



Managing Gender Transition in the Workplace

Overview

This article examines how employers can best manage the workplace issues surrounding an employee's gender transition. The term "transgender" is commonly used to refer to people who do not identify with the sex they were assigned at birth or with standard societal expectations of male and female gender roles. Transgender persons include people who are transsexual, cross-dressing, androgynous and gender-nonconforming, among others.

Transgender individuals often suffer discrimination in various aspects of their lives, including employment. This article explains how organizations can treat an employee's transition appropriately. The article also explains HR's role in creating gender transition guidelines, ensuring good communications with employees and managers, and protecting the legal rights of transgender individuals. The article does not cover sexual orientation. It also does not examine the processes involved in gender transition.

Background

The American Psychological Association (APA) says that "transgender is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth. Gender identity refers to a person's internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics."¹ One of the transgender identities is that of transsexual—a person whose gender identity is different from their assigned sex. "Transgender people may be straight, lesbian, gay, bisexual or asexual,"² and the term transgender is used to encompass a broad category of individuals.

Although the transgender population is small, employers must still be prepared to handle workplace issues related to transgender employees. How an employer handles an employee's transition has potential legal implications, as well as an impact on the transitioning employee and their co-workers.

For people transitioning from living—and working—as one gender to living and working as the other gender, no two transitions are alike. The specific steps of transition and their timing can vary, and individuals have different preferences about how widely they want their transitions to be announced. How employers address transgender issues depends on many factors, including organizational culture, workforce composition, the type of work, the physical layout of the workplace, and the amount of interaction the transgender employee has with peers, superiors, subordinates, vendors and clients. Because of these variables, there is no single formula for managing gender transitions at work. The process must be uniquely tailored to meet the needs of each specific situation.

Business Case

Employers that are unprepared to handle a gender transition are likely to face not only employee relations issues but also discrimination claims. Integrating transgender workers into the workplace is good for business. For example, with transgender employees in its workplace, an organization can:



- Attract and retain the people most qualified for particular jobs.
- Become productive, innovative and creative, because inclusiveness means an employer can draw from a broad range of talented people.
- Treat all workers fairly and judge them on their abilities, not on their gender identity or expression.
- Demonstrate compliance with federal, state, local and global employment laws.
- Fulfill diversity and inclusion initiatives.

HR's Role

Transgender employees look chiefly to HR to help them navigate the changes that are inevitable during the transition process—and to help with concerns that co-workers may express. The degree of success in a transition is strongly influenced by a person's ability to maintain a stable job and income during the process and by the level of support in the work environment.

HR can support employees undergoing gender transition and also legally protect the organization by having a thorough understanding of anti-discrimination law and by keeping an eye on developing case law and proposed legislation. HR should ensure that those protections are incorporated into the organization's policies, practices, training and communication initiatives.

When is a transition "official"?

A key question HR needs to consider is when to start regarding a transitioning employee as being officially a member of their chosen new gender. There is no single means of defining a person's legal gender, and there is no official point in time when a transgender person changes from one gender to the other.

No uniformity on this issue exists among the states, between state and federal policies or among federal agencies. For example, many states permit a transgender person to easily obtain a new driver's license; this can help accommodate the medical requirement that a transgender person in surgical transition must live as a member of their new gender for at least a year before undergoing genital reconstructive surgery. In other states, changing the sex designation on any form of state-issued identification may be difficult or impossible.

Because the laws vary, employers should seek legal advice when addressing gender transition issues. Employers would encounter problems if they tied recognition of gender in the workplace to government agencies' legal recognition of the person's sex. Even more dubious is any attempt to base the person's acknowledged gender on medical or surgical treatment milestones.

Here is a commonsense approach for employers: Until a transgender person begins *working* in their new gender role, the person should be considered a member of their original sex and should be treated the same as other members of that sex. Once the employee begins to present themselves in the new gender role at work, the employee should be considered and treated as a member of the new sex. This approach follows the growing legal trend toward recognizing that a transgender person should be treated as a legal member of the gender in which they live life.

Keeping co-workers in mind



HR may also have to deal with questions from and reactions by co-workers of the transitioning employee. Although many employees want to be supportive of an individual in transition, others may be offended by the idea of transition. Diversity in a workplace means that employees should be able to work with all people; it does not require that employees believe in or accept transgenderism. Employees are entitled to their beliefs, but they should also be required to treat the transgender person—and every other employee—with respect and tolerance.

Employers need to make clear statements in employee handbooks, rules manuals, orientation and training that all employees are welcomed and supported. Employers should also remind managers that they are responsible for following policies on transgender issues and for maintaining a harassment-free workplace.

