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**“ARE YOU READY FOR MS. COX? TRANSGENDER INDIVIDUALS
AND EPL ISSUES FACING EMPLOYERS”**

I. Media Attention to Transgenders Raises Awareness.

Caitlin Jenner and Laverne Cox have received a great deal of media attention recently. However, not all transgender individuals end up on the cover of a national magazine or with a television show. Even Caitlin Jenner and Laverne Cox admit that their journey has been difficult. They have, however, along with recent activity by the Equal Employment Opportunity Commission ("EEOC") raised awareness of the issues facing transgenders and particularly those in the work force.

For those transgender employees who are not on television, their employment experiences are quite different. Many employees have been terminated as soon as the employer learns that the employee is transgender.

The law, however is rapidly changing and providing protections to transgender employees. Cases are being asserted by the EEOC addressing employee dress codes; which bathroom an employee may use; and, the name by which that employee prefers to be called.

A variety of reasons nonetheless have been and continue to be espoused by employers as to why they needed to fire a transgender employee – some of those reasons includes religious objections. But, if the EEOC's directives are to be followed, employers must reevaluate their policies and procedures and also how they insure that transgender employees are not discriminated against in the workplace.

II. Basic Understanding.

It is perhaps best to start with a basic understanding of certain definitions.

"Transgender" is a term for people whose gender identity or behavior differs from those typically associated with their gender at birth. This can include transsexuals, cross-dressers and gender non-conforming individuals.

"Transition" refers to the time period when the person begins to live as their new gender. It is at this point that one makes changes to their driver's license, social security; as well as when one begins dressing as that gender; taking hormones and then "sex reassignment surgery".

III. It has been a long journey.

In 1964 the Civil Rights Act became the law of the nation and prohibited employers from discriminating against employees on the basis of sex, race, color, national origin and religion. In 1964, at the time that the Civil Rights Act was passed, the issue of gender identity or sexual orientation was not even discussed. For Laverne Cox, an African American transgender, before 1964, she did not even have protections as an African American.

There is no mention of gender identity or sexual orientation as being protected under Title VII. Many have argued that if Congress had intended to include sexual orientation or identity, it would have included same. However, that argument has been slowly eviscerated.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court would expand Title VII to include discrimination based on gender stereotyping. In this now famous case, a woman alleged that she was denied partnership because she did not fit the female stereotype. The woman was described as being "too aggressive". In fact, was told that if she wanted to improve her chances for partnership she should wear more makeup or have her hair styled and wear jewelry. While the Supreme Court found that this was discrimination based on gender stereotyping, the case did not go so far as to state that sexual orientation was protected under Title VII.

This analysis of discrimination based on gender stereo typing as being in violation of Title VII has been expanded to prohibit discrimination on the basis of sexual orientation and gender identity. Over time, courts have expanded that analysis to included transgender employees. *Lopez v. River Oaks Imaging and Diagnostics Group, Inc.*, 542 F. Supp.2d 653 (S.D. Texas 2008); *see also, Michaels, v. Akal Security*, (Colo. 2010), Civil Action No. 09-cv-01300-ZLW (while court dismissed some claims by male to female employee, claims under Title VII for gender stereotyping allowed to proceed).

IV. The EEOC Leads The Way.

Perhaps the biggest driving force in expanding protections to transgender employees has been the EEOC. In December of 2012, the commission voted to include its Strategic Enforcement Plan coverage of lesbian, gay, bi-sexual and transgender individuals under Title VII's Sex Discriminations Provisions as part of an enforcement priority for their fiscal years 2013 to 2016. Indeed in 2012, the EEOC held that discrimination against an individual because that person is transgender is discrimination because of sex and gender identity and prohibited under Title VII. *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012).

Then, in February of 2015, the EEOC issued a Memorandum stating that its field offices would now process and investigate claims of discrimination based upon sexual orientation, transgender status and gender identity as charges of discrimination. Furthermore, the EEOC stated that complaints about sexual orientation discrimination can constitute a "protected activity" for the purposes of a claim of retaliation. Equal Employment Opportunity Commission Memorandum, Update on Intake and Charge Processing of Title VII Claims of Sex Discrimination Related to LGBT Status, February 3, 2015 <https://s3.amazonaws.com/s3.documentcloud.org/documents/1670449/eoc-lgbt->

field-guidance.pdf The memorandum sets forth areas in which the EEOC “remains interested” for purposes of policy development, such as issues of first impression or other issues of significance regarding LGBT discrimination, including:

- Claims related to discriminatory policies;
- Insurance issues including benefits for same-sex couples or transgender individuals;
- Access to facilities based on gender identity;
- Questions of coverage, such as whether the alleged discrimination related to transgender status, gender identity, or sexual orientation constitutes sex discrimination under Title VII); and
- any other “unsettled issues on which stakeholders could benefit from policy guidance, technical assistance, or outreach” and charges which may assist the EEOC to “articulate policy on emerging or novel issues of this nature.”

