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# Transgender Employees & the Workplace

*Laws, Policies & Best Practices*

TxPELRA Workshop

Sugar Land Marriot Town Square

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# Overview

- ❖ Applicable federal and state laws
- ❖ Influential agency policies (EEOC, OSHA)
- ❖ Scenarios you may run into
- ❖ Suggestions that — if followed — will minimize liability when confronted with transgender discrimination claims

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But first a quiz...



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# Gender Identity

- A person's internal sense of their gender.
- For transgender people, their own internal gender identity does not match the sex they were assigned at birth.



# Gender Expression

- External manifestations of gender, expressed through a person's name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics.
- Typically, transgender people seek to align their gender expression with their gender identity, rather than the sex they were assigned at birth.



# Transition

- Altering one's birth sex is not a one-step procedure; it is a complex process that occurs over a long period of time.
- Transition can include some or all of the following personal, medical, and legal steps: telling one's family, friends, and co-workers; using a different name and new pronouns; dressing differently; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) one or more types of surgery.

- **Avoid the phrase "sex change."**



# Cisgender

- A term used by some to describe people who are not transgender (a.k.a. "non-transgender people")
- "Cis-" is a Latin prefix meaning "on the same side as," and is therefore an antonym of "trans-."



# intersex

- An umbrella term describing people born with reproductive or sexual anatomy and/or a chromosome pattern that can't be classified as typically male or female.
- While some people can have an intersex condition and also identify as transgender, the two are separate and should not be conflated.
- **Avoid the outdated term "hermaphrodite."**





# Gender Dysphoria

- The condition of feeling one's emotional and psychological identity as male or female to be opposite to one's biological sex.
- Those diagnosed often experience significant distress and/or problems functioning associated with the conflict between the way they feel and their gender assigned at birth.



# Applicable Laws

## Federal:

- ❖ Title VII
- ❖ Americans with Disabilities Act
- ❖ Affordable Care Act
- ❖ Tax Code???

## State:

- ❖ Texas Commission on Human Rights Act???



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# Influential Policies

## ❖ EEOC

- “Strategic Enforcement Plan” (12/2012)
  - Includes sexual orientation and gender identity under sex discrimination prohibitions of Title VII
  - [http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)
- Bathroom/Facility Access Guidance
  - <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm>

# Influential Policies

## ❖ OSHA

- <https://www.osha.gov/Publications/OSHA3795.pdf>
- Single-occupancy gender-neutral (unisex) restrooms
- Multiple-occupant, gender-neutral restroom with lockable, single occupant stalls

# Influential Policies

## Executive Orders 13672 & 13673

- July 2014 – President Obama in July 2014 signed 13672 adding gender identity to protected categories for federal procurement contracts; 13673 enforced 13672
- May 2017 – 13673 rescinded by President Trump, but 13672 still stands...

# Hypo #1: Jason's Transition\*

- ❖ Jason has worked for a municipality for ten years
  - Good worker with solid attendance and no disciplinary record
- ❖ Jason asks to meet with HR Director, Donna
  - Going through a gender transition
  - Has been dressing as a woman at home for months
  - Next step in her therapy is to present as a woman at work; plans to start in a few weeks

\*Jason is referred to by the pronoun corresponding to her gender identity – female

# Hypo #1: Jason's Transition

## ❖ Jason asks:

- To have all her employment records changed to reflect her new name: Janet
- For a new ID badge with a new picture and name
- To begin using the female restrooms

# Hypo #1: Jason's Transition

- ❖ Very traditional environment in a conservative community
- ❖ Donna: concerned about employees' reactions
  - Wants to issue a memo to all employees
  - Considers conducting training
  - Consults with the Supervisor, Todd, who says to just keep it quiet – drawing attention to issue will just make things worse
  - Respecting his wishes, she communicates nothing and leaves it all up to Jason/Janet to tell others; if they have questions, she says “talk to Jason”



# Hypo #1: Jason's Transition

- ❖ After Janet begins using the female restroom, another employee complains that she does not feel comfortable sharing a restroom with a man
- ❖ A few months later, Janet requests FMLA leave for sex reassignment surgery
  - What if the request is for appointments related to hormone therapy or other psychological counseling?

