Transgender Employees

By John D. Shyer and Toshi Kameoka

Anti-Discrimination Laws and Corporate Non-Discrimination Policies, Part One of a Two-Part Article

Even as employers have grown more accustomed to addressing the rights of openly gay and lesbian employees in the workplace, they are increasingly faced with a new population that seeks protection from discrimination: transgender employees. While in the past some people have conflated gender identity with sexual orientation, there is a growing public awareness that transgender people face unique challenges in the workplace. In response, legislatures and courts alike in several jurisdictions have extended existing anti-discrimination laws to transgender people, and some employers have followed suit with changes to their non-discrimination policies. Employers are thus advised not only to familiarize themselves with the current legal landscape for transgender rights, but also to consider the practical implications of such laws on their own efforts to provide an inclusive and non-discriminatory workplace environment for transgender employees. This two-part article will explore the legal landscape and its implications.

Key Terminology

Anyone seeking to address the needs of transgender people must first understand the accepted terminology. Although definitions and preferred terms can vary even among transgender rights groups, “transgender” is generally used as an umbrella term to refer to people whose gender identity and/or gender expression differs from the sex they were assigned at birth. In turn, gender identity refers to one’s innate, personal sense of being male or female, whereas gender expression pertains to one’s external manifestation of gender identity, typically expressed through such attributes as attire, hairstyle, behavior, and voice. For transgender people, the birth-assigned sex is different from their own internal sense of gender identity. The process of transition, then, is one in which a transgender person modifies his or her physical characteristics and/or manner of expression to fit the stereotypical norms associated with his
or her gender identity. Dealing with transgender employees can present a
unique challenge to employers since, unlike other protected categories in
which an employee’s status tends to be static, a transgender person may still
be in the process of transitioning from his or her birth-assigned sex to his or
her reassigned gender. Note, too, that transgender does not imply any specific
form of sexual orientation, as, for example, a transgender person could be
heterosexual or homosexual.

**Current Legal Landscape**

Prohibiting discrimination on the basis of gender identity has become a growing
concern for employers as transgender people have gained broader legal
protections in recent years. According to the Human Rights Campaign ("HRC")
Foundation, part of the nation’s largest gay, lesbian, bisexual and transgender
("GLBT") advocacy organization, seven states and 87 municipalities have in
effect anti-discrimination employment laws that explicitly protect gender
identity or expression. HRC Workplace Project Database, www.hrc.org/worklife/
pdsearch (last visited Mar. 23, 2007). The first such legislation dates back
to 1975, when the city of Minneapolis first included gender identity in the
definition of its protected category-affectional preference (now codified as
sexual orientation). In addition to those 94 jurisdictions with explicit statutes or
ordinances, in a number of jurisdictions, courts have interpreted other types
of non-discrimination statutes, such as sex or disability laws, as covering
transgender people. For instance, in New Jersey, a state whose protection
of gender identity or expression under its anti-discrimination statute will take
effect in mid-2007, an appellate court held in 2001 that transgender people
2001). Similarly, while there is no federal statute that protects transgender people,
the Sixth U.S. Circuit Court of Appeals held in the landmark case *Smith v. City of Salem*, involving a transgender firefighter, that sex stereotyping based
on a person’s gender non-conforming behavior is impermissible discrimination
under Title VII prohibition of sex discrimination. 378 F.3d 566, 575 (6th Cir. 2004); see also *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)
(similarly holding in the case of a transgender police officer).

Note, however, that Title VII and most state employment anti-discrimination
laws recognize a limited bona fide occupational qualification (“BFOQ”)
defense to discriminatory hiring. In the context of sex-based discrimination,
a BFOQ may apply when the position directly raises privacy concerns for
third parties, such as when nudity is involved. See, e.g., *Local 567 Am. Fed
of State, etc. v. Mich. Council 25, Am. Fed of State, etc.*, 635 F. Supp. 1010,
1013 (D. Mich. 1986) (privacy rights of mental health patients or residents
in mental health facilities can justify a BFOQ to provide for same-sex personal
hygiene care). Courts have yet to tackle privacy-related BFOQs with respect to
transgender employees, and it remains to be seen how a court would classify
a transitioning employee under such circumstances.

Legislators and judges alike continue to struggle over how to frame the category
of gender identity. Many jurisdictions, especially those that were among the
earliest to pass anti-discrimination laws, have chosen to subsume gender identity
within the definition of an existing protected category, rather than include
gender identity directly and distinctly as a protected class. For example, in
extending anti-discrimination protection to transgender persons, states such
as Illinois, Maine, Minnesota, and Washington have chosen to include
gender identity within the definition of sexual orientation. By contrast,
California’s statute adds an additional
layer of complexity by including gender within its definition of sex, which is the actual protected category, and referring one to the Penal Code for the definition of gender, which in turn includes gender and gender-related appearance and behavior. Rhode Island has added gender identity or expression to its anti-discrimination statute, while New Mexico has simply added gender identity. Nevertheless, the end result is the same: transgender employees in these states are protected from discrimination in employment (as well as in public accommodations and housing) on the basis of their gender identity.

Part two of this article will address the implications of these laws for employers.

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