A Gender Transition Primer: The Evolution of ADA Protections and Benefits Coverage

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Introduction

Issues involving the rights of lesbian, gay, bisexual, and transgender (LGBT) persons (and in particular LGBT employees) make headlines across the nation almost daily. From legislation involving bathroom usage to the evolving split in three federal appellate courts over whether federal law prohibits discrimination on the basis of sexual orientation or gender identity, LGBT rights are a rapidly evolving area of the law. These developments create legal and practical considerations for employers and employees as they navigate a patchwork of changing federal, state, and local laws.

Part I of this Article provides an overview of these issues under two particularly relevant statutes: Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991 (Title VII) and the Americans with Disabilities Act of 1990 (ADA). Part II introduces the historical interpretation of the ADA regarding gender identity. Parts III and IV examine two current federal cases that depart from historical ADA interpretations. Part V explores benefits coverage for gender-transitioning employees and related employer legal challenges. Part

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VI admonishes federal contractors to appreciate enhanced employee protections, and Part VII cautions all employers to familiarize themselves with state and local disability law to avoid potential future litigation. Part VIII articulates best practices for employers of gender-transitioning employees.

I. Brief Overview of the Evolution of Title VII and ADA Issues

The issue of whether Title VII prohibits discrimination based on gender identity and sexual orientation has been hotly contested. Since 2015, the U.S. Equal Employment Opportunity Commission’s (EEOC) position has been that Title VII’s prohibition of discrimination based on “sex” includes sexual orientation, gender identity, and transgender status. In 2017, the Seventh Circuit became the first federal appellate court to agree with the EEOC. The Second Circuit, sitting en banc, joined the Seventh Circuit later that year, also ruling that discrimination because of sexual orientation constitutes sex discrimination under Title VII. The Eleventh Circuit reached the opposite conclusion. The Supreme Court has already rejected one petition for certiorari involving this circuit split.

By contrast, disability law has played little to no role until recently in the development of protections against discrimination for trans-gender individuals, at least at the federal level. This is almost certainly because the ADA specifically excludes certain gender identity disorders from its definition of “disability.” This exclusion has been controversial, particularly in recent years as the LGBT rights movement has gained political momentum and won significant legal victories at federal, state, and local levels. Some have criticized the ADA’s exclusion of gender identity disorders (GID) as discriminatory, misguided, and outdated. One commentator asserted that GID is explicitly excluded from the ADA “not because people with GID are not impaired . . . , but rather because, in 1989, several members of Congress believed

5. Hively, 853 F.3d at 341.
7. Evans, 850 F.3d at 1255.
10. See, e.g., Hively, 853 F.3d at 341.
that people with GID were morally bankrupt, dangerous, and sick.” 11 Regardless, for over twenty-five years, courts uniformly interpreted the ADA’s plain language as barring disability claims based on GID, ostensibly because the statutory coverage language specifically excludes “gender identity disorders not resulting from physical impairments.” 12

Until 2013, the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA), classified “gender identity disorder” as a mental disorder that required a showing of: (1) strong and persistent cross-gender identification; and (2) persistent discomfort about assigned sex or a sense of inappropriateness in the gender role of that sex. 13 This definition was criticized for stigmatizing all transgender persons with a mental disorder. 14 But in 2013, the APA removed GID from the DSM-V and added a new mental condition of “gender dysphoria.” 15 The DSM-V defines gender dysphoria in adolescents and adults as (1) a difference between one’s experienced/expressed gender and assigned gender; (2) that is accompanied by clinically significant distress or problems functioning; and (3) lasts at least six months and is shown by at least two of the following:

- A marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics;
- A strong desire to be rid of one’s primary and/or secondary sex characteristics;
- A strong desire for the primary and/or secondary sex characteristics of the other gender;
- A strong desire to be of the other gender;
- A strong desire to be treated as the other gender;
- A strong conviction that one has the typical feelings and reactions of the other gender. 16

The removal of GID from the DSM and addition of gender dysphoria narrow the circumstances under which transgender persons are

15. Id.
considered to have a mental disorder. For the psychiatric community, the focus has shifted from identifying as transgender, which is not a mental disorder, to suffering severe distress as a result of identifying as transgender, which can be a mental condition. This change in psychiatric practice is starting to affect the legislative and judicial community.