In July of 2015, the EEOC explicitly ruled that failure to hire someone because they are gay constitutes sexual discrimination under Title VII. In *Baldwin v. Department of Transportation*, an employee of Miami Airport alleged that the Federal Aviation Administration (FAA) denied him a permanent position as a frontline manager because he was gay. On July 15, the EEOC held for the first time that Title VII prohibits employment discrimination based on sexual orientation. The EEOC found that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.” The EEOC based its decision on three theories:

1. Sexual orientation is “premised on sex-based preferences, assumptions, expectations, stereotypes, or norms;”

2. Discrimination based on sexual orientation is “associational discrimination on the basis of sex,” analogizing sexual orientation discrimination to race-based discrimination; and that

3. Sexual orientation discrimination impermissibly relies on gender stereotyping. In support of this last proposition, the EEOC relied heavily on a 1989 Price Waterhouse Supreme decision.

This case was a giant leap forward for the LGBT community. While it applies to federal employees, this case coupled with the EEOC's directives made it clear that the EEOC would be proceeding against employers who discriminated against LGBT employees.

V. EEOC Paved the Way—Courts Are Following

The EEOC has been following its plan and pursuing claims of discrimination against transgender employees. *EEOC v. Lakeland Eye Clinic*, Civ. No. 8:14-cv-2421-&35 AEP (M.D. Fla. 2015) (\$150,000 settlement by clinic that fired an employee after employee informed them that she was transgender and intended to start presenting as a woman), *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, Case No. 14-13710 (E.D. Mi. 2015) (Alleged discrimination against a transgender employee because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes). In accordance with same, the EEOC has either been investigation charges of discrimination against transgender employees and filing

and joining lawsuits when not submitting amicus briefs.
http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm

Courts do not appear to be too far behind. at least two courts have recently issued decisions which are consistent with the EEOC's position. *Isaacs v. Felder Services, LLC*, Civil Action No. 2:13cv693-MHT. (M.D. Al. 2015); *Videckas and White v. Pepperdine University*, Case No. 15-00298 (C.D. Ca. 2015) (Title IX case where the court references Title VII in its analysis "claims of sexual orientation discrimination are gender stereotype or sex discrimination claims.")

VI. Protections Not Just From Wrongful Termination of Employment.

The EEOC has also been pursuing employers whose policies the EEOC believes discriminate against transgender employees. For example, the EEOC filed a law suit against Deluxe Financial Services (Case No. 15-cv-02646 D. Minn.), when after a long termed employee started to present as a woman and informed her supervisors that she was transgender, the employee was terminated. The company refused to let the employee use the women's restroom and the employees also refused to call the employee by the correct pronoun. The EEOC argued that this and other conduct violates Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination, including that based on transgender status and gender stereotyping. These violations include subjecting an employee to different terms and conditions of employment based on their gender identify. This decision is consistent with the EEOC's prior decision in *Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (April 1, 2015), where the army forced a transgender individual to use a certain bathroom and refused to use the pronoun chosen by that individual. Simply stated, by requiring an employee to use a specific bathroom, the employer is according to the EEOC discriminating against that employee.

The EEOC also recently joined a lawsuit brought by Tristan Boussardt who was hired by a financial firm within minutes of the interview. But, when the driver's license had a different gender than Boussardt presented, Boussardt was shown the dress code for women and told either Boussardt dress like a woman as he was born or be fired. Boussardt also alleges the loan company asked to him to sign a document acknowledging that his gender identification violated the company's policies and acknowledging that he would need to share hotel rooms with women if traveling overnight for business. As stated above, the EEOC has now joined this lawsuit.

The simple take away is that the EEOC will pursue claims against employers who force transgender employees to use a specific bathroom and who is not called by the proper pronoun.

VII. Coming to Your City or State.

The Supreme Court has not yet ruled on the matter and Congress has not yet acted. But, The EEOC is aggressively pursuing charges of discrimination against transgender employees and regulations and laws are being passed with which employers must familiarize themselves.

States/Cities

California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia all have laws that protect individuals based on gender identity or sexual orientation.. Their protections vary. For example, Nevada's law bans discrimination in employment, housing, and public accommodations like restaurants, hospitals, and retail stores; Maine's law covers those categories plus access to credit and education.

