



WHEN AN EMPLOYEE TRANSITIONS

What Every Employer Should Know

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A familiar scene: An employee has informed their supervisor that they are transgender and intend to transition at work. The employer and their counsel scramble; they have no idea how to support the employee or how to meet obligations under federal and state law.

If your organization and its counsel have not yet encountered this scenario, you undoubtedly will; a significant portion of the U.S. population identifies as transgender, and younger generations identify as more gender expansive than previous generations. According to a 2020 study by the Williams Institute, approximately 4.5 percent of the United States' adult population—or 11,343,000 people—identify as lesbian, gay, bisexual, transgender, or queer (LGBTQ+),¹ and 1,397,150 of those people identify as transgender. These numbers will only continue to grow, as demonstrated by another Williams Institute study estimating that 1,994,000 youth 13 to 17 years old in the United States—approximately 9.5 percent of that population—identify as LGBTQ+, with 149,750 of these youths identifying as transgender.

Last year, the United States Supreme Court extended federal antidiscrimination protections to the LGBTQ+ community in the landmark decision *Bostock v. Clayton County, Georgia*, which held that Title VII

of the Civil Rights Act of 1964 protects employees from discrimination based on sexual orientation and gender identity. This interpretation of “on the basis of sex” bars employers from discriminating against LGBTQ+ employees with regard to any term, condition, or privilege of employment.

State-level antidiscrimination protections for LGBTQ+ employees are more complicated. Currently, 22 states and the District of Columbia have explicit statutory protections that bar discrimination based on sexual orientation and gender identity.² However, 27 states have no protections in place for sexual orientation and gender identity, and one state—Wisconsin—only has antidiscrimination protections in place for sexual orientation. According to the Williams Institute, this leaves approximately 3.6 million LGBTQ+ workers in the United States without state-level statutory protections against employment discrimination based on sexual orientation and gender identity.

As the LGBTQ+ workforce continues to grow, employers need to be ready to anticipate the needs of employees who intend to transition at work to ensure the creation of a workplace that is safe, supportive, and complies with the law. Workplace transitions can be fraught with problems if

employers fail to identify ways to anticipate and support employees' needs. Employer preparations should include developing new and revising old policies and procedures to ensure that the organization is adequately prepared when an employee inevitably tells management they will be transitioning.

The most important transition-related policy and procedure that an employer can develop is gender transition guidelines. These guidelines should clearly delineate responsibilities and expectations for transitioning employees, their supervisors, colleagues, and other staff. The guidelines will need to be flexible enough to be tailored to meet a transitioning employee's individual needs, while also being specific enough to provide a consistent framework that eliminates confusion and the potential for mismanagement (or worse). Gender transition guidelines should, at minimum, address who will assist the transitioning employee with managing their workplace transition; what the employee can expect from management; management's expectation for staff, the transitioning employee, and others in facilitating a successful and supportive transition; and the general procedures for implementing transition plans. Employers should take proactive steps by preparing these guidelines prior to being

advised of an employee's intent to transition. The guidelines can be presented in a formal or informal manner, so long as the necessary parties (such as human resources) have access to the documents and feel adequately prepared to utilize them.

In addition to well-established gender transition guidelines, the key to a successful and supportive workplace transition is creating and implementing a workplace transition plan. Once an employee has provided notice of their intent to transition, a support team should be created to work collaboratively with the employee to develop a workplace transition plan. Employees should be given the freedom to shape the overall process in creating the plan, and employers will need to actively listen to the employee's wants and needs to tailor the plan accordingly. Workplace transition plans should, at the very least, address the following topics:

1. Identify the various stakeholders with whom the employee may need to engage at some point during the transition process. Stakeholders can include, for example, supervisors, colleagues, clients, and vendors.
2. Prepare a communication plan that addresses when and how the various stakeholders will be informed of the transition. The employee should determine the timeline for sharing the information, and information related to the employee's transition should be considered confidential.
3. Identify any materials that will need to be changed to reflect the employee's transition, including, for example, directories, websites, identification badges, email addresses, and telephone listings. An employee should be permitted to change their name at work prior to when any official legal name change (if any) occurs, with exceptions being made for instances where records are required by law to reflect a person's legal name, such as payroll and insurance documents. Employers should be sure to identify and explain the instances where the employee's legal name must be used and the reasons for the use. The support team should also identify any external materials and information that will need to be changed, such as professional licenses and directories.
4. Identify when the employee's workplace transition will begin, when workplace materials will be changed, when changes to any external professional information will occur, and when the employee's legal name change (if any) will take effect.
5. Identify any workplace benefits that may be available to the employee to support their transition, such as medical benefits and time off policies, among others.
6. Identify key points of contact for the employee, management, and support team.
7. Determine whether there are, and develop a plan to address, any urgent issues that need to be dealt with.

Similar to gender transition guidelines, workplace transition plans need to be flexible documents and tailored to the transitioning employee's individual needs. Employers should also remember that these plans are living documents and will likely change as the employee works through the details of their transition.

In addition to developing gender transition guidelines, employers will also need to review their various other policies and procedures to ensure they are in alignment. For example, employers should review their nondiscrimination and antiharassment policies for consistency with their gender transition guidelines and compliance with federal and state laws. These policies should include gender identity and expression as classes protected from workplace discrimination. All employees generally remain subject to these policies, and any complaints or concerns raised by any employee, including the transitioning employee, must be handled consistent with these policies.

Employers should also review any policies that may be in place regarding access to locker rooms and facilities. Consistent with [OSHA guidance](#), these policies should ensure that employees are able to access gender-segregated facilities consistent with their gender identity. Employers should consider the necessity of any gender-segregated grooming or dress codes that are currently in place and should opt for gender-neutral policies whenever possible. If a determination is made that gender-segregated grooming and dress codes are truly necessary, these codes must be applied consistently to all employees and should be based on an employee's gender identity.

Finally, employers will also need to review their confidentiality policies to ensure they can adequately maintain confidentiality regarding an employee's transition. It is important to note that employees should not be required to advise employers of any medical decisions, and any disclosure of this information may be a violation of federal and state laws. Policies and procedures, such as gender transition guidelines, should direct employees to utilize the same policies and procedures for medical care or recovery-related time off requests for any transition-related medical needs. Physician notes regarding time off should explain the workplace-related implications—such as the amount of time off required and any return-to-work restrictions—but should not include any diagnosis or treatment-related information.

Each of these steps is crucial for employers in creating a workplace atmosphere that is safe and supportive for transitioning employees, the LGBTQ+ community, and the workforce at large. They are not, however, the only steps employers must take. Employers must also be aware of unconscious bias—for example, moving a transitioning employee to a position that does not involve direct client interaction—and should regularly provide all employees with information and training on gender identity and gender expression. Utilizing senior management to demonstrate support for the transitioning employee, as well as the larger LGBTQ+ community, can go a long way in creating an atmosphere in which all employees are welcomed, supported, and able to thrive.



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¹ Understanding the language applicable to sexual orientation, gender identity, and gender expression is key to creating a safe and supportive workplace; helpful definitions are available from many sources. See, e.g., The Human Rights Campaign's [Glossary of Terms](#).

² For a list of the states with and without antidiscrimination protections, see the Williams Institute's April 2020 brief, [LGBT Protections from Discrimination: Employment and Public Accommodations](#).