Employers should be aware that the single most sensitive issue for co-workers of transitioning or transgender people is often the issue of bathrooms and workplace dressing rooms. Experts advise that employers should let transgender employees use the facilities designated for their chosen gender—even if other employees are uncomfortable with that. In keeping with the highly individual nature of gender transitions, the transitioning employee, HR and management can work together to determine when the employee will start using certain facilities.

Employers need to be familiar with state gender identity laws to ensure employee protection and maintain compliance at the state and local level. For example, California sex discrimination regulations require employers to allow employees to use facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth.³

HR should prepare its policies so it is ready if an employee makes a gender transition or if a new hire is a transgender person. Preparation includes first updating existing policies and procedures, then creating guidelines for handling gender transition issues. HR departments must also remember to cover these issues in employee training and communications.

Update Existing Practices

Employers should examine their current policies and practice and consider covering gender identity and gender expression in those policies. In particular, HR should see if its equal employment policies protect gender identity. Adding gender identity protection tells employees and candidates that diversity is welcome, and there is evidence that in a knowledge economy, knowledge workers are drawn to organizations that embrace diversity.

But companies cannot just add gender identity to a policy and move on. If the organization simply rolls out a policy with no explanation or training, that leaves room for questions, particularly when a transgender employee is in the organization. Part of the policy execution process is a statement from the organization that employees must follow the policy with regard to workplace behavior and relationships even if their personal beliefs about gender identity differ.

Following are some of the other workplace policies that HR professionals should review in light of gender transition issues:

- **Dress code policy.** Avoid gender stereotypes, such as stating that men must wear dress trousers and women must wear skirts. Do not apply dress codes to off-duty conduct. Consider adding a provision that workers may dress in accordance with their full-time gender expression.



- **Benefits policies and offerings.** Do not deny benefits on the basis of gender identity or expression. Treat transgender workers' spouses, domestic partners, children and step-children in accordance with applicable laws and offer the same benefits as those offered to family members of similarly situated nontransgender workers.
- **Diversity and inclusion initiatives.** Make certain that transgender workers are included in the organization's affinity groups, local outreach efforts, internal programming and related training.
- **Recruitment and selection processes.** Review processes for possible disparate impact or treatment of transgender workers. Educate recruitment teams, contact outreach organizations and conduct anti-discrimination analysis as needed.

Create Guidelines for Gender Transitions

If the organization makes advance preparations, the process is likelier to be smooth.

In the absence of a gender transition plan, both managers and HR will be unprepared, which increases the likelihood of disgruntled employees, grievances and lawsuits. GuardianHR provides its clients with a template for a draft gender transition plan.

Getting started

When an employee comes forward to say they will undergo transition, HR should follow what author Jillian Weiss calls a four-step mediation procedure:⁴

- **Initial employee meeting.** A time to talk to the employee about what they and the organization should expect through the transition process.
- **Initial management meeting.** A separate meeting with the person's supervisor to give the supervisor information about the process and to review the company's policy and procedures.
- **Joint meeting with employee and supervisor.** A meeting to go over the transition plan and address any questions or concerns.
- **Informing co-workers.** A meeting with employees who will have regular contact with the transitioning employee to provide at least basic information about the individual's plans, along with a reminder about company policy, expected behavior and how to deal with any concerns they might have. Weiss advises that it can be helpful if the transitioning or transgender employee is *not* at this session, so that employees feel more comfortable asking questions.

What to cover

HR typically meets with the employee who is preparing to transition and discusses the situation. HR should cover the employee's preferences for handling communications with other employees and the timing of any announcement. Some of the immediate issues to resolve include these:

- Changing the person's name and photo on company documents.
- Coverage under employer health and other benefits plans.
- Communication (and timing of those communications) to the organization.
- Security clearances.
- Restroom and dressing room use.
- Appearance rules.



- Dress code rules.
- Expectations about employee conduct and how to handle difficult conversations and potential conflict.
- Manager and employee training if needed.
- Client and customer notification and communications.

Employers should identify someone in management or HR as a gender transition policy leader—a person tasked with knowing the rules, providing guidance, managing the timeline and making relevant decisions whenever an employee undergoes transition.

Each transgender individual is likely to have different preferences about making the transition known at work. As the Human Rights Campaign (HRC) reports, "one employee may prefer a quick start in which all his/her co-workers and peers are informed about the transition at the end of the work week," and the employee "comes to work the following week presenting in the new/desired gender role. Another employee may prefer a more gradual transition, in which colleagues are notified of the transition, but the employee does not actually present in the new gender role for several weeks. However, in both cases, the same designated contact in human resources is responsible for helping each transitioning employee and the employee's supervisor manage the workplace transition process."⁵

Roles for senior managers

When announcing an employee's plan to transition, senior management can send a strong message of support for the transitioning employee and set the tone for what is expected of staff.

