

**BEFORE, DURING AND AFTER:  
WHAT ARE AN EMPLOYER'S RESPONSIBILITIES  
WHEN AN EMPLOYEE TRANSITIONS GENDER?**

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## I. Introduction

Maureen, a Line Supervisor who works on your plant's second shift, recently shared with HR her plan to transition from female to male over the next year. You've met Maureen several times and know that company leadership, her colleagues, and team all think very highly of her. Your first response to this news is wondering how will her gender change impact how she (he, eventually) is received by this same group. Your second thought: I'm never going to see my family again, am I?

Before you hold yourself and your legal team a pity party for the additional workload, remember this: Maureen is now the bravest person you know. She has felt disconnected with her birth gender her whole life. Despite the potential backlash from her family, friends, coworkers, and complete strangers, Maureen has decided to become the same person on the outside that she has always been on the inside.

From an employment standpoint, she can expect a challenging road ahead. In studies conducted between 1996 and 2006, 20% to 57% of transgendered respondents reported being discriminated against in the workplace, including being harassed, denied a promotion, being fired, or denied employment altogether.<sup>1</sup> Title VII of the Civil Rights Act of 1964, the federal law prohibiting discrimination by private employers, does not expressly prohibit employment discrimination based on gender identity or expression.<sup>2</sup>

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<sup>1</sup> Note, *Equal Protection for Transgendered Employees? Analyzing the Courts Call for more than Rational Basis in the Glenn v. Brumby Decision*, 28 GA. ST. U. L. REV. 1315 (2012).

<sup>2</sup> 42 U.S.C. § 200e-2.

As an employer, what are a company's legal obligations before, during, and after the transition? This white paper will explore not just these, but also specific strategies that have worked—and some that haven't.

## **II. How Do Transsexuals Differ From Transgendered Groups?**

The term “gender identity” was first used in the United States in a press release on November 21, 1966, to announce the new clinic for transsexuals at Johns Hopkins Hospital.<sup>3</sup> Generally, the terms “transsexual” and “transgender” have been used synonymously to articulate a state in which the apparent gender (determined at birth) of a person does not match the subjective gender.<sup>4</sup>

### **A. How The Medical Profession Defines The Two Terms**

The medical profession defines transsexuals as individuals who experience discomfort regarding their actual anatomic gender and who are committed to altering their physical appearance through cosmetics, hormones, and, in some cases, surgery.<sup>5</sup> Transsexuals do not identify themselves as being members of the sex that they were assigned at birth, whereas transvestites are content with the sex they were assigned at birth, but dress as people of the opposite sex for sexual arousal. The term “transgendered” is used as an umbrella term to describe anybody whose dress and/or behavior can be interpreted as transgressing gender roles.<sup>6</sup>

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<sup>3</sup> J. Money, *The Concept of Gender Identity Disorder in Childhood and Adolescence after 39 Years*, NCBI, <https://www.ncbi.nlm.nih.gov/pubmed/7996589> (last visited Jan. 25, 2019).

<sup>4</sup> *What is the Difference Between Transgender And Transsexual?*, TRANS AWARENESS PROJECT, <http://www.transawareness.org/what-is-the-difference-between-transgender-and-transsexual.html> (last visited Jan. 25, 2019).

<sup>5</sup> WebMD, *Gender Identity Disorder*, <http://www.webmd.com/sex/gender-identity-disorder> (last visited Jan. 18, 2019).

<sup>6</sup> See Richard Ekins & Dave King, *Blending Genders: Contributions to the Emerging Field of Transgender Studies*, 1 INT'L J. TRANSGENDERISM 1, 1 (1997).

This includes transsexuals, transvestites, and other categories of people whose dress and/or behavior do not conform to specific gender roles.<sup>7</sup>

Moreover, the medical profession uses the term “transsexualism” as an informal synonym for “gender identity disorder” or GID.<sup>8</sup> The standard medical procedure for treating GID is referred to as “triadic therapy,” and it consists of: (1) real-life experience living as a person of the self-identified sex; (2) hormone therapy; and (3) surgery to change genitalia and other sex characteristics.<sup>9</sup>

## **B. ... And, How Do The Courts Define Them?**

Currently, no federal court has definitively, other than dicta, assigned a legal definition for the word “transsexual.” For example, in *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1083 (7th Cir. 1984), the Seventh Circuit, in a footnote, defined the term “transsexualism” as “a condition that exists when a physiologically normal person . . . experiences discomfort or discontent about nature’s choice of his or her particular sex and prefers to be the other sex.”

In order to state a claim as a “transsexual” under Title VII, courts seem to require more than a mere diagnosis of “gender identity disorder.” See *Schroer v. Billington*, 424 F.Supp.2d 203, 213 (D.D.C. 2006) (requiring the plaintiff to develop a more thorough factual record that “reflects the scientific basis of sexual identity in general, and gender dysphoria in particular”).

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<sup>7</sup> *Id.*

<sup>8</sup> WebMD, *supra* note 2.

