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## **Transgender Employees & Customers: Practical Considerations for Managing Risk & Politics**

### **I. Definitions**

The EEOC's website provides guidance for the term "transgender."

"Transgender" refers to people whose gender identity and/or expression is different from the sex assigned to them at birth (e.g. the sex listed on an original birth certificate). The term transgender woman typically is used to refer to someone who was assigned the male sex at birth but who identifies as a female. Likewise, the term transgender man typically is used to refer to someone who was assigned the female sex at birth but who identifies as male. A person does not need to undergo any medical procedure to be considered a transgender man or a transgender woman.

Courts have also provided definitions of certain terms.

1. **Transgender:** 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. American Psychological Association, *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression*, p. 1 (2011). "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).
2. **Gender Identity:** A person's internal sense of being male or female (or, in some instances, both or neither). *Glenn*, 663 F.3d at 1316. Since gender identity is internal, one's gender identity is not necessarily visible to others.
3. **Gender Expression:** The way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics. *Glenn*, 663 F.3d at 1316.

4. **Transition:** The time when a person begins to living as the gender with which they identify rather than the gender they were assigned at birth, which often includes changing one's first name and dressing and grooming differently. Transitioning may or may not also include medical and legal aspects, including taking hormones, having surgery, or changing identity documents (e.g. driver's license, Social Security record) to reflect one's gender identity.
5. **LGBT:** Lesbian, gay, bi-sexual, transgender. All have different meanings.

## **II. Managing the Risk and the Claims**

The EEOC's position is that transgender status is a protected class. In *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012), the EEOC concluded discrimination based on transgender status is sex discrimination in violation of Title VII.

Macy applied for a job while presenting as a male. He alleged the interview process went well and he was promised the job, as evidenced by the initiation of background investigations for the position. While awaiting the results of these investigations, Macy advised the potential employer that he was transitioning from male to female. Five days later she was informed that federal budget reductions had eliminated the potential position. She later learned that the position had not been eliminated, but that it was awarded to someone else. The potential employer stated the person ultimately hired was farthest along in the background investigation, Macy argued this was a pretext.

The focus of the appeal was whether transgender status was protected under Title VII. The EEOC stated "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process." It relied, in part, upon an Eleventh Circuit decision concluding Title VII barred "not just discrimination because of biological sex, but also gender stereotyping-failing to act and appear according to expectations defined by gender." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). Title VII's protections encompass transgender status "in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."

The Commission also addressed common questions raised about transgender status. It reiterated that discrimination against transgender status is discrimination based upon gender.

This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.

The analysis relied, in part, upon the logic of *Schroer v. Billington*, 577 F. Supp. 2d 293,306 (D.D.C. 2008) where the Library of Congress rescinded a job offer when the applicant transitioned from male to female.

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

*Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013) concerned a postal worker who apparently transitioned from male to female and alleged she was then subjected to a hostile work environment. The worker alleged that her supervisor repeatedly referred to her as “he.” While not deciding the merits of the claim, the EEOC stated “supervisors and coworkers should use the name and pronoun of the gender that the employee identifies with in employee records and in communications with and about the employee. Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.”

*Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014) concerned a VA employee who was transitioning from female to male. He legally changed his name and then submitted a request to the VA information security officer to have this change recognized for computer access purposes. He alleged the agency's officer refused to implement the change.

Complainant explained that it was important to him to change his name in the VISTA system because many people accessed the system, including veteran clients and other employees, which resulted in many questions about "Cynthia" (his unchanged user name in the system). Complainant said this put him in the position of having to divulge the reason for his name change, which he felt was a breach of his privacy. When he

discussed the matter with his immediate supervisor, he was given permission to switch his Shreveport cases with coworkers so he did not have to explain the name change. However, Complainant stated that as time went on without his name being changed in the system, switching cases began to have a negative impact on his workload and created a problem for him to meet his case quota under his performance standards. It is undisputed in the record that Complainant's name was not changed in the Shreveport VISTA system until a year after he first made the request to do so, and only after he had initiated EEO counseling on the matter.

The EEOC concluded a proper claim had at least been alleged and should be permitted to proceed.

The topic of bathrooms specifically arose in *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015). A civilian working for the U.S. Army transitioned from male to female in 2010. She also legally changed her name and requested that her current name and sex be reflected in her personnel records. This request was honored.

Lusardi's supervisors then met with her. They discussed the transition process and how Lusardi "would explain her transition to colleagues and the estimated timeline for any medical procedures." They "also discussed which bathrooms Complainant would use when she began presenting as a woman." A plan was drafted indicating that Lusardi "would use a single-user restroom referred to as the 'executive restroom' or the 'single shot rest room' rather than the multi-user 'common women's restroom' until Complainant had undergone an undefined surgery."

There were competing facts alleged as to the motivation for the plan. Regardless, the manager who eventually adopted the plan stated:

I made the decision based on the fact that I have a significant number of women in my building who would probably be extremely uncomfortable having an individual, despite the fact that she is conducting herself as a female, is still basically a male, physically.

And that would cause as many problems if more problems [sic] than having the individuals use a private bathroom. I also thought that under the circumstances, a male restroom would be inappropriate. So, that was left [sic] to use the single use bathrooms.

Another supervisor testified that Lusardi's bathroom access was conditioned upon a medical procedure.

Lusardi attempted to abide by the plan, but alleged there were instances when could not due to the designated restroom being cleaned or being out of service. At those moments, she chose to use the women's restroom. Each time she did, a supervisor confronted Lusardi and "told her she'd been observed using the common women's restroom, that she was making people uncomfortable, and that she had to use the executive restroom until she could show proof of having undergone the "final surgery."

Finally, Lusardi also alleged harassment. Specifically that one supervisor repeatedly referred to her by her former male name and male pronouns.

The EEOC ultimately concluded that denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination. It reinforced prior rulings that an employer cannot condition access to a common restroom right on the employee undergoing or providing proof of surgery or any other medical procedure. Importantly, an employer cannot avoid the requirement to provide equal access to a common restroom by restricting a transgender employee to a single-user restroom instead, though the employer can make a single-user restroom available to all employees who might choose to use it. It also directly addressed the political or societal concerns that may arise. "[S]upervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."

This guidance was also later applied to schools. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), deferred to the U.S. Department of Education's position that the prohibition against sex discrimination under Title IX requires educational institutions to give transgender students restroom and locker access consistent with their gender identity.