



Fisher Phillips

NEW TRENDS IN DISCRIMINATION AND HARASSMENT

Sex, Transgender, and More

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The Times They Are A-changing

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- Public sentiment concerning LGBT issues has evolved rapidly
- Congress has failed to pass sexual orientation/gender identity protections in employment
- Congressional inaction has left administrative agencies, states, municipalities and courts to fill in the gaps
- Last year, the U.S. Supreme Court legalized same-sex marriage

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Definitions

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- **Sex** = Biological sex at birth (male or female)
- **Gender** = Attitudes, feelings, and behaviors that a given culture associates with a person's biological sex; Identity as a social or cultural construct
- **Gender identity** = One's own gender identification, which may be the same or opposite of biological fact



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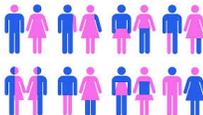
Definitions Fisher Phillips

- **Transgender** = A person whose identity, expression, or general sense of self does not conform to what is usually associated with the sex they were born
- **Transsexual** = A person who seeks to transition for their sex at birth; Includes those who have had sex-reassignment surgery
- **Sexual Orientation** = The status of being straight, gay or bisexual

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Definitions Fisher Phillips

- **“Gender identity discrimination”** means treating someone differently (segregating them, denying them benefits) based on the fact that the person identifies with a gender that is different than their biological gender



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What Is The Law At The Federal Level? Fisher Phillips

- The Employment Non-Discrimination Act (ENDA)
- First introduced in Congress in 1994
- Has not been passed by Congress
- If passed, it will prohibit discrimination in hiring and employment on the basis of sexual orientation and gender identity
- Would apply to civilian, non-religious employers with at least 15 employees

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What Is The Law At The State Level?



- Twenty-two states have laws prohibiting discrimination against individuals based on gender identity and/or sexual orientation:
 - CA, CO, CT, DE, HI, IA, IL, MA, MD, ME, MN, NH, NJ, NM, NV, NY, OR, RI, UT, VT, WA, and WI
 - Also DC, Guam, and Puerto Rico
- Twelve other states, by executive order, have transgender and/or sexual orientation inclusive discrimination prohibitions for state employees:
 - AK, AR, IN, KY, LA, MI, MO, MT, NC, OH, PA, and VA

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What Is The Law At The Local Level?



- At least 255 cities and counties have laws or ordinances prohibiting discrimination against individuals based on gender identity and/or sexual orientation
- Many major cities and metropolitan areas protect gender identity and expression, including Atlanta, Austin, Baltimore, Boston, Buffalo, Chicago, Dallas, Denver, Detroit, Indianapolis, Los Angeles, Milwaukee, Nashville, New Orleans, New York City, Oakland, Philadelphia, Pittsburgh, San Diego, and San Francisco

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What Is The Law In Florida?



- In 2016, Florida lawmakers considered a bill, SB 120 (Florida Competitive Workforce Act), that would add sexual orientation and gender identity to the protected classes under the Florida Civil Rights Act for employment, housing, and public accommodations
 - SB 120 failed at the committee level and did not reach the floor for a vote
 - Supporters have vowed to bring the bill back every year until it passes



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What Is The Law In Florida? 

- Florida towns, counties & cities that prohibit employment discrimination for sexual orientation **and** gender identity:
 - Alachua, Broward, Leon, Miami-Dade, Monroe, Orange, Osceola, Palm Beach, Pinellas and Volusia Counties
 - Atlantic Beach, Boynton Beach, Cape Coral, Delray Beach, Dunedin, Gainesville, Greenacres, Gulfport, Haverhill, Jacksonville, Key West, Lake Worth, Largo, Leesburg, Mascotte, Miami, Miami Beach, Neptune Beach, North Port, Oakland Park, Orlando, Pembroke Pines, St. Augustine Beach, Tallahassee, Tampa, Venice, West Palm Beach, and Wilton Manors

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What Is The Law In Florida? 

- Florida towns, counties & cities that prohibit employment discrimination for sexual orientation **only**:
 - Fort Lauderdale, Hialeah, Hypoluxo, Juno Beach, Jupiter, Miami Shores, Palm Beach Gardens, Royal Palm Beach, Sarasota, St. Petersburg

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What Is The Law In Orlando? 

