A Workforce In Transition: Working With Transgender Employees

Insights
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Since Caitlyn Jenner made her very public debut in June and brought transgender issues into the limelight, a national conversation on the topic has been sparked. Employers have plenty of compelling reasons to join this conversation, including an increasing number of transgender discrimination charges filed with the Equal Employment Opportunity Commission (EEOC), and several other federal agencies taking action on the subject.

Employers of all sizes should be prepared to face issues associated with transitioning employees. Proactive employers should work with their human resources staff to create a plan that addresses and educates the workforce on relevant policies, including bathroom use, dress and grooming requirements, and the use of names and pronouns.

How Many Transgender Americans Are There?
Though Caitlyn's coming out may have triggered the conversation for many, she was by no means the first person to transition. A 2011 UCLA study estimated that 0.3% of adult Americans considered themselves transgender, which would translate to about 700,000 people.

The current number is likely much higher. Other studies estimate that 2% to 5% of adult Americans are transgender, which would mean between 5 million and 12 million individuals fall into this category. No matter which study is most accurate, in light of recent media attention and an increasing acceptance of the transgender community, we will no doubt see more and more individuals communicate an intention to openly identify as transgender in the coming years.

Legal Protections Of Transgender And Transitioning Employees
Currently, only 19 states and the District of Columbia, along with some local municipalities scattered across the country, ban private employers from discriminating against transgender employees. The EEOC, however, has taken the position since at least 2012 that Title VII of the Civil Rights Act prohibits discrimination on the basis of sexual orientation and gender identity. In the past year, the EEOC has filed at least three prominent lawsuits against private employers alleging transgender discrimination. Issues in these lawsuits include what kind of bathroom access needs to be provided, and the proper use of the transitioning employee's new name with appropriate gender pronouns ("he" or "she," "his" or "her," etc.).

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Recently, both the U.S. Department of Justice (DOJ) and U.S. Occupational Safety and Health Administration (OSHA) have taken action consistent with the EEOC's views. Last December, the DOJ publicly adopted the position that Title VII protects employees based on gender identity. The agency then filed a lawsuit against an Oklahoma university alleging discrimination against a professor who was denied tenure after announcing her intent to transition from male to female.

In May 2015, OSHA issued "A Guide to Restroom Access for Transgender Workers." The core principle of this document, which does not carry the force of law, is that employers should let workers use the bathroom that corresponds to their chosen gender identity. As an alternative, OSHA's guidance states that employers may offer single-occupancy unisex restrooms.

Preparing A Transition Plan

When faced with a transitioning employee, employers should take a proactive approach and develop a detailed transition plan. It should broadly focus on three areas: communication, education, and accommodation. Specifically, it should address issues relating to bathroom access, the company dress code, and use of proper names and pronouns.

At the outset, the plan should designate one or more specific points of contact, so that employees — both those transitioning and their coworkers — know to whom they may address concerns and questions.

Step One: Communication

First and foremost, employers should always convey their tolerance and understanding to employees. This includes distributing a written open-door policy for employees who wish to speak with management or human resources. Employers that invite employees with special circumstances to speak directly with someone involved in decision-making processes often avoid problems down the road. Such an open-door arrangement could avoid the shock of an employee accusing the company of discrimination before the employer even had knowledge of the situation and a chance to respond.

Once an employer learns that an employee plans to transition, it should engage in an open dialogue. A good starting point is to simply ask what workplace accommodations the employee would like during the transition process. During the conversation, the employer may ask what name the employee wishes to use and the employee's anticipated timetable for the transition process.

Collaboratively, the employee and employer should determine a plan for the employee's bathroom access (whether to permit restroom use that corresponds with the employee's new gender identity, or, if the employee chooses and one is available, a single-occupancy unisex bathroom) and for the employee's compliance with the dress code associated with the employee's gender identity. Other topics to discuss include when and how the employee wishes for coworkers to become aware of the transition, and when the employee wishes to switch names and use of pronouns.

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Step Two: Education

Once those issues are addressed, employers must then educate their workforce on the situation. Although it may not happen overnight, employers should continue to encourage a working environment of tolerance and mutual respect. As part of the education process, make sure all employees know that they should use the transitioning employee's new name, if applicable, and use the appropriate pronouns for the employee's new gender identity.

Education is a key component of the plan. Unlike bathroom access and dress code issues, this is not directly in the hands of employers, yet they will pay the price if an employee — especially one in a management position — fails to comply. Open forums may encourage the exchange of concerns and suggested approaches. In addition, employers should make the workforce aware that the employee will likely switch restrooms and comply with the dress code corresponding with the employee's new gender identity. Employers should remember that coworker complaints should not trump a transitioning employee's rights.

Step Three: Accommodation

Finally, when possible, employers may benefit by allowing reasonable accommodation requests from transitioning employees. Until these specific issues work their way through the courts, we have minimal guidance on the full extent of employer obligations to transgender employees. However, sometimes an accommodation, which may be of minimal cost and burden, may be well worth the effort. This is especially true if it prevents a costly discrimination claim.

At a minimum, employers should keep lines of communication open with transitioning employees and consider their accommodation options. Workers are much less likely to become disgruntled if they understand the employer is acknowledging their issues and working with them to find solutions.

Conclusion

In this rapidly evolving area of law, employers would be well-served to develop an appropriate response to transitioning employees when the issue arises. These situations require a transition not only by the individual going through the process, but also by management and coworkers. Employers should always emphasize open communication, tolerance, and mutual respect in their response to employees who announce their intent to transition.

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