

OSHA Issues Guidance on Transgender Workers and Workplace Restrooms

3 min read

Jun 10, 2015

By: Aimee E. Delaney

For those savvy employers staying ahead of the curve, here's something new: OSHA has published a "Best Practices" guide addressing restroom access for transgender workers. To be clear, as "guidance," the OSHA publication is not a rule or regulation, and does not create legal obligations for employers. Still, this is the latest development in a fast-changing area of employment law, with protections for transgender workers shifting (it feels) all the time.

As a general rule, OSHA requires employers under its jurisdiction to provide employees with sanitary and available facilities in order to prevent the obvious health effects which can result when toilet facilities are not available when employees need them. This is a clear requirement of OSHA's Sanitation standard, 1910.141. Traditionally, for most employers, compliance with this rule has been easy: separate restroom facilities for men and women. If you have ever had a transgender employee in your workforce, however, you know this seemingly non-controversial separation of facilities can be anything but.

Here are some highlights of [OSHA's new guidance](#) on the issue:

- OSHA advises that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity. For example, a person who identifies as a man should be permitted to use the men's restroom, and a person who identifies as a woman should be permitted to use the women's restroom; just as importantly, the *employee* should be the one to determine the most appropriate and safest option for him- or herself.
- OSHA cautions that best practices include allowing an employee to choose a gender-neutral or unisex facility if one exists; the guidance does not, however, go so far as providing transgender employees the ability to demand such facilities.
- OSHA warns that segregating a transgender worker by requiring him or her to use a bathroom separate from the usual men's and women's bathrooms would not comport with best practices.
- Interestingly, OSHA advises that employees should not be asked to provide any medical or legal documentation of their gender identify in order to support the desired bathroom use.

So why is OSHA's new "best practices" guidance significant? You may already be located in a state that has recognized transgender status (or, perhaps more likely, sexual orientation) as a protected category under its anti-discrimination statute. If so, you may already have the impacted employees on your HR radar. On the federal level, though, transgender protections are not contained in the literal language of the statutes. OSHA's guidance appears to be yet another example of increasing efforts by the EEOC, the Department of Justice, and the Department of Labor, among others, to interpret the federal prohibitions that *do* exist — namely sex discrimination — to include gender identity and, more specifically, transgender status.

In April of this year, for example, the EEOC found that the Department of the Army had engaged in discrimination against a transgender employee who transitioned from male to female. The employee was refused access to a restroom consistent with her gender identity and her supervisors were determined to have harassed the employee by repeatedly using male pronouns, intentionally mocking her and "outing" her as transgender. Similarly, just this month, the EEOC filed suit in federal court against a Minnesota financial services firm alleging that the employer violated Title VII of the 1964 Civil Rights Act by, among other acts, denying a transgender employee who was transitioning to female the use of the women's bathroom. This suit marks the third time the EEOC has sued a private sector employer for sex discrimination under Title VII based on its treatment of a transgender employee.

Given this climate, it is important to be aware of all developments on this topic so that when (not *if*) you do have transgender employees in your workforce, you can address this and other employment issues that may arise from an informed position. With questions on this issue, contact [Aimee Delaney](#) of Hinshaw's Chicago office.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

OSHA