



# Gender Transitioning in the Workplace: An Employer's Guide

Insights

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As workplace protections expand for the LGBTQ+ community, transgender and non-binary employees may feel more comfortable being their authentic self at work. As a result, you should be prepared to work with transitioning employees. Consider developing a plan with your human resources department to educate the workforce and foster an inclusive work environment by creating policies that prohibit discrimination on the basis of gender identity or expression, allow for employee self-identification, address access to bathroom facilities, and make dress codes gender neutral. What should you know if an employee in your workplace is transitioning?

## Understand the Meaning of 'Transgender'

An important first step for employers is to understand what "transgender" means. "Transgender" is a broad term that may apply to a range of gender-nonconforming people. In general, a transgender person is someone whose gender identity or gender expression is different than their sex assigned at birth, and they may identify as male, female, or some combination of both or neither. Many people who consider themselves transgender do not undergo gender-affirmation surgery.

Additionally, while many transgender people do identify as male or female, some do not. They may refer to themselves as non-binary or prefer other terms to describe their gender identity, such as gender fluid, genderqueer, agender, or bigender.

A person's sexuality and gender identity are separate statuses, and transgender people may identify as straight, lesbian, gay, bisexual, asexual, or another sexual orientation. In order to foster an inclusive environment, and avoid potential claims, it is important to avoid making assumptions about anyone's sexuality based on their gender identity.

## Review the Evolving Legal Landscape

While some states have provided employment protections for LGBTQ+ workers for years, the U.S. Supreme Court's landmark 2020 decision in *Bostock v. Clayton County* changed the legal landscape nationwide.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees based on color, national origin, race, religion, or sex. In the *Bostock* case, the SCOTUS held that workplace discrimination based on sexual orientation and gender identity is unlawful "sex"

discrimination under Title VII. This means employers cannot lawfully make employment decisions – such as hiring, firing, promoting, or disciplining employees – based on a job applicant’s or employee’s LGBTQ+ identification.

The Supreme Court found that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

The Court provided a workplace example to illustrate its point: An employer fired a woman because she is insufficiently feminine and also fired a man for being insufficiently masculine. Even if the employer treated them equally, it fired each worker because of their sex. “Instead of avoiding Title VII exposure, this employer doubles it,” according to the Court.

You should also [review guidelines](#) from the Equal Opportunity Commission (EEOC) – the federal agency that enforces Title VII – on sexual orientation and gender identity discrimination in the workplace. The EEOC updated its guidance in 2021 in light of the *Bostock* ruling.

Be sure to also review state and local laws, which may provide additional rights to LGBTQ+ employees in the jurisdictions where they work.

## **Prepare a Transition Plan**

If you are approached by a transitioning employee or otherwise become aware of an employee transitioning, you should consider developing a detailed plan that broadly focuses on three areas: communication, education, and accommodation.

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 who to call with concerns and questions.

Consider the following three points as you develop your plan:

### **1. Communication is Key**

You should create an inclusive and understanding environment to convey to your employees your acceptance and understanding. This includes distributing a written open-door policy for employees who wish to speak with management or human resources. If you invite employees with special circumstances to speak directly with someone in leadership, you may have a chance to respond to concerns before they escalate.

Once you learn that an employee plans to transition, you should engage in an open dialogue with that individual. Encourage the employee to self-identify their pronouns and make name or pronoun changes easily accessible.

You should also work with the employee to determine their anticipated timetable for the transition process. Discuss when and how the employee wants coworkers to become aware of

the transition and when the employee wishes to switch names and use of pronouns. You should also 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.

All employees should be permitted 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.

Remember that coworker 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.

## **2. Educate Your Workforce**

Once those matters are addressed, you should educate your workforce and encourage an 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 gender identity.

One common issue many transgender people experience is misgendering, and if done intentionally over time could create potential for hostile work environment. A simple way to demonstrate inclusivity is to encourage all employees to specify their pronouns of choice on company email signatures or other personal identifying communication.

Education is a key part of the plan. Open forums may encourage the respectful exchange of concerns and suggested approaches. If a transitioning employee reports any incidents of perceived harassment or discrimination, you should take immediate steps to investigate those concerns and remediate any confirmed instances of unlawful discrimination.

## **3. Explore Reasonable Accommodations**

Finally, when possible, you should consider requests for reasonable accommodations from 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 employee would like during the transition process. At a minimum, you should keep lines of communication open with

transitioning employees and review their accommodation options. Workers are less likely to become disgruntled, and seek out counsel, if you acknowledge their concerns and work with them to find solutions.

## Conclusion

You should review your policies and practices to ensure compliance with the Supreme Court's *Bostock* ruling, the EEOC's updated guidance, and applicable state and local laws.

We'll continue to monitor developments in this area and provide updates as warranted. Make sure you are subscribed to the [Fisher Phillips Insight service](#) 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.

A version of this article originally appeared on *Law360.com*.

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