# Revisiting Hypo #1: Rest Room Issues

- ❖ Best practice: Allow employee to use rest room corresponding to his/her gender presentation
  - *G.G. v. Gloucester County Sch. Bd.*, Appeal: 15-2056 (April 19, 2016) – Title IX prohibits school districts from assigning students to bathrooms and locker rooms that correspond with their birth sex

# Revisiting Hypo #1: Rest Room Issues

- ❖ What about other employees who complain?
  - Make another restroom available to complaining employee
    - Do not force transgender employee to travel long distance to use a different restroom
    - State laws enacted to "protect religious beliefs" of those who oppose LBGTQ under challenge
      - HB 1523 (Mississippi)
      - HB2 (North Carolina)
    - Allowing transgender employee to use restroom does not = sexual harassment or religious discrimination of other employees *Cruzan v. Special School District* (Minnesota 2002)

# Revisiting Hypo #1: Communication Issues

- ❖ Donna's instincts are good; Plant Manager's are not
  - Especially where there is concern of a backlash, a clear message of support from the company, with some explanation of the situation, will help quiet the rumor mill and set a positive tone
    - Work with Janet on a communication plan
    - Respect privacy
    - No need to notify whole company; only those who work with Janet
  - Always keep medical information confidential

# Revisiting Hypo #1: Communication Issues

- ❖ Updated harassment/diversity training will also go a long way towards quelling rumors, putting potential harassers on notice, and setting a tone of respectfulness
  - Legal obligation to maintain a harassment free environment most likely extends to transgender employees because they could mount a challenge based on the gender-stereotyping theory

# Revisiting Hypo #1: Name Change Issues

- ❖ Name changes are not unique to transgender employees. Therefore:
  - Respond to Janet’s requests the same as any other request for a name change
  - Appropriateness of asking for proof of a legal name change depends on the type of request, and the company’s practices with respect to other name change requests from non-transgender employees

# Revisiting Hypo #1: Name Change Issues

## ❖ “Call me Janet”

- Allow this; No different from an employee named Michael asking to be called Mike
- No proof of legal change required

## ❖ “I’ll need a new badge”

- Same

## ❖ “My paycheck should change too”

- IRS requires that W-2 and W-4 match Social Security card  
Therefore, request copy of new SS card in order to make change
- But be sure to respond similarly to other employees’ requests, e.g., newly married employees

# Revisiting Hypo #1: Name Change Issues

## ❖ “What about my health benefits?”

- Benefits documentation should reflect the employee’s legal name; therefore, do not change unless there is reasonable assurance that the name has been legally changed

## ❖ “Do I need to fill out a new I-9?”

- No
- But although not legally required, the USCIS does recommend making a change to Section 3 of the I-9; to do so, the employer “should take steps to be reasonably assured your employee’s identity and the accuracy of your employee’s legal name change”
- If you require documentation for one employee, require for all employees with name changes; do not discriminate based on gender



# Revisiting Hypo #1: FMLA Issues

- ❖ Key question: Does the employee have a “serious health condition” under the FMLA?
  - Sex reassignment surgery
    - Yes – Requires overnight stay
  - Hormone therapy or psychological counseling
    - Unclear. Request medical certification. Does employee require “continuing treatment” as defined by FMLA?
      - More than 3 consecutive days of incapacity
      - PLUS
        - » Treatment two or more times by health care provider within 30 days of first day of capacity, OR
        - » Treatment that results in a continuing regimen of treatment

# Other Issues

- ❖ Dress codes - gender specific dress codes/grooming standards are currently lawful (not in NYC)
  - But may create issues when transgender employees wish to follow the dress code corresponding to their gender identity
  - Change in DHR regulations likely would require employers to allow transgendered employee to follows standards applicable to gender identity
- ❖ Health Insurance
  - ACA - 42 USC § 18116 prohibits discrimination in provision of benefits
  - Regulations issued in May applying non-discrimination provisions to self-insured plans using a TPA (eff. 1/1/17)

# Public Accommodation and Non-Employment Issues

## Cannot discriminate in places of public accommodations

❖ place of public accommodation includes: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures occupied by tenants, or by the owner and one or more tenants.

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# Non-Employment Issues

## Other Municipal Services

- Nursing home facilities – no specific law but...
  - HRL – new regulations prohibit discrimination in housing
  - Federal Nursing Home Reform Act
    - “protect and promote the rights of each resident”
    - “maintain a resident’s highest practicable physical, mental, and psychological health”
  - Fair Housing Act – HUD guidance has suggested that denial of housing based upon gender identity could be sex discrimination
- Jails/Prisons
  - Prison Rape Elimination Act - Title 28 C.F.R. 115.42(g)
  - Constitution
    - Duty to provide adequate medical care
      - » *Denegal v. Farrell*, 2016 U.S. Dist. Lexis 88937 (E.D. Cal.)
    - Equal protection

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# What to do...

- ❖ Establish policies and protocols to address appropriate responses should a transgendered individual require service
- ❖ Ensure that all staff is trained regarding their non-discrimination obligations
- ❖ If a transgendered individual requests service, establish a dialogue to determine his/her wishes
- ❖ Address conflicts as confidentially and promptly as possible

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