

California Leads the Way in Accommodating Transgender Employees

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By June D. Bell

School restrooms and, specifically, who can and can't use them—have been making headlines outside of California.

Maine's Supreme Court recently heard arguments brought by Nicole Maines, a transgender student who claimed her school violated the state's Human Rights Act when it barred her from using the girls' restroom. In Colorado the parents of Coy Mathis, 6, are suing because their child, a biological boy who identifies as a girl, has been denied access to the girls' toilets.

Such cases alleging discrimination against transgender individuals are much less likely to be filed in California. The Golden State has long led the country in laws to safeguard transgender people from bias in areas including employment, health care and housing.

"Of all states, we have the most comprehensive and progressive laws to protect transgender people," said Jamison Green, a Northern California-based consultant on transgender policy issues. "We have definitely laid the groundwork, and other states are following our example."

HR professionals are at the forefront of ensuring that bias plays no role in employment decisions, promotions, job assignments and access to facilities such as bathrooms and company locker rooms. Understanding the transgender population, which is hard to quantify but estimated at between 1 percent and 3 percent, is critical to preventing discrimination.

Transgender individuals believe that their biology does not align with their gender identity, or their innate sense of gender. Some have known since childhood that their assigned sex doesn't match how they view themselves, while others come to that realization later in life.

Transgender people can sync their gender identity with how they're perceived through the use of clothing, hormone treatments or gender-reassignment surgery, but they need not take any particular action, either. "There's no one way to be transgender," said Matthew Wood, staff attorney for the nonprofit Transgender Law Center in San Francisco.

Legal Protection

All California employees are protected against discrimination based on gender, gender identity and gender expression. Gender-identity protection safeguards employees who wish to dress like, act like and use the restroom of the gender they identify with, even if they never undergo surgery to alter their appearance, said

Christy Joseph, an employment attorney at Snell & Wilmer in Costa Mesa, Calif. She has 25 years of experience representing employers and serves on the firm's diversity committee.

Joseph expects to see an upswing in Americans with Disabilities Act (ADA) discrimination claims nationwide in the wake of a decision last year by the U.S. Equal Employment Opportunity Commission. In *Macy v. Holder*, the EEOC held that Title VII of the federal Civil Rights Act of 1964 protects transgender people from discrimination because Title VII's protection against sex discrimination also encompasses gender discrimination.

Joseph expects that key areas of litigation will be in accommodation, specifically, in determining at what point it is a hardship for an employer to accommodate someone who is transgender. "There are so few hard and fast rules we can give to employers," she said. "It's such a frustrating area. Whether something's a reasonable accommodation or undue hardship has to be looked at on an individual basis."

The best way to make tolerance part of the corporate culture is to have strong anti-discrimination provisions in personnel policies and to include gender identity in proactive diversity training, said Wood, of the Transgender Law Center, which provides education to law firms and Fortune 500 companies.

If an employee requests HR's help as he or she undergoes a gender transition, HR staff should ask the employee to share any concerns, then figure out how to best accommodate the worker, Wood advised. A change in wardrobe could occur overnight, but a transition involving hormones and surgery might take several years to complete.

A hostile work environment for transgender employees can lead to claims of discrimination and workplace harassment. To ensure that tolerance and respect are the cornerstones of your workplace:

Don't comment, question or criticize. No one's personal life or decisions should be subject to discussion. Don't say, "You look fine the way you are" or "You'll make a wonderful man/woman."

Do not tolerate colleagues' passive-aggressive behavior. This could include "forgetting" to copy a co-worker on group e-mails or "accidentally" leaving her off a list of meeting attendees.

Use the correct name. Insist that all co-workers address transgender employees by the name they prefer.

Respect the privacy of medical records. Disclosing details about an employee's medical record—including hormone treatments or gender-reassignment surgery—may violate the Americans with Disabilities Act and Health Insurance Portability and Accountability Act regulations.

Hire and promote based on skills and ability, not appearance. Employment lawyer Christy Joseph has

received calls from employers who are unsure what to do when a male job applicant is dressed as a woman and identifies as a female. "I explain, you treat them as a woman and don't let that affect your hiring decision," she said.

California's Medical Conditions statute forbids discrimination based on medical conditions, but it's "as broad and vague as can be," Joseph said. HR should meet with an employee who will be undergoing gender-reassignment surgery to determine what reasonable accommodations the individual may need, such as time off or schedule changes for recovery and therapy.

A transgender employee may—or may not—prefer to use a single-stall, gender-neutral restroom. Though workers may not be happy about sharing a restroom with a transgender colleague whom they consider to be a different gender, they are forbidden from creating a hostile work environment, including refusing to give the individual access to the restroom. "Likewise, people may have been uncomfortable [years ago] with women in the workplace or with people of a different color in the workplace," she said. "They need to get over that."

Soft Launch

HR should not announce an employee's change in gender identity without consulting the person. At a smaller company the worker may prefer to share the information personally, but at a larger organization, the employee may request a matter-of-fact announcement at a staff meeting, said Green, author of *Becoming a Visible Man*, about his experiences transitioning 25 years ago.

HR can help by complying with the employee's request to be identified by the name that aligns with the gender the individual is transitioning to. HR professionals can change the employee's e-mail address, ID tag or name badge to reflect the new identity. However, HR should not change the name on an employee's paycheck until that worker legally changes his or her name. For consistency and clarity, the name on the employee's paycheck should match the name on his or her Social Security card, Joseph said.

HR should make sure that if the transgender worker's employment records are transferred within the company those records consistently refer to the person by the name he or she currently uses. Wood advises creating a policy on this to protect the transgender employee's privacy.

Through anti-harassment training and strong policies, HR can ensure that all employees, including those who are transgender, are treated fairly. "Everyone will fall in line," Wood said, "if HR says that's the way things are."

June D. Bell is a San Francisco-based journalist who has contributed to The National Law Journal, The San Francisco Chronicle and California Lawyer. She can be reached at junebell@aol.com.

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