<sup>9</sup> Kevin Schwin, *Toward A Plain Meaning Approach to Analyzing Title VII: Employment Discrimination Protection of Transsexuals*, 57 CLEV. ST. L. REV. 645, 648 (2009).

### **III. Legislative Approaches To Protecting Transsexual And Transgendered Individuals**

Numerous states, counties, and municipalities have enacted legislation that either explicitly declares that employment discrimination on the basis of “gender identity” is forbidden,<sup>10</sup> or that protects transsexuals and other transgendered individuals under a prohibition of discrimination because of “sex” or because of “sexual orientation.”<sup>11</sup> Other state law protected classes that include transsexuals are “gender,” “transgender status,” and “affectional preference.” Moreover, other states, counties, and municipalities have enacted legislation or executive orders that protect transsexuals and other transgendered individuals who are public employees from employment discrimination. What explains this trend toward legislative protection of transsexuals and other transgendered individuals from employment discrimination?

The answer lies in the rationale and purpose behind antidiscrimination laws in general. The general goal of employment discrimination law is to achieve equal employment opportunities for everybody.<sup>12</sup> Thus, the law seeks employment decisions based solely on merit (i.e., the quality of an individual’s work performance), rather than on immutable characteristics such as race, skin color, sex, disability, age, etc.<sup>13</sup>

Some of the criticism surrounding the protection of transsexuals from workplace discrimination is based on an unfortunate common misconception that transsexualism is a choice and therefore is not an immutable characteristic deserving protected class status. However,

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<sup>10</sup> See, e.g., N.M. STAT. § 28-1-7(A)(2007); R.I. GEN. LAWS § 28-5-7(1)(I)(2007); N.J. STAT. ANN. § 10-5-12 (West 2007).

<sup>11</sup> See, e.g., CAL. GOV’T CODE § 12926(p) (West 2007); CAL. PENAL CODE § 422.56(C) (West 2009).

<sup>12</sup> See Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 77 (2007).

<sup>13</sup> See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8, 13, 19-20 (2000).

various medical studies “suggest that [transsexualism] may be caused by genetic (chromosomal) abnormalities, hormone imbalances during fetal and childhood development, defects in normal human bonding and child rearing, or a combination of these factors.”<sup>14</sup> Thus, transsexualism is immutable. After all, why would anybody voluntarily subject themselves to the negative consequences that transsexuals often face, such as high unemployment, low wages and homelessness, lack of health care, and criminal victimization?<sup>15</sup>

#### **A. Title VII Issues, The Old Guard**

One of the three core statutes prohibiting discrimination includes Title VII.<sup>16</sup> Specifically, Title VII makes it unlawful for a covered employer to “fail or refuse to hire or discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges or employment,” or to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual’s . . . sex.”<sup>17</sup>

Courts have generally interpreted the term “sex” under Title VII to refer to the physical and biological differences between males and females. While the courts generally used the terms “sex” and “gender” interchangeably, social scientists make a distinction. While “sex” refers to the difference between males and females based on their physical organs, “gender” is regarded

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<sup>14</sup> WebMD, *supra* note 2.

<sup>15</sup> For statistical data regarding income, health insurance, housing, employment, and abuse rates for transgendered people, see S.F. Dept’t of Pub. Health, *The Transgender Community Health Project* (1999), available at <http://www.transgenderlaw.org/resources/transfactsheet.pdf>.

<sup>16</sup> The other two core statutes are The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 (2016) and The Americans With Disabilities Act (ADA), 42 U.S.C. § 1201 (1981).

<sup>17</sup> 42 U.S.C. §§ 2000e-2(a)(1), (2) (1991). See also 42 U.S.C. § 2000e-16(a) (1991). Distinctions must be made based on the qualification for the job and the person's sex.

as a broader term referring to the outward appearances and gestures that one manifests in identifying one's self as a male or female.

### **I. Gender Stereotyping**

The Supreme Court held in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that “gender stereotyping” was considered sex discrimination under Title VII. In that case, Price Waterhouse was found liable for gender stereotyping a female employee by failing to elevate her status to partner. In her evaluations by the other partners, she was regarded as too aggressive and in need of “a course at charm school.” *Id.* at 256. She was advised that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” in order to advance to partner level. *Id.* at 235.

By refusing to advance the employee to partner status due to her failure to conform to the employer's gender-based expectations, Price Waterhouse discriminated on the basis of her sex. The Court held that Title VII prohibits “in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Id.* at 250. Hence, discriminating against the employee because her actions did not conform to her gender was prohibited under Title VII.