II. Historical Interpretation of the ADA’s Inapplicability to Gender Identity Disorders

The ADA’s purpose, in part, is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” The ADA considers persons “disabled” if they (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such an impairment; or (3) are regarded as having such an impairment. This is a broad, but not unlimited, definition. In fact, there are specific statutory exceptions. ADA exclusions include “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.” That provision had been uniformly interpreted as excluding gender identity claims from ADA coverage.

III. Case Study: Blatt v. Cabela’s Retail, Inc.

In 2006, Cabela’s, a popular sporting goods store, hired Kate Lynn Blatt, a transgender woman, as a merchandise stocker. Shortly after being hired, Blatt informed Cabela’s that she suffered from gender dys-

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17. See Wynne Parry, Gender Dysphoria: DSM-5 Reflects Shift in Perspective on Gender Identity, HUFFPOST WELLNESS (June 4, 2013, 2:11 PM), https://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html (“This shift reflects recognition that the disagreement between birth gender and identity may not necessarily be pathological if it does not cause the individual distress. . . . Transgender people and their allies have pointed out that distress in gender dysphoria is not an inherent part of being transgender. This sets it apart from many other disorders in the DSM, because if someone is depressed, for example, he or she is, almost by definition, distressed as part of depression. In contrast, the distress that accompanies gender dysphoria arises as a result of a culture that stigmatizes people who do not conform to gender norms.”).

18. Id. (“In the old DSM-IV, [gender identity disorder] focused on the ‘identity’ issue—namely, the incongruity between someone’s birth gender and the gender with which he or she identifies. While this incongruity is still crucial to gender dysphoria, the drafters of the new DSM-5 wanted to emphasize the importance of distress about the incongruity for a diagnosis.”).

20. Id. § 12102(1).
21. Id. § 12211(b)(1).
phoria. Cabela’s allegedly responded by prohibiting Blatt from using the female employee restroom and refusing to issue her a female uniform or a name tag with her female name. When Cabela’s fired her six months after she was hired, Blatt sued, alleging, in part, that Cabela’s had violated the ADA by discriminating and retaliating against her and failing to accommodate her disability.

Blatt alleged that she was diagnosed with “Gender Dysphoria, also known as Gender Identity Disorder, a medical condition in which a person’s gender identity does not match his or her anatomical sex at birth.” She also alleged that her “medical condition is a disability within the meaning of the ADA in that it substantially impairs one or more . . . major life activities, including, but not limited to, interacting with others, reproducing, and social and occupational functioning.”

Cabela’s moved to dismiss Blatt’s case, arguing that she failed to state a claim upon which relief could be granted because, “[b]ased upon the plain language of the ADA and corresponding regulation, Plaintiff is not disabled within the meaning of the ADA.”

In 2017, Judge Joseph F. Leeson, Jr. of the United States District Court for the Eastern District of Pennsylvania issued a groundbreaking decision denying Cabela’s motion to dismiss and challenging the historical interpretation that the ADA excludes gender identity claims. Judge Leeson interpreted the ADA’s exclusion of “gender identity disorders” narrowly. He said the ADA language should be read to refer only to “the condition of identifying with a different gender.” He concluded that it did not encompass “a condition like Blatt’s gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling.”

