Is Your Law Practice Welcoming to Transgender Employees and Clients?

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If you had a new employee or client, a transgender woman, would she feel safe, comfortable and welcome in your office? Twenty-one states and the District of Columbia have laws that prohibit discrimination on the basis of gender identity and/or expression, and there are similar laws pending in other states. These laws often apply to law practices both in their capacity as employers and as professionals serving members of the public. Further, the Equal Employment Opportunity Commission (EEOC) takes the position that discrimination against transgender persons violates Title VII’s prohibition against gender discrimination. Some state courts have reached the same conclusion with respect to their state’s gender discrimination laws, which often apply to smaller employers not covered by Title VII. In short, the question posed above is not just one of diversity and inclusion – not that they are not worthy goals in and of themselves – but also one of civil rights. Whether or not you are in a state that expressly prohibits discrimination on the basis of gender identity, you need to be aware of this issue. This article discusses steps you can take now to promote a more welcoming, inclusive and also legally compliant work environment.

Some definitions

Although definitions can vary, the term gender identity is generally used to refer to an individual’s internal sense of being male, female, neither or both. A transgender person is a person whose gender identity is different from the sex assigned to that person at birth. An example of a famous transgender person is Chas Bono (formerly Chastity Bono), son of the popular rock duo “Sonny and Cher.” Mr. Bono’s assigned sex at birth was female, but he now lives his life as a man; he went through a gender transition, in other words, a process by which he went from living and working as one gender to another. Note that laws referenced above additionally protect persons whose gender identity is consistent with their assigned sex at birth, but who do not fit traditional gender roles, stereotypes or cultural norms. For example, a person may be designated as female at birth and consider herself to be female but not act in a manner that others consider feminine. Gender identity is not the same thing as sexual orientation. Sexual orientation describes the direction of a person’s physical and romantic attractions, such as whether the person is straight, gay, lesbian, bi-sexual, or queer. Gender identity deals with people’s internal sense of their own gender and how they express that gender through their gender expression.

What types of conduct by a law practice could be viewed as discrimination on the basis of gender identity or gender expression?
Examples of conduct that could result in a discrimination claim include the following:

- An associate takes a leave of absence to undergo a gender transition from male to female. When she returns from leave, her employer refuses to permit her to use the women’s bathroom.

- A job applicant is rejected solely because the firm learns, when checking his references, that he used to live and work as a woman.

- A prospective client is turned down because the client has masculine features (e.g., facial stubble, Adam’s apple) but is wearing feminine clothing, jewelry and makeup.

- A male secretary is teased and tormented by his colleagues because he has mannerisms that they perceive as effeminate.

- An employee is denied a leave of absence to have gender affirming surgery, while other employees are granted leave under similar circumstances.

What steps can law practices take to avoid discrimination claims and to create a more comfortable and welcoming environment for transgender employees and clients?

1. **Policies and Forms:** Add “gender identity/expression” to the list of protected classes in application forms, recruitment materials, marketing materials, website pages and policies related to non-discrimination, anti-harassment and equal employment opportunity, non-discrimination, and anti-harassment. If you use client intake forms, eliminate any questions related to gender (or other protected class status, for that matter).

2. **Access to Facilities:** Permit clients, applicants, employees and visitors to access bathrooms and other gender-segregated facilities based on the individual’s stated gender identity, regardless of what steps they have taken to transition. For example, if an employee identifies as female, she should be permitted to use the women’s bathroom, regardless of whether she has had gender affirmation surgery. If keys to the bathroom are kept with the receptionist or other gatekeeper, make sure that such persons are sensitive to issues of gender identity. If the office has single occupant bathroom facilities, consider re-labeling them to simply say “Restroom” to permit access by all genders. If other employees or clients express discomfort about sharing a multi-stall bathroom with a transgender person, explain your policy of non-discrimination, and offer solutions targeted at the person complaining – as opposed to the transgender person. For example, you could offer them access to a different bathroom, or use an “occupied” sign so that they can wait for the bathroom to be empty if they prefer. What you should not do is make transgender persons use a different bathroom, or otherwise single them out. “Separate but equal” is not acceptable for gender identity any more than it is for race.

3. **Pronouns and Names:** Use appropriate pronouns and other gendered language consistent with an employee’s or client’s stated gender identity. For example, if your employee identifies as male, do not refer to the employee as “she” or “her.” Use the name used by an employee (whether or not it is the employee’s legal name) in staff directories, business cards, websites, and other internal and external communications and records. Be similarly respectful of clients. If you are unsure, it is acceptable to ask, provided you do so in a sensitive and open-
ended manner. For example, don’t say, “Are you a man or a woman?” Instead, say, “With what gender do you identify?” or “What name and pronoun would you prefer me to use for you?”

4. **Training:** Training programs and materials related to discrimination, harassment, diversity, supervision, and leadership should address transgender issues and applicable law, even if you do not have (or do not think you have) any transgender employees or clients. The training should include a discussion of the meaning of gender identity, of the law’s prohibition against discrimination or harassment on the basis of gender identity, and of the practice’s expectations regarding lawful and respectful treatment of transgender persons and anyone who does not conform to traditional gender roles or societal gender norms.

5. **Confidentiality:** Do not “out” your transgender employees or clients. Make sure you have their permission before disclosing to anyone that they are transgender. Be similarly scrupulous about protecting the confidentiality of any medical information they may provide to you to enable you to better accommodate their needs.

6. **Gender Transition:** Work with a transitioning employee to develop an action plan for accommodating and supporting their transition. Be prepared in advance to address such issues as changing the employee’s name and gender in practice records, educating co-workers, and confidentiality. If your practice offers health insurance to its employees, research options to properly cover persons undergoing transition.

7. **Remedial Action:** Respond quickly and decisively to any anti-transgender incidents in your workplace, such as teasing, rude comments (e.g., “you aren’t a real woman”), or refusal to use correct name and/or pronouns. Promote an environment where all persons, including persons who do not conform to traditional gender norms, are treated with dignity and respect.

8. **Hire Transgender People:** The ABA’s publications are already replete with articles about the business benefits of having a diverse staff. Remember that diversity is not just about race and national origin. Having staff with different backgrounds and perspectives helps you to better serve your clients. It also sends a message to the outside world about your values, company culture and commitment to equal treatment.

As with any expansion to civil rights laws, there is always a learning curve. Even the most sensitive and forward-thinking of lawyers sometimes struggle with issues involving transgender employees and clients. Here are some places you can turn to for assistance:

- ABA Commission on Sexual Orientation and Gender Identity: [http://www.americanbar.org/groups/sexual_orientation.html](http://www.americanbar.org/groups/sexual_orientation.html)
- Gay and Lesbian Advocates and Defenders: [www.glad.org](http://www.glad.org)
- Transgender Law Center: [www.transgenderlawcenter.org](http://www.transgenderlawcenter.org)
- Sylvia Rivera Law Project: [www.srlp.org](http://www.srlp.org)