### **2. Sexual Orientation**

While many states and hundreds of municipalities prohibit discrimination based on sexual orientation, the courts have long held that sex discrimination claims by gay and lesbian employees are claims of sexual orientation, which is not protected under Title VII.<sup>18</sup> But this distinction is

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<sup>18</sup> See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (“The law is well-settled in this circuit and in all others to have reached the question that [plaintiff] has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation”); *Dillon v. Frank*, 1992 U.S. App. LEXIS 766, at \*12 (6th Cir. Jan. 15, 1992) (“The circuits are unanimous in holding that Title VII does not proscribe discrimination based on sexual activities or orientation.”).

less true in complaints where sexual harassment is being alleged.<sup>19</sup> The courts have limited *Price Waterhouse* to allegations of sexual discrimination when the individual exhibits gender characteristics generally affiliated with individuals of the opposite sex (e.g., attributing the characteristics of an employee's behavior as masculine, while she was a female).<sup>20</sup> This draws a line between discrimination against a person perceived to be gay or lesbian—which is not protected by Title VII—and discrimination against a person because of her masculine or feminine gender characteristics.

While courts have extended Title VII's prohibition of race discrimination to apply to an employee's association with a person of another race (e.g., interracial marriage or interracial friendship), they have rejected such “bootstrapping” in the context of discrimination against an employee because of his/her spouse's sex or friend's sex.<sup>21</sup> Hence, discrimination against a lesbian employee would not be actionable because she was married to a same-sex spouse. But the EEOC and some courts—most notably the Seventh Circuit—have more recently taken a contrary position on whether claims of sexual orientation discrimination and/or gender identity discrimination may be classified as claims of discrimination “because of sex” under Title VII.

In *Baldwin v. Department of Transportation*, EEOC DOC 0120133080, 2015 WL 44397641 (July 15, 2015), the EEOC viewed the issue broadly as to whether a complainant's claim of discrimination based on sexual orientation under Title VII was actionable. The complainant argued that he was not selected for a permanent position as a front line manager because he was gay

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<sup>19</sup> See *Oncale v. Sundowner Office Servs., Inc.*, 523 U.S. 75, 81 (1998) (holding that same-sex sexual harassment was actionable under Title VII in the context of a hostile work environment as “the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination . . . because of . . . sex.’”).

<sup>20</sup> See *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001).

<sup>21</sup> See *DeSantis Co., Inc. v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329 (9th Cir. 1979).



(i.e., his sexual orientation). *Id.* at \*2. The EEOC held 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.” *Id.* at \*5. Thus, if his employer took his sexual orientation into account in an employment action, a complaint for sex discrimination can be alleged. *Id.*

The EEOC justified its conclusion on several theories. First, it reasoned that sexual orientation cannot be understandable without reference to sex as it refers to the sex of someone to whom one is sexually and romantically related. By discriminating against an employee due to his sexual orientation, the employer is treating that employee less favorably because of his sex. *Id.* at \*6. Second, sexual orientation discrimination is an associational discrimination on the basis of sex because the employer is treating the employee differently for “associating with a person of the same sex.” *Id.* While such associational discrimination applies in the context of race discrimination, it should not be limited solely to that context, according to the EEOC.

Third, sexual orientation discrimination involves discrimination based on gender stereotypes as prohibited by the Supreme Court in *Price Waterhouse*. *Id.* at \*7. Such claims should be allowed to be made by gays and lesbians if they can demonstrate they were treated adversely because of their sexual orientation. Finally, sexual orientation discrimination and harassment “[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.” *Id.* at \*8. Therefore, discrimination based on an employee's non-conformity with sex stereotypes (e.g., a gay male not conforming to the gender stereotypes associated with males) is valid sex discrimination claim.

A few district courts followed suit allowing gay and lesbian employees to allege discrimination on the basis of sexual orientation under Title VII.<sup>22</sup> But the real “shake-up” in jurisprudence came in April 2017, with the Seventh Circuit decision in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017). In *Hively*, the full panel Seventh Circuit reversed the lower court's dismissal of the complainant's sexual orientation discrimination claim under Title VII. Hively was openly lesbian and was allegedly discriminated against by her employer when her part-time position was terminated and her employer failed to provide her with a full-time position. She argued two theories for her contention that sex discrimination included discrimination based on sexual orientation: first, that she was treated differently only because of her sexual orientation, and second, that she was discriminated against due to her intimate associations with a person of the same sex. *Id.* at 345.

The Seventh Circuit provided three rationales to support Title VII's prohibition against sexual orientation in *Hively*. First, the court applied a “comparative method” in interpreting the statute—asking simply whether Hively's protected characteristic played a role in an adverse employment decision. *Id.* at 345. If Hively had been a man married to a woman and all variables were the same, Ivy Tech would not have refused to promote her and would not have fired her. The court considered this as “paradigmatic sex discrimination,” as Ivy Tech is disadvantaging her “because she is a woman.” *Id.* Secondly, the court applied the Supreme Court's gender

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<sup>22</sup> See *Terveer v. Billington*, 34 F.Supp. 3d 100, 2014 WL 1280301, at \*9 (D.D.C. Mar. 31, 2014) (allowing a gay's claim for sex discrimination because his “sexual orientation was not consistent with the defendant's perception of acceptable gender roles”); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (stating that “[s]exual orientation discrimination can take the form of sex discrimination”); *Koren v. Ohio Bell Tel. Co.*, 894 F.Supp. 2d 1032, 1038 (N.D. Ohio 2012) (allowing the plaintiff to pursue a Title VII sex discrimination claim because he was mistreated for “tak[ing] his [male] spouse's surname--a ‘traditionally’ female practice”). But see *Evans v. Georgia Reg'l Hosp.*, 2015 WL 5316694, at \*3 (S.D. Ga. Sept. 10, 2015) (stating it “simply not unlawful under Title VII to discriminate against homosexuals or based on sexual orientation”), *report and recommendation adopted*, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015).

