




2019
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 CONFERENCE & EXPO

August 25-28, 2019
 GAYLORD PALMS & CONVENTION CENTER
 KISSIMMEE, FLORIDA

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**NAVIGATING GENDER TRANSITION
 IN THE WORKPLACE**



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Introduction

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- The word “transgender” – or trans – is an umbrella term for people whose gender identity is different from the sex assigned to us at birth. Although the word “transgender” and our modern definition of it only came into use in the late 20th century, people who would fit under this definition have existed in every culture throughout recorded history. Source: Human Rights Campaign
- According to a 2016 [survey](#) commissioned by the Human Rights Campaign, 35 percent of likely voters in the United States “personally know or work with someone who is transgender.” That's more than double the 17 percent who answered yes when asked the same question in 2014. Source: Human Rights Campaign

Introduction

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- An estimated 0.6% of adults, about 1.4 million, identify as transgender in the United States. Florida is notable for its relatively high percentage of transgender-identified adults (.066%)
Source: The Williams Institute, June 2016
- More than 70 percent of transgender respondents said they had to hide their gender identity, delay their transition, or quit their job due to fear of negative repercussions. Source: Newsweek 11/29/17

Challenges that the Transgender Community Faces

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- **Lack of legal protection:** While the federal government's Equal Employment Opportunity Commission (EEOC) and the Department of Education have recently taken steps to include transgender people under existing non-discrimination protections, there is still no comprehensive non-discrimination law that includes gender identity.
- Moreover, state legislatures across the country are debating – and in some cases passing – legislation specifically designed to prohibit transgender people from accessing public bathrooms that correspond with our gender identity, or creating exemptions based on religious beliefs that would allow discrimination against LGBTQ people.

What are the Numbers?

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- As of 2018, 93% of **Fortune 500 companies** have non-discrimination policies that include sexual orientation. Eighty-five percent have non-discrimination policies that include gender identity. Source: Catalyst.
- 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.

Key Legal Considerations

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- Federal statutes and regulations
- Executive Orders
- Judicial interpretation
- Agency guidance
- State and local laws

What is the Federal Law for **Employees**?

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- There is currently **no** federal law in place.
- Congress has attempted to pass a law: The Employment Non-Discrimination Act (ENDA):
 - First introduced in Congress in 1974
 - Since 1994, ENDA has been reintroduced in every session of Congress except one
 - **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

What is the Federal Law for **Employees**?

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- Thus, there is no federal statute that prohibits gender identity or sexual orientation discrimination.
- However, the law has been developing through individual court cases and federal agency action (EEOC).
- This has caused inconsistent laws across our nation and encouraged courts and agencies to push for change through cases and regulation.

Supreme Court Cases-Fall Term 2019

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- Several high profile cases on this issue will be decided by The Supreme Court during the Fall Term.
- The Supreme Court has agreed to consider whether federal discrimination law that bans discrimination based on sex also encompasses discrimination based on sexual orientation or gender identification.
- The EEOC says the act protects against discrimination but the Trump administration's DOJ has taken a conflicting position and has said that Title VII of the Civil Rights Act does not provide such protections.
- The Supreme Court will hear the case of *R.G. and G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, over the company's firing of a funeral director, Aimee Stephens, after her gender transition; the owner said she violated the dress code by wearing women's clothing. The high court will hear the case October 8 along with cases involving the firing of gay men.

Supreme Court Cases-Fall Term 2019

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- These cases will determine legal precedent in this arena.
- The Supreme Court will hear the case of *R.G. and G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, over the company's firing of a funeral director, Aimee Stephens, after her gender transition; the owner said she violated the dress code by wearing women's clothing.
- Stephens had been a funeral director for Harris Funeral Homes from 2008 until 2013, when she told her supervisor, funeral home owner Thomas Rost, that she had gender identity disorder and would begin transitioning at work. In response, Rost fired Stephens, saying that things "were not going to work out" if she intended to "no longer represent [herself] as a man."

Supreme Court Cases-Fall Term 2019

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- Stephens filed a charge with the EEOC, alleging Harris Funeral Homes and Rost had violated Title VII of the Civil Rights Act's prohibition on sex-based discrimination by firing her. A lower court initially ruled in favor of Harris Funeral Homes, but the Sixth Circuit Court of Appeals reversed that decision and held that the federal anti-employment discrimination law protects workers from being fired because they are transgender. The high court will hear the case October 8th.

What are the State and Local Law for **Employees**?

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Ordinances

- At least 225 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.

What is the State Law for **Employees**?

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- Twenty-two states and three territories 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 in Florida?