Judge Leeson viewed gender dysphoria as fundamentally different from GID. Unlike GID, he reasoned, gender dysphoria is disabling because it limits Blatt’s major life activities of interacting with others,

24. See id. ¶ 16.
25. Id. ¶¶ 18–19.
26. Id. ¶¶ 37–59.
27. Id. ¶ 10.
28. Id.
31. Id. at *2.
32. Id.
33. Id. at *4 (“[I]t is fairly possible to interpret the term gender identity disorders narrowly to refer to simply the condition of identifying with a different gender, not to exclude from ADA coverage disabling conditions that persons who identify with a different gender may have—such as Blatt’s gender dysphoria . . . .”).
reproducing, and functioning both socially and occupationally.\textsuperscript{34} He noted that Congress purposefully distinguished between excluding certain sexual identities from the ADA’s definition of disability, on the one hand, and not excluding disabling conditions that persons of those sexual identities might suffer from, on the other.\textsuperscript{35} Judge Leeson thus held that gender dysphoria is a disability under the ADA because, unlike GID, it can be a substantially limiting impairment.

IV. Case Study: \textit{Schawe-Lane v. Amazon.com.KYDC LLC}

Although Blatt’s holding that the ADA’s definition of disability encompasses gender dysphoria was non-precedential, it invited future transgender plaintiffs to allege ADA claims.\textsuperscript{36} For example, in 2017, Allegra Schawe-Lane, a transgender woman, sued her ex-employer, alleging in part that the employer violated the ADA by failing to accommodate her reasonably, creating a hostile work environment, and retaliating.\textsuperscript{37} She worked at an Amazon shipping facility.\textsuperscript{38} She alleged that, after her colleagues and managers discovered she was transgender, they called her male pronouns, threatened her with physical violence, and looked into her stall when she used the restroom.\textsuperscript{39}

Her ADA claims, like those in Blatt, asserted that she suffered from gender dysphoria, which she alleged was “the formal diagnosis used by physicians and psychologists to describe people who experience significant distress with the sex that they were assigned at birth.”\textsuperscript{40} She alleged ADA coverage because “[d]iscrimination against transgender people diagnosed with gender dysphoria is based on disability.”\textsuperscript{41} Amazon denied the allegations,\textsuperscript{42} and the case is pending.

\textsuperscript{34} Id.
\textsuperscript{35} Id. at *3 & n.3 (citing 135 Cong. Rec. S10765-01 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin), 135 Cong. Rec. S10765-01, at *S10767, 1989 WL 183216) (“[I]n response to inquiries about the proposed bill’s coverage of homosexuality . . . , Senator Thomas Harkin, a sponsor of the bill, clarified that although homosexuality itself would not meet the definition of a disability under the ADA, that would not prevent a person who is gay from receiving coverage under the statute if the person had a disability.”).
\textsuperscript{38} Id. ¶ 5.
\textsuperscript{39} Id. ¶¶ 73, 77, 81.
\textsuperscript{40} Id. ¶ 50.
\textsuperscript{41} Id. ¶ 54.
V. Benefits-Related Guidance and Litigation

Based on litigation and conciliation activity, the EEOC's stance on benefits for transgender employees appears to be that partial or categorical exclusions for otherwise medically-necessary care solely on the basis of sex, including transgender status and gender dysphoria, violates Title VII. The 2016 EEOC v. Deluxe Financial Services, Inc. consent decree, for example, demonstrated the EEOC's position. The transgender plaintiff there alleged both disparate treatment and hostile work environment discrimination. None of the plaintiff's allegations addressed healthcare coverage. Nevertheless, the consent decree contains the following provision in which Deluxe agreed to provide such coverage:

As of January 1, 2016, Defendant's national health benefits plan does not and will not include partial or categorical exclusions for otherwise medically necessary care solely on the basis of sex (including transgender status) and gender dysphoria. For example, if the health benefits plan covers exogenous hormone therapy for non-transgender enrollees who demonstrate medical necessity for treatment, the plan cannot exclude exogenous hormone therapy for transgender enrollees or persons diagnosed with gender dysphoria where medical necessity for treatment is also demonstrated. This plan was available to all Deluxe's United States based employees during open enrollment for 2016 and will be available for all open enrollment periods during the term of this Decree. In addition, Defendant will notify its national plan third party administrator contracted to provide benefits to covered beneficiaries of these non-discrimination requirements. Defendant will also take steps to ensure that employees can meaningfully report health benefits related discrimination on the basis of sex (including transgender status) and gender dysphoria directly to Defendant in the same manner other complaints of sex and disability discrimination are reported.