- **Orlando Code, Chapter 57**
 - Section 57.14 provides that "it is unlawful for an employer because of . . . **sex, sexual orientation, gender identity**, . . . of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."
 - Employer: 5 or more full-time employees working more than 30 hours per week or 10 employees in 13 or more calendar weeks in the current or preceding year, and any agent (Section 57.01)
 - Gender Identity: "includes actual or perceived sex, and shall also include a person's gender identity, self-image, appearance, expression or behavior, whether or not that gender identity, self-image, appearance, expression or behavior is different from that traditionally associated with the sex assigned to that person at birth." (Section 57.01)

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What Is The Law In Orange County? Fisher Phillips

- **Orange County Code, Chapter 22**
 - Section 22-28 provides that it is unlawful for an employer to discharge, take adverse action, fail to hire, promote or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of **sex** or **sexual orientation**.
 - Employer: 5 or more employees for each working day 4 or more calendar weeks in the current or preceding year, and any agent (Section 22-27)
 - Sexual orientation: "an individual's actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity or expression" (Section 22-2)

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The Changing Landscape Fisher Phillips

- As of 2011, there were an estimated 700,000 transgender Americans and the current number is likely much higher
- According to a 2014 study, 90% of transgender employees have experienced harassment, mistreatment, or discrimination at work
- Where state and/or local laws exist, LGBT discrimination complaints are filed at comparable rates to sex and race discrimination



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Fact Scenario Fisher Phillips

- Ann works at a prestigious accounting firm, and applies for partnership, but her promotion to partnership is postponed.
- Ann's evaluations noted she was **macho, aggressive, foul-mouthed, demanding, impatient with other staff members, and needed a course in charm school**.
- Ann's supervisor told her that to increase chances of promotion she needed to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.
- Ann applies for partnership the second year, but is denied.
- Ann quits her job. Does she have any actionable claims?

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Price Waterhouse v. Hopkins
(U.S. 1989)

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- Supreme Court: Gender stereotyping is actionable under Title VII as discrimination “because of sex”
- Held: Violation of Title VII to deny a woman partnership based on her failure to conform to gender stereotype

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Fact Scenario

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- Antonio is a waiter at a Mexican restaurant chain. Antonio’s co-workers and supervisor repeatedly refer to Antonio as “she” and “her.”
- Male co-workers mock Antonio for walking and carrying his serving tray “like a woman,” and call him a “faggot.”
- After months on the job, Antonio becomes involved in a heated argument with an assistant manager, and walks off the job. He is fired for leaving work in the middle of his shift.
- Does Antonio have any actionable claims?

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Nichols v. Azteca Restaurant Enterprises
(9th Cir. 2001)

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- Male employee can sue for harassment by male co-workers based on his failure to conform to a masculine stereotype
- *Nichols* spawned a whole new breed of harassment claims:
 - Claims based on insults, comments and taunting of employees based on other employees’ perception that they are behaving in a way that is too masculine or too feminine.
 - “Sissy,” “wimp” and “girly-man” have become the hot-button slurs of this new generation of harassment suits.

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Fact Scenario Fisher Phillips

- Jimmy, a fire department lieutenant, considers himself a transsexual and has been diagnosed with Gender Identity Disorder. Jimmy worked for the Fire Department for seven years without any negative incidents.
- Jimmy begins expressing a more feminine appearance on a full-time basis - including at work. Jimmy meets with HR and informs HR that treatment for his GID would eventually include complete physical transformation from male to female.
- The Fire Chief terminates Jimmy because of his transsexualism.
- Does Title VII protect transsexuals?



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Smith v. City of Salem
(6th Cir. 2004) Fisher Phillips

- “After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex...
- ... it follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”

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Fact Scenario Fisher Phillips

- Krystal, a bus driver for the state transit authority, was born biologically a man. The bus drivers often use public restrooms while on route.
- When Krystal was hired she presented as a man and used male restrooms.
- After training, Krystal informs her supervisor she is a transsexual.
- Thereafter, Krystal begins presenting as a female and using female restrooms. Krystal has begun the transition from male to female by taking female hormones, but she has not yet completed the sex reassignment surgery. Krystal describes herself as a “pre-operative transgendered individual.”
- Her supervisor becomes concerned about liability associated with Krystal’s restroom usage.
- Krystal is terminated, but is told she can apply for reinstatement after her surgery.

