

OSHA's New Guidance on Transgender Restroom Access: What Employers Need to Know

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On June 1, 2015, the Department of Labor's Occupational Safety and Health Administration ("OSHA") issued [guidance](#) on the best practices for providing restroom access to transgender workers. The guidance's core principle is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity.

Under OSHA's sanitation standard, 29 C.F.R. § 1910.141, employers are required to allow employees prompt access to sanitary facilities so that employees will not suffer adverse health effects that can result if toilets are not available when employees need them. Further, employers may not impose unreasonable restrictions on employee use of toilet facilities, including, for example:

- restricting employees to using only restrooms that are not consistent with their gender identity, or
- segregating them from other workers by requiring the employees to use gender-neutral or other specific restrooms.

OSHA notes that the employee should determine the most appropriate and safest option for himself or herself, and states that a best practice is that "employees are not asked to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities."

As a matter of best practice, OSHA recommends that employers implement written policies ensuring that all employees have prompt access to appropriate sanitary facilities. Further, OSHA encourages employers to also provide employees with additional options—including single-occupancy gender-neutral facilities and the use of multiple occupant, gender-neutral restroom facilities with lockable single occupant stalls—which employees may choose, but are not required, to use.

Because OSHA has characterized the new guidance document as “best practices,” employers may be tempted to ignore it. But employers choosing to ignore the guidance do so at their peril. The Occupational Safety and Health Act empowers OSHA to issue citations to employers when it finds that they have not met their duty to provide a safe workplace, even if there are no regulations specifically addressing the hazard that OSHA perceives. Simply stated, employers that fail to comply with the guidance put themselves at risk of receiving an OSHA citation. Failure to implement these best practices would also significantly increase the odds that a whistleblower complaint will be filed by affected employees, exposing an employer to significant financial penalties.

Additionally, separate and apart from potential liability under OSHA, employers that choose to ignore issues related to transgender individuals may also expose themselves to risks of regulatory and/or private-party actions under Title VII of the Civil Rights Act of 1964 (“Title VII”). The Equal Employment Opportunity Commission (“EEOC”)—taking the position that Title VII, as written, clearly protects individuals who are transgender from discrimination (under the theory that it is discrimination because of sex)—has recently begun pursuing actions against employers for discrimination against employees who are transgender. In particular, the EEOC has taken the position that denying an employee the use of a restroom consistent with the employee’s gender identity is unlawful discrimination based on sex.

Employers also need to be aware of state and local laws that may create other express obligations regarding individuals who are transgender. Indeed, for employers that also operate places of public accommodation (e.g., theaters, museums, retail stores, hospitals, hotels, and restaurants), the risks created by state and local law may exist with respect to both employees and individuals visiting the place of public accommodation. For example, New York City has a law that protects a person from discrimination on the basis of gender identity—particularly with respect to the right to use the restroom of the gender with which the person identifies. Under the New York City law, a place of public accommodation has engaged in discrimination on the basis of gender identity if it:

- does not allow an individual to use a restroom or other sex-segregated facility consistent with his or her gender identity or gender expression, or
- requires an individual to provide identification as a means of identifying his or her gender before allowing him or her to use the restroom or other sex-segregated facility.

What Employers Should Do Now

- Consider adopting and implementing policies or practices regarding transgender employees’ use of their restroom facilities; any such policy or practice should:
 - be clear that you will not require a transgender employee to use any particular restroom, whether an individual restroom or a multiple-occupant restroom, and

- provide options available to the employee.
- Train human resources personnel and managers that they may not require transgender employees to use a particular restroom facility; rather, the employee may choose to use a facility that he or she feels safest and most comfortable using.
- If you also operate a place of public accommodation, strongly consider adopting, implementing, and providing training on similar policies and procedures regarding transgender customers' and other visitors' use of public restroom facilities.

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