Although this language does not appear to prohibit all health benefit exclusions affecting transgender persons, it provides an example of one exclusion the EEOC considered discriminatory. The consent decree provided no guidance on how broadly the EEOC might view such exclusions as unlawful.

In another case, Robinson v. Dignity Health, the EEOC advanced a plaintiff's claim against her employer by filing an amicus brief,

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44. Id.
45. Id.
46. Id. ¶ 1.
47. Id. ¶ 30.
48. Id.
49. Id.
arguing that the plaintiff’s condition, gender dysphoria, makes gender reassignment surgery “medically necessary” and that the failure of the defendant’s health plan to cover reassignment surgery states a claim for sex discrimination under Title VII. The EEOC noted that the plaintiff alleged that “employees who are not transgender receive coverage for all medically necessary healthcare.” The EEOC explained that the plaintiff paid out of pocket for hormone therapy and a double mastectomy after insurance plan denials, but he could not afford other medically necessary treatment, including sex transformation surgery. Further, the EEOC stated that “[a] transgender individual, by definition, fails to act in the way expected of someone of that individual’s birth-assigned sex.” The agency added that because the plaintiff “fails to conform to socially-constructed gender expectations of how someone who was assigned the female sex at birth ought to act,” the claim should be treated no differently than any other claim for sex discrimination.

In response, the employer argued that even though sex stereotyping claims are cognizable under Title VII, the statute’s prohibition on discrimination based on sex does not encompass discrimination based on gender identity. It also argued that the EEOC’s contention that Title VII prohibits gender identity discrimination because it prohibits sex stereotyping “attempts to eradicate any distinction [between sex stereotyping and gender identity] by trying to force a transgender status theory into the sex stereotyping mold.” The case was reported by the media to have settled in 2017 for $25,000.

In a third health benefits case, the EEOC determined that a transgender male stated a cognizable claim of sex discrimination under Title VII when alleging that his Federal Employee Health Benefits insurance plan denied pre-authorization for nipple-areola reconstruction. The EEOC explained that it has long held that because insurance coverage is a fringe benefit of employment, denial of coverage concerns a term, condition, or privilege of employment. Further, the

51. See Amicus Brief of the EEOC in Support of Plaintiff & in Opposition to Defendant’s Motion to Dismiss at 12, Robinson v. Dignity Health, No. 4:16-cv-03035-YGR (N.D. Cal. Aug. 22, 2016).
52. Id. at 4.
53. Id. at 2.
54. Id. at 5.
55. Id. at 6.
57. Id. at 8.
60. Id.
EEOC found that the employee’s failure to appeal the matter through the agency’s regulatory process did not preclude him from asserting a viable claim.61 Finally, the Commission noted that dismissing his disability claim would be improper because, without investigation, he had no opportunity to adduce evidence and, accordingly, the record was silent as to whether the complainant’s gender dysphoria resulted from a physical impairment.62

Gender identity discrimination cases have been appearing on court dockets as well.63 For example, in one claim commenced in 2016, Rachel Dovel sued her employer, the Public Library of Cincinnati and Hamilton County, and her health insurance provider.64 After being diagnosed with gender dysphoria, Ms. Dovel underwent hormone therapy.65 The insurer denied her coverage for sex reassignment surgery despite her healthcare providers’ determination that the procedure was medically necessary to treat her gender dysphoria effectively.66 The insurer claimed that any procedure related to gender reassignment, “regardless of origin or cause,” was expressly excluded under the library’s insurance policy.67 Dovel sued under Title VII and the Affordable Care Act, alleging that the library’s healthcare policy discriminated against her by denying her equal compensation and terms, conditions, and privileges of employment because of her birth sex.68 The case settled in February 2017.69