Etsitty v. Utah Transit Authority
(10th Cir. 2007)

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- Discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII.
- Krystal's claim must rest entirely on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes.
- The court concluded that use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.
- Terminating Krystal due to concerns of avoiding lawsuits resulting from her bathroom use was legitimate, non-discriminatory reason.

Glenn v. Brumby,
663 F.3d 1312 (11th Cir. 2011)

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- A transgender female brought a claim under 42 U.S.C. § 1983 alleging unlawful discrimination based on sex in violation of the Equal Protection Clause when she was terminated from her position with the Georgia General Assembly.
- Court concluded that the defendant discriminated against the plaintiff based on her sex by terminating her because she was transitioning from male to female.
- A person is considered transgender "precisely because of the perception that his or her behavior transgresses gender stereotypes." There is "congruence" between discriminating against transgender individuals and discrimination on the basis of "gender-based behavioral norms." Because everyone is protected against discrimination based on sex stereotypes, such protections cannot be denied to transgender individuals.

Glenn v. Brumby
663 F.3d 1312 (11th Cir. 2011)

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- Government termination of a transgender person for his or her gender nonconformity is unconstitutional sex discrimination.
- While the defendant asserted that it fired the plaintiff because of potential lawsuits if she used the women's restroom, the plaintiff's office had only single-use unisex restrooms, and there was no evidence that the defendant was actually motivated by litigation concerns regarding the plaintiff's restroom use.

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Fact Scenario Fisher Phillips

- Matthew is a creative director at a marketing firm.
- Matthew is openly gay.
- Matthew's co-worker draws naked pictures of Matthew on a company whiteboard, puts an image of Matthew's face on the body of a woman, refers to Matthew as "the gay guy," and makes the comment that Matthew has AIDS.
- Matthew remains employed, but files a charge of discrimination against the company.
- Can Matthew recover for sexual orientation discrimination?

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Christiansen v. Omnicom Group, Inc. Fisher Phillips
(S.D.N.Y. Mar. 2016)

- Court holds that it was bound to apply circuit precedent disallowing Title VII sex discrimination claims based on sexual orientation.
- The Court nevertheless included in its decision an extensive critique of that precedent and others, observing:
 - "In light of the EEOC's recent [Baldwin] decision on Title VII's scope, and the demonstrated impracticality of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask - and, lest there be any doubt, this Court is asking - whether that line should be erased."

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Videckis v. Pepperdine University Fisher Phillips
(C.D.Cal. Dec. 2015)

- The district court denied motion to dismiss, explicitly holding that "sexual orientation discrimination is a form of sex or gender discrimination."
- Explaining that sexual orientation discrimination is sex discrimination "because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex."

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Burrows v. College of Central Florida
 (M.D. Fla Jul. 2015)

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- Court granted Defendant's motion for summary judgment because "[p]laintiff's claim, although cast as a claim for gender stereotype discrimination, is merely a repackaged claim for discrimination based on sexual orientation, which is not cognizable under Title VII or the FCRA."
- Explaining that gender stereotyping is concerned with behavior, mannerisms, and appearances, or other characteristics that are "readily demonstrable in the workplace." "Plaintiff's relationship with a woman was not a characteristic readily demonstrable in the workplace, and Plaintiff provides no other evidence of discrimination based on her failure to conform to a feminine stereotype."

