

# Transgender Employees – – Which Bathroom?

## Labor & Employment Law Update

on February 3, 2014

More employers are encountering issues with transgender employees and job applicants. The term “transgender” has various meanings, ranging from people who have undergone a sex change operation, are considering or preparing for such an operation, or are merely dressed like the opposite sex.

There are indications that “gender identity” could become a category of work place discrimination. The U.S. Senate recently passed a bill providing protection against work place discrimination on the basis of sexual orientation or gender identity, although the bill is considered dead on arrival in the House. The EEOC has taken the position that discrimination based on gender identity is impermissible under Title VII. So, although the law is not well-developed, there is a trend emerging.

One basic issue is which restroom a transgender employee must use. Under current law in most states, employees should use the facilities that match their current gender. In other words, if a male employee is transitioning to being female, but is still anatomically male, he should use the men’s room. However, given the evolving status of the law on this issue, employees are well-advised to take additional steps. For example, the work force should be engaged through training so that they are aware of the transgender employee and treat the employee with respect. This type of sensitivity training is useful to avoid liability for claims where other employees are accused of harassing the transgender employee. A unisex bathroom is also useful, if it is available. Often, while much of the work place will be tolerant of the transgender individual, a portion of the work force may be uncomfortable with sharing a bathroom with the transgender employee. A unisex bathroom can solve the problem.

Other steps that are recommended are to review and revise the employee handbook to prohibit discrimination based on gender identity or expression, update personnel records to reflect the gender transition, and review dress codes to avoid gender stereotypes. Also, if an employee has undergone surgery and is fully transgender, the employee’s status should be kept confidential just like other personal medical information.

Please keep in mind that this is a cutting edge issue and that the law varies from state to state. It is imperative that employers consult with experienced labor and employment counsel when dealing with transgender issues.