In Tovar v. Essentia Health,70 the Eighth Circuit held that a nurse could not pursue gender bias claims under Title VII against her employer over its refusal to cover her son’s gender reassignment surgery.71 The court found that the plaintiff’s complaint, brought on her own behalf for coverage of her son’s treatment, was not cognizable under Title VII.72 The court emphasized that her son was not a plaintiff and that no claim was being brought on his behalf.73 However, the court found that the mother had demonstrated standing to sue under the Affordable Care Act because she claimed that her health insurer’s discriminatory conduct denied her the benefits of her insurance policy

61. Id.
62. Id.
66. Id. ¶¶ 34–36.
67. Id. ¶¶ 32–34.
68. Id.
71. Id. at 775–76.
72. Id.
73. Id. at 777.
and forced her to pay out of pocket for some of her son’s medication.\textsuperscript{74} The court remanded to the trial court to assess the mother’s claims under the Affordable Care Act.\textsuperscript{75}

In October 2017, Attorney General Jeff Sessions reversed former Attorney General Eric Holder’s guidance that gender identity discrimination was protected as Title VII sex discrimination.\textsuperscript{76} Sessions’s memorandum states, “Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity \textit{per se}, including transgender status.”\textsuperscript{77}

\section*{VI. Enhanced Protections for Employees of Federal Contractors}

Federal contractors have clearer liability for gender identity discrimination. In 2014, President Barack Obama signed Executive Order 13672, adding sexual orientation and gender identity to the categories of protected characteristics, which already included race, color, religion, sex, and national origin.\textsuperscript{78} The order also requires contractors to ensure equal employment opportunities for employees and applicants without regard to protected characteristics, to take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to protected characteristics.\textsuperscript{79}

The Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) Final Rule implementing Executive Order 13672 interprets the nondiscrimination provisions of the Order consistently with Title VII principles.\textsuperscript{80} The OFCCP specifically recognizes the sex stereotyping rationale of \textit{Price Waterhouse v. Hopkins}\textsuperscript{81} as part of its Proposed Guidelines.\textsuperscript{82} In the foreword to the Final Rule, the OFCCP acknowledges how damaging sex-based discrimination can be to LGBT applicants and employees, many of whom report that workplace discrimination has led to lower self-esteem, greater anxiety and conflict, and less job satisfaction.\textsuperscript{83} Further, OFCCP Directive 2014-02 indicates that the OFCCP agrees with the EEOC’s decision in \textit{Macy v. Holder},\textsuperscript{84}

\begin{thebibliography}{99}
\bibitem{74} Id. at 779.
\bibitem{75} Id. at 777.
\bibitem{77} Id. at 2.
\bibitem{80} 41 C.F.R. §§ 60-1, 60-2, 60-4, 60-50 (2018).
\bibitem{83} 41 C.F.R. §§ 60-1, 60-2, 60-4, 60-50.
\bibitem{84} Id.
\end{thebibliography}
which held that sex stereotyping transgender employees constitutes gender discrimination in violation of Title VII (and therefore Amended Executive Order 11246).⁸⁵

In 2016, the OFCCP published final revisions to its Sex Discrimination Guidelines (Revised Guidelines).⁸⁶ The OFCCP says the Revised Guidelines reflect Amended Executive Order 11246 and align it with EEOC Title VII interpretations.⁸⁷ The Revised Guidelines identify issues and illuminate related areas of law for federal contractors. For instance, the Revised Guidelines require federal contractors to permit transgender employees to use the bathroom of the gender with which they identify,⁸⁸ which is consistent with the EEOC⁸⁹ and OSHA⁹⁰ positions.