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Application Of Title VII To LGBT Employees: The New

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- **EEOC:** Title VII prohibits discrimination and harassment on the basis of gender identity and sexual orientation
- **DOJ:** In 2014, adopted the position that Title VII protects transgender employees
- **Courts:** Increasingly interpreting "because of sex" broadly to include gender identity, not yet as inclined to extend protections for sexual orientation
- *Generally speaking, lesbian, gay, and bisexual persons have fewer rights than transgender persons in the current climate!*

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Other Changes To The Legal Landscape

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- **LGBT Executive Orders**
 - July 2014, President Obama signed two Executive Orders prohibiting discrimination on the basis of sexual orientation and gender identity
 - Affects federal employees and employees of federal contractors:
 - Employers with contracts of \$10,000 or more
 - Approximately 21% of U.S. workforce
 - No religious exemption
 - DOL published Final Rule changing OFCCP's regulations: Federal contractors required to treat applicants/employees without regard to their sexual orientation or gender identity. Amended regulations effective 4/8/2015

* Several attempts by Congress to undercut the Executive Orders.

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Other Changes To The Legal Landscape Fisher Phillips

- OSHA**
- In 2015, OSHA issued Best Practices, "A Guide to Restroom Access to Transgender Workers"
- Recommends allowing transitioning employees to use the restroom of their choice
- Employers may offer (but not *require*) single-use, gender-neutral restrooms



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An Active EEOC Fisher Phillips

- EEOC Strategic Enforcement Plan FY 2013-2016:
 - Commission recognizes that coverage of **lesbian, gay, bisexual and transgender** individuals under Title VII's sex discrimination provisions, as they may apply, are elements of **emerging or developing issues**
- In FY 2015, EEOC received a total of 1,412 charges that included allegations of sex discrimination related to sexual orientation (1,181) and/or gender identity/transgender status (271):
 - This represents an increase of approximately 28% over the total LGBT charges filed in FY 2014 (1,100)

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Breakdown Of 2015 EEOC LGBT Charges Fisher Phillips

FY 2015				
	Total LGBT	Sex Gender Identity/Transgender	Sex Sexual Orientation	
Total Receipts	1,412	271	1,181	
Total Resolutions	1,135	184	975	
Resolutions	Settlements	96 (8.5%)	12 (6.5%)	85 (8.7%)
	Withdrawals w/Benefits	57 (5.0%)	6(3.3%)	53 (5.4%)
	Administrative Closures	203 (17.9%)	38 (20.7%)	168 (17.2%)
	No Reasonable Cause	737 (64.9%)	110 (59.8%)	644 (66.1%)
	Reasonable Cause	42 (3.7%)	18 (9.8)	25 (2.6%)
Reasonable Cause	Successful Conciliations	13 (1.1%)	7 (3.8%)	6 (0.6%)
	Unsuccessful Conciliations	29 (2.6%)	11 (6.0%)	19 (1.9%)
	Merit Resolutions	195 (17.2%)	36 (19.6%)	163 (16.7%)
Monetary Benefits (Millions)	\$3.3	\$0.3	\$3.0	

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EEOC Decisions Fisher Phillips

- **Jameson v. U.S. Postal Service**, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013) (intentional misuse of a transgender employee's new name and pronoun may constitute sex-based discrimination and/or harassment)
- **Lusardi v. Dep't of the Army**, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015) (EEOC held that an employer's restrictions on a transgender woman's ability to use a common female restroom facility constitutes disparate treatment)
- **Baldwin v. Dep't of Transportation**, EEOC Appeal No. 0120133080 (July 15, 2015) ("Complainant has stated a claim of sex discrimination. Indeed, we conclude 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.")

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EEOC Enforcement Actions: Transgender Fisher Phillips

- In September 2014, EEOC filed its first two transgender suits against private employers:
 - **EEOC v. G.R. Harris Funeral Homes**
 - Filed in federal court in Michigan alleging wrongful termination after disclosing intention to transition from one sex to the other; Court denied motion to dismiss due to possible sex stereotyping
 - **EEOC v. Lakeland Eye Clinic**
 - Filed in federal court in Florida against an employer for allegedly firing its director of hearing services after she began wearing feminine clothing to work and informed the clinic she was transitioning from male to female

EEOC Enforcement Actions: Sexual Orientation Fisher Phillips

- In March 2016, EEOC filed its first two lawsuits against private employers alleging discrimination and harassment based on sexual orientation:
 - **EEOC v. Scott Medical Health Center (PA)**
 - **EEOC v. Pallet Companies (MD)**

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What Does This Mean For Employers?