Some employers assign an executive to sponsor the transitioning employee to help communicate top-down inclusive messages and expectations. Managers and HR should reiterate these messages regularly. The desire to minimize disruption in the office routine and to send the message that business will continue as usual should be carefully balanced with the need to educate co-workers so that they too can successfully navigate the situation.

Employee Communications

Information about the organization's policies and guidelines for managing a gender transition should be widely accessible for employees, supervisors and managers, and HR professionals. The HRC's Workplace Gender Transition Guidelines⁶ recommends that information appear in various venues, including these:

- The organization's intranet, particularly the HR resources pages and any pages for lesbian, gay, bisexual and transgender (LGBT) employee groups.
- The company's online and print code of conduct documents, covering employment nondiscrimination, equal employment opportunity policy, dress code, restroom policy and other topics.
- The search engine used to navigate company sites and pages. Users should be able to find information by searching terms such as transition guidelines, gender identity, gender expression, transgender, transsexual, cross-dress, gender reassignment, sex reassignment, sex change or transgendered. (The terms sex change and transgendered are not preferred terminology, but are intended to capture potential searches).
- Employee assistance program resources.
- HR hotline resources.



Benefits Issues

The U.S. Department of Health and Human Services (HHS) has issued a final rule that implements nondiscrimination provisions under Section 1557 of the Affordable Care Act (ACA).

Employers are also finding that offering transgender inclusive benefits is important in recruitment and retention of LGBT employees.

The Legal Framework

A study conducted by the National LGBTQ Task Force and the National Center for Transgender Equality documented that transgender individuals' unemployment rate was twice the rate for the general population, and it reported substantial rates of workplace abuse and discrimination. Workplace discrimination may be overt, such as denial of access to a workplace restroom, or it may be more subtle, such as personal questions from co-workers that invade the person's privacy. HR professionals should be aware of the potential for discrimination against these employees and should know the federal, state and local laws that apply. Paying attention to new developments in legislation and case law is also important.

Federal anti-discrimination protections

Title VII of the Civil Rights Act of 1964 protects individuals against employment discrimination on the basis of race and color, national origin, sex and religion. In addition to the increasingly expansive federal interpretations of what constitutes sex discrimination under Title VII, additional legal protections are emerging for transgender employees. Many states, localities and the District of Columbia have enacted laws that expressly prohibit employment discrimination based on gender identity and expression.

In *Macy v. Department of Justice*, the EEOC held that intentional discrimination against a transgender individual violates Title VII because that person's gender identity is, by definition, discrimination based on sex. The *Macy* decision explains that allegations of gender identity/transgender discrimination necessarily involve sex discrimination.

HR practitioners should also review other familiar federal laws in light of how they apply to transitioning workers or transgender hires:

- **Patient Protection and Affordable Care Act.** The health reform law prohibits sex discrimination in health insurance. In 2012, the HHS stipulated that the law's prohibition against sex discrimination applies to transgender people.
- **Americans with Disabilities Act of 1990 (ADA).** The ADA does not cover "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders"⁷ under its definition of disabilities. However, some transgender individuals may suffer from depression or other medical conditions that could be covered. Employers should consult with legal counsel before making any negative employment-related decisions involving a medical disability of a transgender worker.
- **Family and Medical Leave Act of 1993 (FMLA).** Some treatments and procedures for transgender employees may not qualify for employment leave under terms of the FMLA, but others may. Some that may qualify could include treatment related to gender identity disorder, overnight hospital stays related to sex-reassignment surgeries and continued counseling with a



mental health professional. The employer should follow normal notification procedures and review each medical certification to determine FMLA applicability.

State and local laws

Although the ADA excludes gender identity disorders from its definitions of disability, state disability discrimination laws may be broader and may not contain such exclusions. Employers should check with their attorneys regarding their states' laws.

Some states' medical leave laws may be broader than the federal FMLA. For example, the FMLA does not include domestic partners in its definition of spouse, but some state medical leave laws do. Therefore, in those states, an employee may be able to take leave to be with a transgender partner or spouse. Employers should carefully review the terms of their states' laws on family and medical leave.

Global Issues

Employers operating internationally need to know the law in all areas where they have employees. Several countries have protections in place to prevent discrimination aimed at transgender individuals. For example, in the United Kingdom, the 1999 Sex Discrimination (Gender Reassignment) Regulations are applicable to all stages of employment. Both the United Kingdom and Spain allow transgender individuals to change their name and gender on official documents without undergoing surgical changes. In the European Union, a 1996 decision in the European Court of Justice provided workplace discrimination protections for workers undergoing gender reassignment.