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- In 2016, Florida lawmakers considered a bill, SB 120, 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
- **Currently, there is no explicit state law that prohibits discrimination based on sexual orientation or gender identity in the state of Florida.**

What is the law in Florida?

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- Florida 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.
 - Atlantic Beach, Boynton Beach, Cape Coral, Delray Beach, Dunedin, Gainesville, Greenacres, Gulfport, 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.

What is the Law in Florida?

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

Can you explain the differences between “sex,” “gender,” and “gender identity”?

- Yes
- Somewhat
- No



Definitions

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- **Sex** = Biological sex assigned at birth (male or female)
- **Gender expression** = A person's sexual identity as a social or cultural construct, as evidenced by behavior and mode of dress
- **Gender identity** = one's own gender identification, which may be the same or opposite of the person's biological sex; how an individual perceives themselves.
 - i.e., Suzanne was born a girl but she has always identified (from a gender perspective) more as a boy.
- **Transgender** = people who live, or wish to begin living, in the gender role associated with the other sex from the one in which they were born

Definitions


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- **Transition** = is a process that some transgender people undergo when they decide to live as the gender with which they identify, rather than the one they were assigned at birth. A transgender person transitioning is not "becoming" a man or a woman; they are starting to live openly as their true gender.
- **Sexual Orientation** = The status of being straight, gay, asexual, or bisexual
- **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 his/her biological gender

And There's Much More

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- **Agender** = people who find that they have no inner sense of their gender identity
- **Androgyne** = a mix of male or female or in between
- **Bigender** = people who often change between genders or are both at once
- **Genderfluid** = people who feel they have different gender identities at different times



Questions
from
Employers

What Does This Mean For **Employers**?

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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

So, What Do You Do?

When faced with a request to accommodate a transgender employee, what are the options for approaching the issue?



Case Study

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Male employee tells you he is transitioning to a female:

- Can you request medical documentation or “proof”?
- Can you require the employee to continue using the male restroom?
- Can you require the employee to comply with your gender-specific dress code or grooming policies?
- How will co-workers react? How should you inform them?
- How will your customers/clients feel about this?

Requesting Proof

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- Do **not** require medical documentation or “proof” of transgender status:
 - No legal support for these requests
 - Do not require full transition before accommodating

Which Way to the Restroom?



Which Way to the Restroom?

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- March 2015: Utah enacts law requiring employers to afford “reasonable accommodations based on gender identity” to employees, including in restrooms
- April 2015: EEOC ruled that U.S. Army discriminated against transgender woman by refusing use of women’s restroom
- 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
- **September 2016:** California is the first state to adopt a law requiring all single-user restrooms in businesses, places of public accommodation, and local and state agencies to be identified as “all-gender.”

OSHA Guidance



- 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
- The alternative is a multi-occupant gender neutral restroom.
- Single stalls/restrooms should lock.

Restroom Takeaways



- Check for local laws and regulations in your area.
- Do **not** require transgender employees to use certain restrooms.
- **Accommodate** – allow transitioning employees to use restroom of choice.
- Suggest other, more private facilities if available:
 - But . . . Beware of OSHA guidelines
- Consider unisex/gender neutral designation:
 - Ex. Single-use, gender-neutral restrooms

What challenges have you faced?

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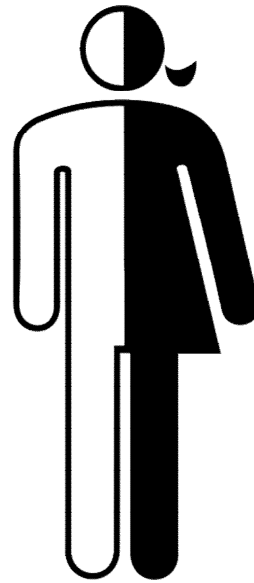
- Have you had any employee challenges?
- Anyone claim it is an invasion of their privacy to have to share a restroom with someone not of the same biological gender?
- How have you handled urinals – have you provided privacy for males using urinals? If not, why not?

What challenges have you faced?

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- **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.”

Dressing the Part



Dressing the Part

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- April 2015: Transgender man files suit against finance company in Louisiana alleging he was terminated after refusing to dress and be treated as a female:
 - Asked to sign document saying his dress “preference” did not comply with personnel policies
- April 2015: Transgender worker sues Forever 21 alleging harassment and discrimination after she began transition to a woman
- April 2015: Michigan court allows case to go forward – plaintiff alleges she was fired by funeral home after announcing transition to female and dressing in women’s business attire
- April 2015: Florida eye clinic settles for \$150,000 - former employee allegedly harassed and terminated after she began to wear makeup and traditionally female clothing to work

Dressing the Part

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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"

Americans with Disabilities

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- ADA implications?
- Not required to accommodate if condition not a disability impairment but case law is changing....
- Remember: Medical information must be kept confidential
- In Jan. 2015: lawsuit filed in PA challenging constitutionality of exclusion and held that ADA can cover gender dysphoria.
- Gender dysphoria refers to "clinical significant distress" resulting from a difference between someone's gender identity and sex assigned at birth. Not all trans people have gender dysphoria, but for those who do, that distress can have a major impact on their ability to work, participate in public life, and be healthy.