stereotyping theory to both gender conformity and gender nonconformity situations. According to the court, the discrimination alleged by Hively would not exist “without taking the victim's biological sex (either as observed at birth or as modified, in the case of transsexuals) into account.” *Id.* at 347. Thus, it viewed discrimination on the basis of sexual orientation to be based on assumptions regarding the proper behavior for someone of a given sex. Thus, negative behavior against a plaintiff—man or woman—who “dresses differently, speaks differently, or dates or marries a same-sex partner” is based on sex and therefore prohibited by Title VII. *Id.* Finally, the court agreed that the association discrimination theory that has been applied in the racial context applies equally to discrimination based on color, national origin, religion, or sex, as the statute “draws no distinction.” *Id.* at 349.

#### **B. Title VII Issues Related To Transgender Or Transsexual Discrimination**

For Title VII purposes, discrimination against transgender or transsexual employees has been distinguished from sexual orientation discrimination as such individuals may be undergoing an actual physical or biological change to become a different sex. For example, in *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), a prison guard assaulted a male-to-female transgender prisoner who was seeking sex reassignment surgery. The Ninth Circuit concluded that the male guard targeted the prisoner “only after he discovered that she considered herself female” and was “motivated, at least in part, by [her] gender.” *Id.* at 1202. In light of these facts, the court held that sex discrimination includes discrimination due to the failure to “conform to socially-constructed gender expectations.” *Id.* at 1201-02. Therefore, discrimination against transgender females “as anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity” is discrimination “because of sex.” *Id.*

Similarly, in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), the plaintiff was “biologically and by birth male” but was transitioning to become a female under the medical protocols of GID. With complaints from coworkers that the plaintiff was “not masculine enough,” his employer subjected him to psychological evaluations and eventually suspended him. *Id.* at 569–70. The Sixth Circuit held that discrimination against a transsexual for failing to act or identify with his or her gender “is not different from discrimination directed against [the plaintiff] in *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228 (1989)] who, in sex-stereotypical terms, did not act like a woman.” *Id.* at 574–75. Consequently, the Sixth Circuit concluded that the *Price Waterhouse* definition of sex as “sex stereotype” was not limited to biological sex. Thus, the court permitted the plaintiff to pursue his claim for relief under Title VII for sex discrimination.

Likewise, the Eleventh Circuit held that an employer's firing of a transgender woman was based on her gender non-conformity and thus actionable under Title VII. In *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011), the employer felt that the employee's appearance in woman's attire was “inappropriate,” “unsettling,” and “unnatural.” According to the court, “[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” *Id.* at 1316–17. Thus, the Eleventh Circuit concluded that there is an analogy between discrimination against transgender individuals and discrimination on the basis of gender-based behavioral norms. *Id.*

The EEOC relied on some of these cases in *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995 (April 20, 2012), where it clarified that allegations of discrimination based on gender identity are recognizable under Title VII's sex discrimination prohibition. The EEOC interprets Title VII to protect against discrimination based on a person's sex and gender—the latter of which includes not only one's biological sex but the “cultural and social aspects associated

with masculinity and femininity.” *Id.* at \*16. Thus, when an employer discriminates against an employee because the person is transgender, it is making a gender-based distinction, which violates *Price Waterhouse's* assertion that “an employer may not take gender into account in making an employment decision.” *Id.* at \*19. Thus, intentional discrimination against a transgender employee because he or she is transgender is discrimination “based on sex” for purposes of Title VII. *Id.* at 34–35.

The Seventh Circuit in the *Hively* case explicitly stated that the discrimination alleged would not have existed without taking the victim's biological sex into account, whether or not that sex was determined at birth and modified “in the case of transsexuals.” 853 F.3d at 346-47. Considering the holding in *Hively*, the Seventh Circuit would clearly entertain discrimination against a transsexual as a sex discrimination claim under Title VII. Although the U.S. Supreme Court has not explicitly ruled that Title VII protects transgender or transsexual employees, the above cases demonstrate a trend in finding equal protection.

Whether the EEOC's determinations change under the Trump Administration remains to be seen. In his Twitter account, President Trump in July 2017 announced that he would reverse the Obama administration's decision to allow transgender people to serve in the military. He cited the “tremendous medical costs” associated with transgender service personnel as the reason for the reversal. And on August 29, 2017, Defense Secretary Jim Mattis announced a freeze on President Trump's ban on transgender individuals serving in the military so that a panel of experts could be assembled to provide advice and recommendations in carrying out President Trump's directive.<sup>23</sup> Earlier this year, the U.S. Supreme Court, in a 5 to 4 decision, granted a

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<sup>23</sup> See Dan Lamothe, *Transgender Ban Frozen as Mattis Moves Forward with New Review of Options*, WASHINGTON POST (Aug. 29, 2017),

request by the Trump administration to lift two nationwide injunctions issued by Federal District Court judges in California and Washington to block implementation of Trump's transgender military ban. The U.S. Supreme Court, however, declined to immediately hear the pending appeals from those District Court rulings until after the Ninth Circuit has the opportunity to rule.