The Revised Guidelines prohibit taking adverse actions against transgender persons for having undergone, undergoing, or planning to undergo sex-reassignment surgery or other processes designed to facilitate adoption of a gender or sex other than that assigned sex at birth.⁹¹ The Guidelines further state that federal contractors must provide equal opportunity with respect to wages and other forms of compensation, including insurance and other fringe benefits, regardless of sex.⁹² Consistent with Macy and Price Waterhouse, the Revised Guidelines explicitly prohibit “employment decisions on the basis of sex-based stereotypes, such as stereotypes about how males and/or females are expected to look, speak, or act.”⁹³ Finally, the Revised Guidelines clarify that harassment on the basis of sex includes sexual harassment based on gender identity and harassment that is not sexual in nature if it is because of sex (including harassment based on gender identity).⁹⁴

The Trump Administration, in 2017, announced that protections extended to LGBT persons under Executive Order 13672 would “remain intact.”⁹⁵ Thereafter, the OFCCP filed its first administrative complaint to enforce Amended Executive Order 11246’s prohibition

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⁸⁶. 41 C.F.R. § 60-20.
⁸⁷. Id.
⁸⁸. Id. § 60-20.2(b)(12), (13)
⁹¹. 41 C.F.R. § 60-20.2(b)(11).
⁹². Id. § 60-20.4(e).
⁹⁴. 41 C.F.R. § 60-20.8.
of sexual orientation discrimination. It is possible, however, for the Trump Administration to curb Executive Order 13672 without repealing or modifying it. The OFCCP may alter its enforcement priorities or modify the Revised Guidelines without the president revising or repealing Executive Order 13672.

VII. State and Local Disability Law

While it remains unclear whether employers must provide reasonable accommodations to transgender employees or employees suffering from gender dysphoria under the ADA, several states and cities have expanded or interpreted definitions of “disability” in discrimination laws to include transgender individuals and gender dysphoria. Under these laws, employers may have greater accommodation obligations than under federal law. State courts and administrative agencies in Connecticut, Florida, Illinois, Massachusetts, New Hampshire, New Jersey, and New York have ruled that their state disability laws prohibit either transgender or gender dysphoria discrimination. Additionally, gender dysphoria is considered a disability under the New York City Human Rights Law. However, state

107. See Governor Cuomo Announces New Regulations Protecting Transgender New Yorkers from Discrimination, N.Y. DIV. HUMAN RTS. (Jan. 20, 2016), https://dhr.ny.gov/gender_identity_regulations (“The regulations confirm that the Division of Human Rights will accept and process Human Rights Law complaints alleging discrimination because of gender identity, on the basis of the protected categories of both sex and disability . . . .”).
disability laws in Idaho, Indiana, Iowa, Louisiana, Nebraska, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and Virginia specifically exclude either transgender persons or gender dysphoria from coverage.

VIII. Best Employer Practices for Gender-Transitioning Employees

No single model works for all employers when an employee is in the gender transition process. Each transition is unique. In establishing and applying practices and policies, employers must use common sense to create an inclusive and legally compliant workplace for employees in transition and those interacting with them. Here are some basic guidelines.

First, use a transgender person’s chosen name and inclusive terminology. Many transgender persons have not taken official steps to change their name legally. Allow them to use their chosen name as you would anyone else who lives or goes by a name other than their legal one.

Second, when referring to a transgender employee, use the pronoun that the transitioning person prefers (he, she, or they) and is consistent with the person’s appearance and gender expression. A person identifying as a certain gender should be referred to using appropriate pronouns, regardless of whether the person has taken hormones or had some form of surgery or other gender-conforming procedure. If unsure of someone’s preferred gender pronoun, it is generally appropriate to ask. Likewise, when describing a transgender employee, use the correct terms to describe the person’s identity.

122. Id. at 30.
123. Id. at 45.
124. Id. at 50.
125. Id. at 45.
126. Id.
male who transitions to become female is a transgender woman.\textsuperscript{127} A person born female who transitions to become male is a transgender male.\textsuperscript{128}

Third, establish an action plan for transitioning employees.\textsuperscript{129} Discuss the expected timescale of medical procedures, if known (while being cautious not to conduct improper medical inquiries prohibited by the ADA);\textsuperscript{130} the expected point or phase of name change, personal details, and social gender; dissemination of information to management and co-workers; educational and training opportunities; dress code; and use of single-sex facilities for the employee’s new gender. Consider discussing and including the following additional issues or items in the action plan:

- Time away from work required for medical treatment;
- Whether (and if so, when) the employee wishes to inform managers, colleagues, and clients, or whether the employee would prefer that the employer do so; and
- Training or briefing of colleagues or clients.