Other Considerations

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- Reaction from co-workers?
- Bullying?
- Disruption/productivity?
- Perceived Customer Bias?



Best Practices

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- **Awareness:** Be aware of all applicable state and local non-discrimination laws where business has operations
- **Compliance:** Ensure policies comply with all state and local laws and workplace non-discrimination objectives
 - Consider developing more comprehensive policies
 - Reporting mechanism
- **Consistency:** Ensure all hiring and employment decisions are based solely on merit and not on discriminatory preconceived notions and gender stereotypes:
- **Documentation:** Do not require medical documentation or “proof” of transgender status

Best Practices

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- **Investigate:** Be alert to bullying and other unprofessional conduct, and discipline where necessary
- **Educate:** Train employees on policies and place appropriate emphasis on inclusive company culture
- **Accommodate** (where possible): Good will (even if not legally required) can go a long way
- Names/pronouns, accommodations, communicating to co-workers, etc.

Same-Sex Marriage

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Obergefell v. Hodges

- June 2015: SCOTUS ruled 5-4 that the Constitution guarantees a right to same-sex marriage
 - Statewide prohibitions on same-sex marriage violate the Equal Protection and Due Process clauses of the 14th Amendment:
 - Lifts state law bans on same-sex marriage
 - Requires all states to recognize valid same-sex marriages
- Review your policies and benefits plans and make sure they are treating all married couples equally.

Recommendations



- Seek legal advice regarding your obligations under federal, state, and local law regarding gender identity issues.
- Consider appointing a team within your company to explore whether, even without a legal obligation, you would like to accommodate employees on the basis of gender identity.
- Recognize that there is a lot of legal activity by the EEOC and employee rights organizations to push gender identity rights on the employee level.

Recommendations



- If the team suggests moving forward, consider drafting a guideline addressing the issues likely to come up with and how the company would address the issues:
 - Bathroom accommodations
 - Dress code issues
 - Handbook policy changes
 - Communications issues
 - Structural changes

Recommendations

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- Consider training by your legal counsel for all employees.
- Discuss the legal landscape and the choices the company has made.
- Outline areas of likely accommodations.
- Address expectations of all to ensure non-discrimination, no harassment, and no bullying or hazing of employees who are transitioning.
- Discuss definitions, pronouns, and working positively through the process even if an individual does not agree.
- Consider inviting an outside organization that specializes in LGBTQ issues to your company for training.

Recommendations

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- Ensure that all employees know where to direct a request for accommodation so it is handled properly.
- The appropriate person(s) should be involved to begin the discussion process.
- Treat every request seriously.
- Assure the employee that the company will work carefully and thoughtfully with the employee.
- Assure no retaliation and advise the person how to report bullying, harassment, and retaliation.
- Ensure confidentiality of the employee's transition or disclosure unless and until that is not appropriate or possible.

Recommendations

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- If you are unable to reach agreement on key considerations in a way that makes everyone comfortable, you should seek legal advice right away.
- You don't want to say "no" to a request until you have consulted counsel.
- You don't want to be the test case under OSHA or the EEOC's initiatives. Lakeland Eye Center paid \$50,000 to settle the transgender claim that the EEOC brought against it in 2014.
- All processes/accommodation discussions should be documented thoroughly to show how you addressed it, open questions, and ultimate decision-making/agreement on proceeding.

Recommendations

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- Most states (including Florida) require a legal process to change an employee's or student's gender and name.
- Consider addressing by a name and pronoun corresponding to the gender identity they consistently assert.
- Some individuals who are transitioning or have transitioned may not identify as "male," or "female" at all or at various times. You need to think about the pronouns or identifying words you will use.
- It is easier to call the individual by their name (rather than referring to him, her, or "they" (if asked to be referred to as "they").

Summary

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- Ask the employee for permission to make mistakes. Talk realistically about how these issues are new and that you will work hard but may make an error here or there.
- Be very careful with employee requests for accommodation based on gender identity.
- Report the request to HR immediately and let the employee know you are doing so.
- Seek legal advice for any “bumps.”
- Document everything.
- **Stay tuned for guidance from the Supreme Court!**

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