### **III. Possible Liabilities When An Employee Transitions Gender**

Other than discrimination or harassment in the workplace, one of the other main areas where the rights of a transgender employee are often tested is when a current employee goes through a gender confirmation process, or as it is often referred to, transitions on the job. Transitioning is when a transgender goes from living as the gender they were assigned at birth to living as the gender consistent with their gender identity.<sup>24</sup>

#### **A. Confidentiality**

Questions sometimes arise regarding if, and what, other employees should be told about a transitioning employee. The most logical answer is that, absent unusual circumstances such as security issues, no information should be disclosed without the consent of the transitioning employee, and, even then, disclosure should only be to those employees with a need to know (e.g., an immediate supervisor). In this regard, it remains an open issue as to whether this information is Health Insurance Portability and Accountability Act (HIPPA) protected. Accordingly, an employer disclosing an individual's transgender status without consent runs the risk of a claim for invasion of privacy.

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[https://www.washingtonpost.com/news/checkpoint/wp/2017/08/29/pentagon-chief-mattis-freezes-trumps-ban-on-transgender-troops-calls-for-more-study/?utm\\_term=.7cbbc3ec09e0](https://www.washingtonpost.com/news/checkpoint/wp/2017/08/29/pentagon-chief-mattis-freezes-trumps-ban-on-transgender-troops-calls-for-more-study/?utm_term=.7cbbc3ec09e0).

<sup>24</sup> See <https://transgenderlawcenter.org/wp-content/uploads/2013/12/model-workplace-employment-policy-Updated.pdf> Definitions at pg. 3 (last viewed February 1, 2019).

## **B. Use Of The Bathroom/Locker Room**

More difficult issues generally arise in the social aspects of the transition, especially when the employee assigned male at birth assigns her gender as female. In particular, bathroom usage may cause concerns for some female employees. Generally, these concerns arise because the transitioning employee, despite having a female gender identity, is still viewed by coworkers as male. Nevertheless, the employee is permitted to use the bathroom consistent with her gender identity or expression.<sup>25</sup>

If other employees raise objections to the transgender employee utilizing bathroom and/or locker room facilities consistent with their gender identity or expression, those objections should be treated no differently than if an employee objected to using the restroom with a person of a different race or religion. At least one federal court has ruled that an employee who claimed both religion discrimination and a hostile work environment based on the fact that a coworker, who was a transgender woman, was allowed to use the women's bathroom failed to establish a *prima facie* case under Title VII and the Minnesota Human Rights Act, entitling the defendant to a summary judgment dismissal of the case. *Cruzan v. Special School District, No. 1*, 294 F. 3d 981 (8th Cir. 2002). Additionally, in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the Eleventh Circuit held that a supervisor's unspecified concerns about a transitioning employee's use of the ladies restroom and the impact it would have on female coworkers, was not a valid non-discriminatory reason to terminate the transgender employee.

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<sup>25</sup> See also *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (March 27, 2015) (ruling that the denial of a transgender employee the right to use the bathroom consistent with their gender identity was a violation of Title VII). <https://www.eeoc.gov/decisions/0120133395.txt>.

### **C. Supervisor And Coworker Issues**

The balance in maintaining confidentiality can be quite challenging, but not as difficult as is navigating the dynamics between supervisors and coworkers of the transitioning employee. Even in a perfect world where everyone understood and fully supported the transitioning employee, some friction would arise between the employees in the normal course of working. Now, regular disagreements or miscommunication become fueled by misunderstanding, fear of the unknown, or pure anger. Other employees begin asserting their rights to not be exposed to the transitioning employee or to not condone the transition by acquiescing to use of a bathroom or calling the person by the opposite gender pronoun or a different name. Once these issues begin to arise, the employer can experience significant disruption to operations and the potential for legal exposure rises exponentially.

While most of the issues that arise in the workplace (and elsewhere) come from perceptions or stereotypes concerning transgender people, some of these issues may be able to be diffused or avoided through training or educational programs designed to educate management and employees about what being transgender means. At a fundamental level, it is important to convey that a transgender person going through the gender confirmation process does not want to “become” male or female; they “are” male or female.<sup>26</sup> Rather, what they are trying to do is align their outward appearance to their own gender identity, and allow how others perceive them to conform to how they perceive themselves so they can live happier and more productive lives.<sup>27</sup> That said, the type and timing of training can be critical. Failing to strategically roll-out this educational component could result in serious back lash from employees.

