, compliance under Title VII and where state law requires, ensure sexual orientation, gender identity, gender expression and similar terms are on the list of protected classes. See [Equal Employment Opportunity Policy: Detailed](#).
- **Dress code policy.** Avoid gender stereotypes, such as men must wear dress trousers and women must wear skirts. Do not apply dress codes to off-duty conduct. Consider adding a provision that workers may dress in accordance with their full-time gender expression. See [When Do Dress Codes That Perpetuate Gender Stereotypes Cross the Line?](#)
- **Benefits policies and offerings.** Follow applicable state laws and monitor the federal law for changes to the ACA. Title VII will not allow the conditions of employment to be discriminatory based on sex, which will apply to benefit offerings. Some states will prohibit discrimination on the basis of gender identity as well and benefits must be designed to meet those requirements. See [3 Checklists for Avoiding LGBTQ Discrimination in Your Benefits Programs](#).
- **Diversity and inclusion initiatives.** Make certain that transgender workers are included in the organization's affinity groups, local outreach efforts, internal programming and related training. See [How to Create Inclusive Workplaces for Transgender and Nonbinary Employees](#).
- **Recruitment and selection processes.** Review processes for possible disparate impact or treatment of transgender workers. Improve processes by educating

recruitment teams, contacting outreach organizations and conducting anti-discrimination analysis as needed. See [Hiring Bias and Workplace Bias](#).

## **TRAINING**

Training employees to recognize and eliminate discrimination in the workplace is important for every employer and updating the organization's presentations to cover transgender workers is essential to provide equal opportunity to all employees. Such training should be included in both new-hire and annual training offerings. In addition, the employer's updated anti-discrimination training should be offered to all employees so that they understand the organization's expectations when a transgender employee is joining their ranks or when a current employee is in gender transition. Various support groups may be able to provide sample training presentations or speakers to help employers ensure the training is appropriate. See SHRM's sample [training presentations](#) for templates that can be used to prepare and educate a workforce on employer nondiscrimination and diversity and inclusion expectations in general.

### Workplace Issues

Some transgender individuals make the transition to full-time expression as another gender while on an employer's payroll. The transition may or may not include surgery, but it will likely require management's help with the person's adjustment in the workplace—and to help with co-workers' concerns throughout the process.

## **MAKE PREPARATIONS**

Although the number of people making a gender transition while remaining in their jobs appears to be increasing, few managers receive training to prepare for the moment when an employee informs them of plans to make such a transition. Knowledge of principles and techniques relevant to more familiar discrimination areas can be applied to issues that arise when an employee transitions. For a transition to be considered successful, it must work for the person in transition, for the people the individual works with and for the organization. If the organization follows basic guidelines, this process can go smoothly.

A complete discussion on managing a gender transition in the workplace is outside the scope of this article, but some general principles are offered. Management typically meets with the employee in transition, discusses changes that need to be made, and lets the timing of those changes be guided by the employee. Matters that may come up for consideration during the process include the following:

- The person's name on organization documents.
- Coverage under employer health benefits.
- Communications to co-workers.
- Security clearances.
- Restroom and dressing room use.

- Dress code rules.
- Medical leave eligibility determinations.
- Employee conduct expectations and training.
- Client and customer communications.

## **APPROACH EACH TRANSITION INDIVIDUALLY**

No two transitions are exactly alike. Some people, because of medical circumstances, are precluded from taking hormones or having surgery. Some postpone or decide against major surgical procedures because the costs are prohibitive for them and are not covered by their health insurance. Some in transition may choose cosmetic surgery, electrolysis, voice training or other procedures.

The specific steps of transition and their timing vary among individuals, and individuals vary in how public they want their transition to be. Some prefer that very few people know about the transition, and they want to blend in quietly as members of their new gender. Others are committed to educating people about transgender issues, are eager to answer questions and continue to talk openly about being transgender long after transition.

Work situations vary, too. The many circumstances that may have a bearing on how the transition should be handled include the nature of the enterprise and the degree to which it is public or private, the organizational culture, the composition of the workforce, the type of work being done, the physical layout of the workplace, and the amount of interaction the transgender employee has with peers, superiors, subordinates, vendors and clients. Because of such variables, there is no single formula for managing transitions in the workplace; rather, the process must be tailored to meet the needs of each specific situation.

## **BE KNOWLEDGEABLE ABOUT THE LEGAL DEFINITIONS OF GENDER**

There is no single means of defining a person's legal gender, and there is no point in time when a transgender person changes from one gender to the other. The laws and rules on gender vary according to jurisdiction. For example, many states permit a transgender person to obtain a new driver's license with relative ease; this can help accommodate the medical requirement that a transgender person in surgical transition must live as a member of the person's new gender for at least a year prior to undergoing genital reconstructive surgery. In other states, changing the sex designation on any form of state-issued identification may be very difficult or even impossible. No uniformity on this issue exists among the states, between state and federal policies, or even among federal agencies.