Periodically update and revisit the plan with the transitioning employee and make changes as needed.

Fourth, decide how to update internal documents and records and what limitations may exist. Determine which can and should be changed and when in the process revisions should occur. When an employee’s legal name has changed, the best practice is to reflect that name change on all documents and records possible. Employers should review the Summary Plan Descriptions and benefits policies, the Employee Retirement Income Security Act of 1974 (ERISA), the Health Insurance Portability and Accountability Act (HIPAA), and the Internal Revenue Code about what may be necessary to effectuate a change in status under health plans and other employer-provided benefits, including any additional documentation required.\textsuperscript{131} Employers should advise transitioning employees to seek information about their rights and responsibilities under these laws and policies. If an employee’s legal name does not match the name associated with the gender to which the employee is transitioning, the employer should accede to an

\begin{footnotesize}
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\item \textsuperscript{127} Frequently Asked Questions About Transgender People, NAT’L CTR. TRANS-GENDER EQUALITY (July 2016), https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Transgender Inclusion in the Workplace, supra note 121, at 37.
\item \textsuperscript{130} Id. at 36.
\end{enumerate}
\end{footnotesize}
employee’s desire to have the preferred new name reflected on things such as business cards, e-mail addresses, name plates, and employee directories.

Fifth, consider guidance or training for supervisors and managers. Their lack of information and training can result in workplace unpleasantness or even illegal actions. Consider conducting a “Transgender 101” training to educate those in the workplace about the issues and their responsibilities under your policies and the law. Recognize that one’s social, political, and religious views are each employee’s own, but compliance remains the employer’s responsibility. Consider incorporating transgender information and policies into existing training modules. If the action plan designates a support team, provide the team with detailed guidance about how to provide assurances, solicit input, and develop or revise the plan. Specifically communicate to managers and supervisors how to discuss issues with the transitioning employee, how to solicit feedback from that employee, and how to discuss and implement the action plan.

Sixth, update policies to include explicit protections against transgender discrimination and harassment. Equal employment opportunity policies may be updated to state explicitly that discrimination and harassment on the basis of gender identity, gender expression, or sexual orientation are strictly prohibited. Understand the patchwork of laws and regulations that apply to each workplace to ensure compliance. Because equal employment opportunity statements are often posted in multiple places (such as in handbooks, Internet home pages, intranet home pages, employment applications, stand-alone policies, and job postings), confirm that all statements are properly revised.

Seventh, make dress code policies gender-neutral, and apply them consistently. Modify your existing dress codes to avoid sexual stereotypes. For example, requiring men to wear suits and women to wear skirts and dresses could be viewed as sexual stereotyping. Alternatively, a policy requiring “attire professionally appropriate to the office or unit in which an employee works” is gender-neutral.

134. Diversity Training on Gender Identity, supra note 132, at 2.
136. Diversity Training on Gender Identity, supra note 132, at 4.
Finally, familiarize key employees with helpful outside resources on transgender issues. While no one resource can be fully applicable for every gender transition, there are good resources to guide employers and their supervisors working with transgender employees.137

Conclusion

The seismic legal activity involving LGBT rights has left employers and employees navigating a sometimes confusing and conflicting body of law. Whether Title VII’s prohibition on gender discrimination encompasses sexual orientation has been resolved only in the Second and Seventh Circuits. The question of whether the ADA covers transgender employees is just now beginning to be determined in courts and governmental agencies, leaving employers to wonder if they must (or should) provide insurance coverage for transition-related procedures. Employers must be vigilant to stay abreast of the patchwork of federal, state, and local discrimination laws that may inform their policies and practices. Agencies, apart from the OFCCP, have yet to announce their policies on many workplace transgender issues. Regardless of the uncertain legal landscape, employers should consider their compliance obligations—as they exist now and may exist in the future—and review and revise policies and procedures impacting LGBT employees accordingly.