

UNDERSTANDING TRANSGENDER WORKERS' RIGHTS: A LEGAL UPDATE AND 3 BEST PRACTICES FOR EMPLOYERS TO CREATE AN INCLUSIVE ENVIRONMENT

Insights
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Employers should review their diversity, equity, and inclusion (DEI) and anti-discrimination policies as federal and state laws protecting transgender workers continue to take shape. The Equal Employment Opportunity Commission (EEOC) recently filed a first-of-its-kind lawsuit on behalf of a transgender employee who was allegedly harassed based on their gender. The agency's action aligns with its five-year enforcement strategy highlighting its commitment to protecting workers — including transgender individuals — who are from underserved communities. You should also note that many states have their own laws that may afford greater protections for LGBTQ+ workers. However, seemingly contradictory laws and court rulings — regarding bathroom access, pronoun usage, and other policies — are causing some confusion for employers. While the U.S. Supreme Court may ultimately need to weigh in on lingering legal questions, employers should keep in mind the goal of creating a healthy, safe, and inclusive environment for all workers. As we wait for further legal guidance, here's a review of transgender employees' workplace rights, as well as three best practices for employers to create an inclusive environment.

Expanded LGBTQ+ Workplace Protections

At the federal level, employment protections for transgender individuals have expanded in recent years. Here are several key takeaways you should note from the U.S. Supreme Court's landmark 2020 decision in [*Bostock v. Clayton County*](#) and the EEOC's subsequent guidance:

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- **SCOTUS issues win for LGBTQ+ workers.** In *Bostock*, the Supreme Court held that discriminating against an individual based on sexual orientation or gender identity (including being transgender) is discrimination “because of sex” under Title VII of the Civil Rights Act of 1964.
- **Limited ruling.** The *Bostock* opinion, however, expressly stated the Court’s ruling did not “purport to address bathrooms, locker rooms, or anything else of the kind.” The Justices noted that the only question before the Court was “whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’... Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases.”
- **EEOC followed up with guidance.** Exactly one year after the *Bostock* opinion was published, the EEOC issued **guidance** aiming to explain what the *Bostock* decision means for covered workers (including LGBTQ+ individuals) and employers across the country, and providing the EEOC’s “legal positions on LGTBQ+-related matters, as voted by the Commission.”
- **Agency addressed bathroom access and pronoun usage.** In the guidance, the Commission asserted several positions, including that:
 - employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee’s gender identity; and
 - although accidental misuse of a transgender employee’s preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.
- **Focus on underserved communities.** Earlier this year, the EEOC released its **draft Strategic Enforcement Plan**, which announced the agency’s “subject matter priorities” for Fiscal Years 2023 through 2027. It includes an emphasis on heightened enforcement efforts focusing on “harassment, retaliation, ... and other policies and practices that impact particularly vulnerable workers and

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persons from underserved communities” including transgender individuals.

A Federal Texas Court Vacated the EEOC’s Guidance

The EEOC’s position has come under scrutiny in some states where officials argue that the agency interpreted *Bostock* too broadly. Notably, Texas sued the EEOC in September 2021 to challenge the agency’s guidance that allows exceptions for LGBTQ+ employees from workplace policies on bathrooms, dress codes, and locker rooms.

A federal district judge sided with Texas and issued an [order](#) vacating the guidance as unlawful. Among other findings, the judge said the guidance improperly interpreted *Bostock*’s holding, which he described as merely establishing that Title VII protected homosexuality and transgender *status*, and that it did not extend to “correlated conduct”— such as sex-specific dress, bathroom, and pronoun preferences of LGBTQ+ individuals.

Thus, under this ruling, an employer does not commit unlawful discrimination under Title VII for simply failing to use an individual’s chosen pronouns or failing to, for example, permit a transgender employee to follow sex-specific dress codes that align with their gender rather than the sex they were assigned at birth.

Despite the ruling, however, the EEOC has maintained its position. Although the Texas federal court blocked application of the agency’s guidance in any state, the EEOC is continuing to test the bounds of *Bostock*’s application in other jurisdictions.

EEOC Files New Lawsuit in New York

The EEOC just filed a lawsuit on March 30 in a federal court in New York claiming that a restaurant subjected a former employee to a hostile work environment based on his transgender status.

In [EEOC v. T.C. Wheelers, Inc.](#), the agency claims that the employer violated federal law by repeatedly harassing the former employee, a transgender male, by making comments such as he “wasn’t a real man”; asking invasive questions about his transition; and allowing others to intentionally misgender him using the pronouns “she” and “her.”

Additionally, his co-workers “openly equated being transgender to pedophilia,” the agency claims. According to the complaint, the restaurant’s owners and managers knew the employee objected to being referred to as female but purportedly intentionally misgendered him by using female pronouns (such as “she” or “her”) and allowed co-workers and customers to do the same.

The employee said he complained about the alleged conduct to management on two occasions, yet the employer purportedly did not act to address the harassment. Eventually, he had no choice but to resign to escape the hostile work environment, the EEOC charged in its lawsuit. The EEOC is seeking pay, compensatory damages, and punitive damages for the employee and injunctive relief against the employer.

Notably, the EEOC’s position in this case appears to contradict the Texas ruling finding that Title VII’s prohibition against sex discrimination did not protect LGBTQ+ employees’ correlated conduct, such as using pronouns that don’t correspond with their sex assigned at birth.