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<sup>26</sup> Robyn B. Gigl, *Gender Identity and the Law Exploring Employment Issues Involving Transgender Employees*, 313-AUG N.J. LAW. 16, 19 (2018).

<sup>27</sup> *Id.*



## **D. Other Potential External Responses**

With the amount of energy spent on dealing with the transitioning employee and the ripple effect on the workplace, there is often little time to consider how to respond to potential external responses like social media campaigns or negative media coverage. When the transitioning employee feels wronged, the potential for the person to seek a voice on social media increases. The transgender issue is a hot social topic, one which can gain significant momentum in the public eye. It is important to remember this as we navigate through handling transitioning employees in the workplace.

## **IV. Odds And Ends**

### **A. Logistical Transitions**

#### **I. Special Accommodations**

The law allows, and sometimes requires, sex segregation of public and private spaces, most notably restrooms, changing facilities, and dormitories. But these arrangements are exceptional, not inevitable, and not a reason to resist the larger project of transgender inclusion.

In addition to the overarching Title VII case law on transgender discrimination, some federal courts have explicitly addressed transgender bathroom access. For example, in *Roberts v. Clark County School District*, 215 F. Supp. 3d 1001, 1005-06 (D. Nev. 2016), a plaintiff informed his employer that he was transgender and would be transitioning from female to male. Shortly thereafter, he began using the men's restroom at his workplace. *Id.* In response, the school district instructed him to only use the gender neutral rooms "to avoid any future complaints" and officially banned him from using the men's or women's restrooms until he could present documentation of a sex change. *Id.*

The Nevada District Court granted the plaintiff summary judgment on his sex discrimination claim, finding that the school district banned him from using the women's rest room "because he no longer behaved like a woman, [which] . . . alone shows that the school district discriminated against [him] based on his gender and sex stereotypes." *Id.* at 1015. The court also addressed the school district's claim that even if discrimination on the basis of the plaintiff's transgender status was prohibited by Title VII, it did not discriminate against him by prohibiting his use of the men's room because he was biologically female and other similarly-situated females were also prohibited from using the men's room. *Id.* at 1016. The court summarily dismissed that argument because the plaintiff, unlike other biological females, was not allowed to use the women's restroom and so was treated differently. *Id.*

Likewise, in *Mickens v. General Electric Co.*, No. 3:16CV-00603-JHM, 2016 U.S. Dist. LEXIS 163961, at \*10 (W.D. Ky. 2016), the Western District of Kentucky denied an employer's motion to dismiss a transgender employee's Title VII sex discrimination claim based on allegations that the employee was denied access to a gender-affirming bathroom and was terminated for attendance issues stemming from that denial. In *Mickens*, the employee alleged that his employer, General Electric (GE), instructed him to not use the men's restroom at the workplace and that he was required to use a restroom further away from his workstation, causing him to return late from breaks, which he was reprimanded for. *Id.* at \*2-3. The court rejected the employer's argument that discrimination on the basis of transgender status is not actionable under Title VII, citing *Price Waterhouse* and the prohibition against discrimination due to sex stereotyping. *Id.* at \*8-9. On this basis, the court found that the plaintiff met his burden of pleading a sex discrimination claim as he had alleged "continued discrimination and harassment against him . . .

because he did not conform to the gender stereotype of what someone who was born female should look and act like.” *Id.* at \*9.

The issue has also been addressed from the other side, where a non-transgender employee alleged she was discriminated against on the basis of sex and religion because her employer permitted a transgender coworker to use the women’s restroom. *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 982-83 (8th Cir. 2002). In *Cruzan*, a female teacher filed a suit against her school district for discrimination after the school permitted a transgender employee, Davis, to use the women's bathroom and she encountered Davis in that bathroom. *Id.* The court rejected the plaintiff's argument that requiring her to share the women's restroom with someone who was biologically male constituted sexual harassment. *Id.* at 984. The court further held that in order establish a *prima facie* case of discrimination on these grounds, a plaintiff must show that the school enacted a policy directed at the plaintiff and that the plaintiff suffered adverse employment action as a result. *Id.* at 982, 984. Because the school’s policy was not directed at the plaintiff and the plaintiff had “convenient access to numerous restrooms,” including single-stall restrooms, the court found that summary judgment for the defendant was appropriate. *Id.*

Taken together, this recent case law demonstrates momentum toward broader interpretations of Title VII that protects employees from both discrimination on the basis of transgender status broadly and specific policies preventing transgender employees from using gender-affirming restroom and facilities.