Another influence on how transgender people are viewed is the context in which legal gender is being considered. Having a driver's license that shows the person's new sex is generally sufficient to enable a transgender person to be treated legally as a member of that gender. Some agencies, however, will not acknowledge a transgender person's new sex until the person

presents evidence that the individual has taken an irreversible step to alter the body in the direction of the target sex. Such an irreversible step could be taking hormones over a period of time or having chest or genital reconstructive surgery. For some purposes, only genital surgery meets the requirement for having changed sex, but the exact nature of the genital surgery may be unspecified.

Given the variables in the law, tying recognition of gender in the workplace to legal recognition of the person's sex is problematic. Even more dubious is any attempt to base the person's acknowledged gender on medical or surgical treatment milestones. The most sensible approach for the employer is to consider the person to be a member of the sex in which the person presents. This approach is in accord with the growing legal trend toward recognizing that a transgender person should be treated as a legal member of the gender in which the individual lives life.

Some transgender and gender-nonconforming individuals prefer to use pronouns other than he/him/his or she/her/hers, such as they/them/theirs or ze/hir. See [Using Employees' Preferred Gender Pronouns](#).

## **KNOW HOW TO DEAL WITH CO-WORKERS' ATTITUDES**

Many co-workers want to be supportive of transgender workers. Some employees, however, may be offended by the idea of a transgender person. Gender transition may run counter to their religious beliefs or moral standards. To reduce the likelihood of negative reactions to gender transition, the organization can establish a culture of appreciation of differences, provide adequate training and treat all employees fairly.

Diversity in a workplace means employees are able to work with all people; it does not require that employees believe in or accept transgenderism. Employees are entitled to their beliefs, but they should also be required to treat the transgender person—and every other employee—with respect.

Inclusion is about a diverse workforce becoming more productive, innovative and creative. It is about effectively harnessing the full range of available perspectives and experiences to create business advantage. To create a more inclusive environment, some organizations define appropriate workplace behaviors that are consistent with the employer's stated beliefs and values about inclusion and productivity. This process is about changing employees' workplace behaviors to be in accordance with the company's values, not changing an employee's personal beliefs and values. See [Creating a Trans-Inclusive Workplace](#).

Like all workers, transgender employees will be happier and more productive in a positive, supportive working environment. Just as an older worker employed in a workplace with mostly younger employees or a male employee working with mostly women might feel out of his element and comfort zone—and maybe even a bit ostracized—a transgender person regularly



encounters such environments. Therefore, an employer that can foster and provide a positive, inclusive working environment, based on respect and professionalism, will likely enjoy workers who are happy to be there, engaged in their work and in the organization's success, and respectful of others.

## **COMMUNICATE WELL**

Information about the organization's policies and guidelines for managing a gender transition should be widely accessible for employees, supervisors and managers, and HR professionals. The HRC's Workplace Gender Transition Guidelines<sup>5</sup> recommends that information appear in various venues, including these:

- The organization's intranet, particularly the HR resources pages and any pages for LGBTQ+ employee groups.
- The company's online and print code of conduct documents, covering employment nondiscrimination, equal employment opportunity policy, dress code, restroom policy and other topics.
- The search engine used to navigate company sites and pages. Users should be able to find information by searching terms such as transition guidelines, gender identity, gender expression, transgender, transsexual, cross-dress, gender reassignment, sex reassignment, sex change or transgendered. (The terms sex change and transgendered are not preferred terminology, but are intended to capture potential searches).
- Employee assistance program resources.
- HR hotline resources.

See [Template for Gender Transition Guidelines](#).

When announcing an employee's plan to transition, senior management can send a strong message of support for the transitioning employee and set the tone for what is expected of staff.

### Endnotes

<sup>1</sup>American Psychological Association. (n.d.). Answers to your questions about transgender people, gender identify and gender expression. Retrieved from <http://www.apa.org/topics/lgbt/transgender.aspx>

<sup>2</sup>Ibid.

<sup>3</sup>Ibid.

<sup>4</sup>Title 42, Chapter 126, Sec. 12211. Definitions. Retrieved from <https://www.ada.gov/pubs/adastatute08.htm#12211>

<sup>5</sup>Human Rights Campaign. (n.d.). Workplace gender transition guidelines. Retrieved from <http://www.hrc.org/resources/entry/workplace-gender-transition-guidelines>