Thus, the EEOC’s new lawsuit signals that the agency is doubling down on its position in the 2021 guidance and continuing to assert such claims in court. So, employers can expect to see more claims related to these issues — which makes it essential for you to review your policies and practices for compliance.

States Impose Their Own Transgender-Based Laws

The patchwork of state laws adds to the confusion for employers. For example:

- In 2016, North Carolina became the first state to pass a bill barring transgender people from using bathrooms consistent with their gender identity — but the bill was later repealed following widespread protests and boycotts.
- Recently, however, Alabama, Arkansas, Idaho, Iowa, Oklahoma, and Tennessee have passed their own bathroom bills (though lawsuits have been filed challenging the Oklahoma and Tennessee laws) and [Arkansas](#) is on the verge of passing an even more restrictive bill.

- As of March 2023, the [Human Rights Campaign reports](#) it is tracking 180 bills introduced in statehouses across the country specifically addressing transgender individuals, including more bathroom bills than were filed in any previous year.

Although many states have [implemented “bathroom ban” laws](#), these restrictions generally only apply to public employers, meaning private employers may still permit transgender workers to use the restroom facility that aligns with their gender identity.

On the other end of the spectrum, anti-discrimination laws that explicitly *protect* LGBTQ+ people have been enacted in at least 18 states and more than 200 municipalities. For example:

- [Colorado regulations](#) require employers to permit their employees to use restrooms appropriate to their gender identity rather than their assigned sex at birth without being harassed or questioned.
- Some jurisdictions, such as [New York City](#), have ordinances making the failure to use an individual’s preferred pronoun a punishable offense.
- In 2015, the Department of Labor’s Occupational Safety and Health Administration (OSHA) published a [“Best Practices”](#) document advising employers that employees, including transgender employees, should have access to restrooms that correspond to their gender identity.

Based on the positions taken by agencies like the EEOC and OSHA on this point, the recommended best practice is to permit all employees to use bathrooms and locker rooms that correspond to their gender identity. Anyone who is uncomfortable sharing restroom facilities with other employees for any reason should be welcome to use single-person, all-gender facilities, if available. If single-person facilities are not available, you should consult your HR department and legal counsel to balance all considerations in a fair and non-discriminatory manner.

What Should Employers Do?

Given the seemingly contradictory approaches by various states and federal agencies, what does the law currently require regarding transgender workers, and what are some

best practices you can implement to reduce your potential liability? Creating a workplace culture that is inclusive, safe, and accepting of all employees can help you stay compliant, increase morale, and lead to a more positive and productive work environment. Here are three key steps you should consider taking:

1. Review the Evolving Legal Landscape

Make sure you stay up to date on local laws at the state, city, and municipality level to ensure compliance with any restrictions or obligations regarding LGBTQ+ individuals that may apply to your business.

At the federal level, it's unclear whether intentional misuse of pronouns or other correlated conduct will be considered a Title VII standing on its own. But liability becomes more likely where those comments are coupled with other, more objectively offensive comments, such as the comments alleged in *T.C. Wheelers* likening transgender status to pedophilia.

2. Communicate with Employees

You should create an inclusive and understanding environment that conveys to your employees the company's acceptance and understanding. This includes providing training to all managers on company policies on anti-discrimination and equal employment opportunities, as well as training on transgender issues. It also includes distributing a written open-door policy for employees who wish to speak with management or human resources. Inviting employees with special circumstances to speak directly with someone in leadership creates an opportunity for you to respond to concerns before they escalate.

If an employee informs you that they plan to transition to another gender, you should engage in an open dialogue with that individual. You should also work with the employee to determine their anticipated timetable for the transition process. Discuss when and how the employee wants co-workers to become aware of the transition and when the employee wishes to switch names and use of pronouns. You should also make name and pronoun changes easily accessible.

Additionally, you'll want to review your dress and appearance policies, make them gender neutral by

removing any standards based on gender stereotypes (such as requiring women to wear dresses and men to wear trousers), and allow transgender workers to follow standards that align with their gender identity and expression.

Remember that co-worker complaints or personal opinions do not supersede a transitioning employee's rights to express their gender identity and to be free from discrimination and harassment for doing so.

3. Explore Reasonable Accommodations

Finally, when possible, you should consider requests for reasonable accommodations from a transitioning employee, such as flexibility or time off for doctor's visits or to address the side effects of hormonal changes or gender reassignment surgery. Sometimes an accommodation has a minimal cost or burden and is well worth the effort. This is especially true if it prevents a costly discrimination claim and fosters an inclusive environment that focuses on retention of workforce talent.

A good starting point is to simply ask what workplace accommodations the transgender employee needs, if any. At a minimum, you should keep lines of communication open with employees and review their accommodation options. Workers are less likely to become disgruntled, or seek out counsel, if you acknowledge their concerns and work with them to find solutions.

Conclusion

Review your policies and practices to ensure they comply with the laws applicable to your workforce. Promptly investigate any allegation of harassing or offensive behavior, because even small offensive comments can constitute actionable discrimination if they are sufficiently pervasive.

We'll continue to monitor developments in this area and provide updates as warranted. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to ensure you receive the latest news directly to your inbox. For further information, contact your Fisher Phillips attorney or the authors of this Insight.