## **2. Address Any Benefits, Reportable Data, PID, Etc. That Need To Be Updated Once The Transition Is Complete**

Transgender persons wishing to undergo gender reassignment frequently face discriminatory employer health insurance policies that label the surgery as cosmetic<sup>28</sup> or medically unnecessary, and therefore outside coverage parameters. *Mario v. P & C Food Mkts. Inc.*, 313 F.3d 758, 765-66 (2d Cir. 2002). In *Mario*, an employee who was denied coverage filed suit under the federal Employee Retirement Income Security Act (ERISA) and Title VII. The Second Circuit rejected the ERISA claim, finding that the plaintiff's mastectomy and hormone therapy were not “medically necessary.” *Id.* at 764-66. The court’s ruling was based upon controversy within the medical community regarding the efficacy of that particular treatment plan. *Id.* at 766. The American Medical Association (AMA) has subsequently declared the denial of coverage based solely on the patient's gender identity to be discrimination.<sup>29</sup> Despite the AMA's determination, *Mario's* rule that gender reassignment is not “medically necessary” has yet to be fully repudiated,<sup>30</sup> therefore forcing individuals to distinguish their cases as exceptional. The *Mario* presumption stands in sharp contrast with the prevailing standard for Medicaid and Medicare beneficiaries; those plans have no blanket denial, but rather deny or extend coverage on a case-by-case basis.<sup>31</sup>

The prevalence of coverage denials under private plans is unclear due to a lack of case law on the matter. It is within an individual company’s purview whether to include gender

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<sup>28</sup> See generally *Davidson v. Aetna Life & Cas. Ins. Co.*, 420 N.Y.S.2d 450 (N.Y. Sup. Ct. 1979).

<sup>29</sup> *Removing Financial Barriers to Care for Transgender Patients*, AM. MED. ASS’N, [http://www.tgender.net/taw/ama\\_resolutions.pdf](http://www.tgender.net/taw/ama_resolutions.pdf) (last visited Feb. 1, 2019) (resolving that the AMA “support public and private health insurance coverage for treatment of gender identity disorder” as recommended by the patient's physician).

<sup>30</sup> See, e.g., *Miles v. Principal Life Ins. Co.*, 720 F.3d 472 (2d Cir. 2013).

<sup>31</sup> See Charles Thomas Little, *Transsexuals and the Family Medical Leave Act*, 24 J. MARSHALL J. COMPUT. & INFO. L. 315, 322 n.45 (2006); see also *Know Your Rights: Medicare*, NAT’L CTR. FOR TRANSGENDER EQUAL., <http://www.transequality.org/know-your-rights/medicare> (last visited Feb. 1, 2019) (noting hormone therapy is covered by Medicare).

reassignment surgery in its health insurance plan, and many large companies do include it.<sup>32</sup> One possible explanation for the lack of case law is transgender employees do not see the courts as an effective tool for procuring assistance against private employers. In stark contrast, cases adjudicating claims for Medicaid and Medicare denials of reassignment services are plentiful, as are cases articulating the government's responsibility to provide prisoners with access to reassignment services.<sup>33</sup>

The current Trump administration's policy on gender reassignment in regard to transgender military personnel is to deny access to funds for gender assignment surgery. The White House specifically called to “halt . . . recourses to fund sex-reassignment surgical procedures” for military personnel.<sup>34</sup> With this stance, it is likely the Trump administration will take similar approaches to Medicaid, in not funding gender reassignment.

### **3. Paid Family And Sick Leave**

An issue that is particularly pertinent to LGBT workers is paid sick leave and paid family leave. Overall, “sixty percent of workers without fully paid leave reported difficulty in making ends meet.”<sup>35</sup> Further, LGBT families experience higher rates of poverty than the general public, so the absence of paid leave is especially difficult for those persons.<sup>36</sup> The majority of low-wage

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<sup>32</sup> See *Finding Insurance for Transgender-Related Healthcare*, HUM. RTS. CAMPAIGN (Aug. 1, 2015), <http://www.hrc.org/resources/entry/finding-insurance-for-transgender-related-healthcare>.

<sup>33</sup> See, e.g., *Fields v. Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010).

<sup>34</sup> *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security: Military Service by Transgender Individuals*, WHITE HOUSE (Aug. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland> (Section 2(b) of the memorandum provides an exception “to the extent necessary to protect the health of an individual who has already begun course of treatment to reassign his or her sex”).

<sup>35</sup> U.S. Dep't of Labor, *The Cost of Doing Nothing* (2015) (citing Jacob Alex Klerman, Kelly Daley & Alyssa Pozniak, *Family and Medical Leave in 2012: Technical Report* (Apr. 18, 2014), <http://dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>).

<sup>36</sup> See *Healthy Families Act*, FAMILY EQUAL. COUNCIL (Nov. 6, 2015), [http://www.family-equality.org/\\_asset/yhpr4i/HFA--Fact-Sheet.pdf](http://www.family-equality.org/_asset/yhpr4i/HFA--Fact-Sheet.pdf)

workers are women,<sup>37</sup> and 69 percent of workers in the lowest 10-percent wage category do not have access to paid sick leave.<sup>38</sup> People at the intersection of these identities, namely LGBT women of color, have an extremely hard time providing for themselves and their families.<sup>39</sup>

No federal legislation exists that guarantees paid sick or paid family leave. However, there is a patchwork of state and local laws that provide for these kinds of leave. Currently, over two-dozen states and municipalities have or will have laws that provide paid sick leave.<sup>40</sup> While the characteristics of these laws vary by jurisdiction, many of them include one hour of sick leave

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<sup>37</sup> *Working Women Need Paid Sick Days*, NAT'L P'SHIP FOR WOMEN AND FAMILIES (Apr. 2013), <http://www.nationalpartnership.org/research-library/work-family/psd/working-women-need-paid-sick-days.pdf> (citing *Gender Pay Differences: Progress Made, but Women Remain Overrepresented among Low-Wage Worker*, U.S. Gov't Accountability Office (Oct. 2011), <https://www.gao.gov/assets/590/585721.pdf>).