- Examples of issues we are seeing:
 - Persons who want to use the restroom of the gender with which they identify
 - Persons who want to dress in the gender with which they identify
 - Persons going through chemical and/or surgical procedures to change gender
 - Persons who want to be called by the name or pronoun of their self-identification
 - Persons who want to compete or participate in events that are associated with the gender with which they identify
 - An accommodated employee may be subject to bullying, hazing, harassment, or isolation at work, requiring the intervention of the employer

What Does This Mean For Employers?



- Competing Issues to Consider: Customer/Client Concerns
- Others might object to the presence of the transgender employee, requiring intervention of the employer
- There may be religious or privacy objections which require the intervention of the employer:
 - “But other employees are complaining...”
 - “What will our customers think?”
 - “We’ll lose business”



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Keep In Mind



- Privacy concerns have generally been rejected by the courts:
 - *Cruzan v. Special School District No. 1* (8th Cir. 2002) (a female employee sued her employer over its decision to allow a transsexual co-worker to use the female restroom, claiming creation of a hostile work environment. The Court rejected the privacy notions and religious concerns, finding there was an alternative restroom for the offended plaintiff)
- Perceived Community Bias?
 - *Schroerer v. Billington* (D.D.C. 2008): “Deference to the real or presumed biases of others is discrimination, no less than if the employer acts on behalf of his own prejudices.”

So, What Do You Do? Fisher
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When faced with a request to accommodate a transgender employee, what are the options for approaching the issue?



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Dressing The Part Fisher
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- Employers have the right to enforce policies relating to employees' physical appearance and attire:
 - Safety, professionalism/public image, productivity
- May be required to allow employees to dress consistent with gender identity
- Do not require adherence to male/female dress code
- Avoid gender stereotyping
- Accommodate during "transition" – determine which policies apply



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- **Section 22-26(e)**
 - "Nothing in this article shall prohibit an employer . . . from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards . . . provided that the employer . . . permits any employee who has undergone sex or gender transition prior to the time of employment, and any employee who has provided written notification to the employer . . . that the employee has undergone or is undergoing sex or gender transition after the time of employment, to adhere to the same dress or grooming standards for the sex or gender to which the employee has transitioned or is transitioning."

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Which Way To The Restroom? Fisher Phillips

- **March 2015:** Utah enacts law requiring employers to afford "reasonable accommodations based on gender identity" to employees, including in restrooms
- **May 2015:** OSHA requires employers to provide "meaningful" access to workplace restrooms, including for transgender employees
- **Spring 2016:** North Carolina and Mississippi regulations regarding bathrooms stir national concern
- **May 2016:** Dept. of Educ. sends guidance to schools saying schools must allow transgender students to use the bathroom that matches their gender identity - 23 states sue

Orange County Fisher Phillips

- **Section 22-26(c)**
 - "Nothing in this article shall be construed to establish a discriminatory practice based on sex due to the denial of access to restrooms, shower rooms and similar facilities . . . provided that the employer . . . provides reasonable access to adequate facilities that are not inconsistent with the employee's sex as established with the employer . . . at the time of employment or upon written notification to the employer . . . that the employee has undergone or is undergoing sex or gender transition, whichever is later."

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Restroom Takeaways Fisher Phillips

- Check for local laws and regulations
- Do not require transgender employees to use certain restrooms
- Allow employee to choose based on gender identity
- Suggest other, more private facilities if available
- Consider unisex/gender neutral designation



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Best Practices 

- Be alert to bullying and other unprofessional conduct, and discipline where necessary
- Train employees on policies and place appropriate emphasis on inclusive company culture
- Implement gender-neutral dress codes (i.e., no requirements like neckties for men and skirts for women)
- Use employee's desired name and pronoun
- Maintain confidentiality of transgender employee's status



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Best Practices 

- Be aware of all applicable state and local non-discrimination laws where business has operations
- Ensure policies comply with all state and local laws and workplace non-discrimination objectives
- Ensure all hiring and employment decisions are based solely on merit and not on discriminatory preconceived notions and gender stereotypes:
- Do not require medical documentation or "proof" of transgender status
- Accommodate (where possible) - good will (even if not legally required) can go a long way



FINAL QUESTIONS

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