At least 200 cities and counties have banned gender identity discrimination, including Atlanta, Austin, Boise, Buffalo, Cincinnati, Dallas, El Paso, Indianapolis, Kansas City, Louisville, Milwaukee, New Orleans, New York City, Philadelphia, Phoenix, Pittsburgh, and San Antonio, as well as many smaller towns.

The governors of Indiana, Kentucky, Michigan, New York, and Pennsylvania have issued executive orders banning discrimination against transgender state workers. Some cities and counties have also protected their transgender public employees through local ordinances, charter provisions, or other means. People discriminated against by public entities on the basis of gender identity might also be able to argue that the government's action was unconstitutional.

OSHA

OSHA has issued guidelines which provides Best Practices for Restroom Access for Transgender Employees. According to OSHA all employees, including transgender employees should have access to a restroom that corresponds to their gender identity. Like the decision in *Lusardi*, an employee cannot be required to use a separate or specific restroom of the employee's choosing.

www.osha.gov/Publications/OSHA3795.pdf

VIII. Best Practices

Besides keeping up with the current laws, it is also critical to update employee policies and handbooks. There are model transgender employment policies available. (<http://translaw.wpengine.com/wp-content/uploads/2013/12/model-workplace-employment-policy-U2.pdf>) and (<http://williamsinstitute.law.ucla.edu/wp-content/uploads/EO-Model-Policy-October-2015.pdf>)

Policies should be reviewed to ensure that they include "sexual orientation, gender identity or expression" as protected categories.

The dress code policy should not be such that it would discriminate against an employee who for example is in transition. Make dress code policies gender neutral and avoid gender stereo types. If the dress code is reasonable and consistently applied, it may not be discriminatory.

Remove any insurance exclusions that are discriminatory. If it is a medically necessary procedure, it should be included in the healthcare coverage.

Communication and education is key. Supervisors should be educated on the changing laws and the need for privacy. An employee in transition may be going through medical procedures. The disclosure of this information would be violating that employee's rights and other laws. It is important that like any other employee, the transgender employee's health status be kept confidential.

Be prepared for name changes and also be prepared to call that employee by their chosen name. Develop systems for addressing situations in which an employee's gender presentation does not match legal documents. Each state has different laws with regards to how legal documents such as driver's license may be changed. Become familiar with such laws.

As for which name to use in the work place, a great comedian, John Oliver, once commented that throughout the years, a rapper has gone by various names; P Diddy, Sean Combs, Puff Daddy and Diddy. Everyone went along with his every name change. The same should hold true for transgender employees. Make sure to change the names of any employee who has transitioned in all the employment records; personnel records; directories and business cards. Remembering all the time of course, that privacy should be maintained.

As with any discrimination complaint, make sure to have policies and procedures in place. Act promptly and impose a remedial action if necessary.

IX Religious objections.

An employer may encounter an objection by an employee on religious grounds. This summer a clerk made headlines when she refused to issue marriage licenses to same sex couples. Recently a school teacher in Houston, Texas was terminated when she, according to the school, she was using her cell phone in school; gossiping and otherwise acting inappropriately in front of the children. The teacher has sued stating that she was fired because she had a religious objection to calling a transgender student by the pronoun matching his chosen identity. The teacher is claiming discrimination under Title VII because of her race, gender, age and religious beliefs.

The lawsuit was filed by the teacher around the same time Houston struck down an anti-discrimination law that would have protected transgender individuals. <https://genderidentitywatch.files.wordpress.com/2015/11/day-care-workers-claim-they-were-fired-over-transgender-student.pdf>

What is an employer to do?

Employers should analyze what the complaints are of the employee objecting. The objection may have nothing to do with religion or the essential job functions of that employee. The employer should explain that it is not asking employees to change their religious beliefs or opinions. However, employers must explain that it has an obligation prevent discrimination and a hostile work environment. .

When confronted with such a situation the employer should be receptive to the objecting employee's concerns and see whether a reasonable accommodation can be made

and keeping in mind that this employee is not entitled to the accommodation of choice. But, communication is always the better route.

As to pronouns, the employees and supervisors should be instructed to use whatever pronoun the transgender employee has chosen.

X The Future

While we still do not have a decision from the Supreme Court on the topic, it is clear that the EEOC will investigate and pursue claims of discrimination against transgender employees. Several courts have agreed and many states have passed laws protecting transgender individuals.

The Employment Non-Discrimination Act which is presently in the House would add gender identity as a protected class. Employers would thus be well served by updating their policies and educating its work force.

It is estimated that there are 700,000 transgender individuals in the United States. Transgenders are reported to have double the rate of unemployment; harassment on the job; poverty and lack of health insurance. It is a situation which the EEOC will not ignore and neither should employers.