<sup>38</sup> *Employee Benefits in the United States*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (Mar. 2017), <https://www.bls.gov/news.release/ebs2.pdf>.

<sup>39</sup> Sharon J. Lettman-Hicks, *The State of Black LGBT People and Their Families*, HUFFINGTON POST (May 13, 2014), [http://www.huffingtonpost.com/sharon-j-lettmanhicks/the-state-of-black-lgbt\\_b\\_4949992.html](http://www.huffingtonpost.com/sharon-j-lettmanhicks/the-state-of-black-lgbt_b_4949992.html).

<sup>40</sup> See S.F., Calif., Admin. Code Chapter 12W.1-.16 (2006); D.C. Code § 32-131.01-.17 (2014); Conn. Gen. Stat. § 31-57r-w (2011); Seattle, Wash., Ordinance 123698 (Sept. 23, 2011); Portland, Ore. Code § 9.01.010-.140 (2013); N.Y.C. Admin. Code tit. 20, Ch. 8, § 20-911-924. (2013); Jersey City, N.J., Ordinance 13.097 (Sept. 25, 2013); Newark, N.J., Ordinance 13-2010 (Jan. 28, 2014); Irvington, N.J., Ordinance MC 3513 (Sept. 10, 2014); Passaic, N.J. Ordinance 1998-14 (Sept. 5, 2014); East Orange, N.J., Ordinance 21 Ch. 140-1-140-15 (Sept. 8, 2014); Paterson, N.J. code § 412-1-13 (2014); Trenton, N.J. Ordinance Ch. 230-1-230-13 (Nov. 4, 2014); Montclair, N.J. Paid Sick Leave Ordinance Ch. 131-1-132-13 (Nov. 4, 2014); Milwaukee, Wi. Ordinance Ch. 350 (Dec. 16, 2014); Bloomfield, N.J. Ordinance Ch. 160-1-160-16 (Mar. 2, 2015); Cal. Lab. Code § 245-249 (West, 2015); Eugene, Ore. Ordinance 20537 (July 29, 2014); Mass. Gen. Laws ch. 149, § 148c-d (2015); Oakland, Calif. Municipal Code ch. 5.92 (2014); Tacoma, Wash., Ordinance 28275 (Jan. 27, 2015); Philadelphia, Pa., Ordinance 141026 (Feb. 12, 2015); S.B. 454, 78th Ore. Leg. Assemb., Reg. Sess. (Ore. 2015); Emeryville, Calif. Ordinance 15-004 (June 2, 2015); Montgomery Cnty. Code Ch. 27, Art. XIII (2015); Pittsburgh, Pa. File 2015-1825 (2015); City of New Brunswick, Title 8, Ch. 56 (Dec. 16, 2015); Spokane, Wa. Ch. 09.01 (Nov. 14, 2016); Plainfield, N.J. Ordinance Ch. 8 (Jan. 29, 2016); Santa Monica Mun. Code 4.62.025; Minneapolis, Mn. Ordinance 2016-040 (May 31, 2016); Los Angeles, Ca. Ordinance 184320 (May 20, 2016); San Diego, Ca. Ordinance 20390 (Aug. 18, 2014); Chicago, Il. Ordinance 02016-2678 Ch. 1-24 (Aug. 21, 2016); Berkeley, Ca. Mun. Code Ch. 13.100 (2016); Saint Paul, Mn. Ordinance Ch. 233 (2016); Cook County, Il. Ordinance 42 Art. I Div. I (2016); see also *Paid Sick Leave*, Nat'l Conference of State Legis. (Oct. 23, 2017), <http://www.ncsl.org/research/laborand-employment/paid-sick-leave.aspx>; *Paid Sick Time Legislative Success, A Better Balance* (Oct. 24, 2017), <https://www.abetterbalance.org/resources/paid-sick-time-legislative-successes/>.

accrual for a specific amount of hours worked (usually between thirty and fifty hours), and almost all jurisdictions exclude some class of workers.

## **B. Food For Future Thought**

The recent increase in awareness of the number of individuals who fall under the transgender/transsexual umbrella suggests that protection of the rights of these individuals is an emerging issue. Whether this increase in awareness correlates to a rise in the number of openly transgender employees remains to be seen. However, as the case law surrounding this issue demonstrates, momentum is trending towards transgender acceptance and accommodation in the workplace.

While one would assume employers moving towards recognition of transgender rights would axiomatically realize less potential legal exposure, it is not necessarily the reality. The transgender issue is difficult and filled with significant challenges at a legal level.