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THE NEW PROTECTED CLASS?

What You Should Know About New Protections
for LGBT Workers and Accommodations
for Transgender Employees

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Presented By



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Agenda


- LGBT Basics
- Current Legal Landscape
- Practical Tips for Managing Workplace
- How to Support a Transitioning Employee
- Behavior that could lead to a Charge of Discrimination






Why are we addressing this topic?

- ~5% of the U.S. workforce identifies as lesbian, gay, bisexual, or transgender
- 21% of LGBTQ employees report some form of workplace discrimination
- 1 out of every 25 complaints made about workplace discrimination comes from LGBTQ employees
- According to a 2016 survey commissioned by the Human Rights Campaign, 35% of likely voters in the US "personally know or work with someone who is transgender"
 - More than double the 17% who answered "yes" when asked the same question in 2014



Know Your Workplace



- 90% of transgender people report being harassed on the job
- The transgender community reports an unemployment rate at double the overall national rate
- 53% of LGBTQ employees are not open to colleagues about their sexual orientation/gender identity
- 64% of LGBTQ individuals have heard anti-LGBTQ slurs and jokes at work, and only 4% have felt comfortable enough to speak up to a supervisor
- 20% of LGBTQ employees report looking for a new job because their work environment was not accepting of them

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LGBT Terminology

- **LGBT:** Lesbian, Gay, Bisexual, Transgender
- **Lesbian:** A woman who is primarily attracted to other women
- **Gay:** A person who is attracted primarily to members of the same sex
 - Although it can be used for any sex (e.g. gay man, gay woman, gay person), "lesbian" is sometimes the preferred term for women who are attracted to women
- **Bisexual:** A person who is attracted to both people of their own gender and another gender
- **Sexual orientation:** The type of sexual, romantic, and/or physical attraction someone feels toward others



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LGBT Terminology

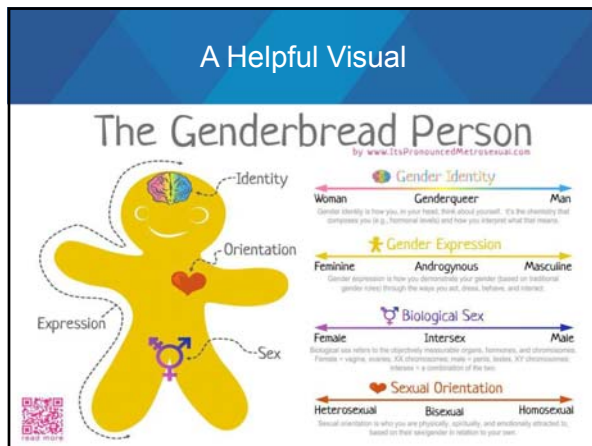
- **Transgender:** Umbrella term to refer to all people who do not identify with their assigned gender at birth; a person who lives as a member of a gender other than expected based on anatomical sex
- **Gender identity:** The sense of "being" male, female, or possessing an identity which falls outside of the widely accepted sexual binary (i.e. "men" and "women"). For most people, gender identity is in accord with their physical anatomy. For transgender people, gender identity may differ from physical anatomy or expected social roles
- *It is important to note that gender identity, biological sex, and sexual orientation are separate and that you cannot assume how someone identifies in one category based on how they identify in another category*

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Gender Expression

- **Gender expression:** A term which refers to the ways in which we each manifest masculinity or femininity. It is usually an extension of our "gender identity," our innate sense of being male, female, etc.
- Each of us expresses a particular gender every day – by the way we style our hair, select our clothing, or even the way we stand
- Our appearance, speech, behavior, movement, and other factors signal that we feel – and wish to be understood – as masculine or feminine, or as a man or a woman

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What Does It Mean To Be Transgender or Trans?



Preferred usage is
 "transgender people,"
 "transgender person,"
 "transgender woman,"
 "transgender man," "trans
 people," "trans person,"
 "trans woman," and "trans
 man"

- Some transgender people are prescribed hormones by their doctors to change their bodies
- Some undergo surgery as well
- Transgender identity is not dependent upon medical procedures

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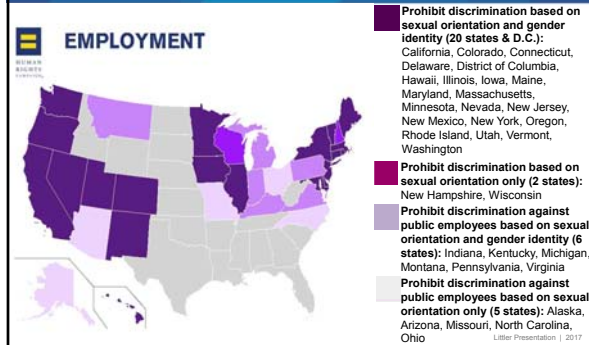




Is Discrimination Related to LGBT Status Protected?

The Current Legal Landscape

Current U.S. LGBT State Employment Discrimination Laws



Tennessee Law Attempts

- In 2016, Gov. Haslam signed legislation that allows mental health counselors and therapists to refuse to treat patients based on religious objections or personal beliefs
- In 2017, 6 anti-LGBT bills were filed, and all were deferred – except one
 - Gov. Haslam signed legislation (aka “the LGBT Erasure Bill”), requiring the state to interpret all undefined words such as “mother,” “father,” “husband” and “wife,” by their “natural and ordinary meaning” in TN legal code
 - However, bathroom bill to require students at public schools and colleges to use restrooms and locker rooms matching the gender listed their birth certificates failed
- Tennessee is one of the only states that has no mechanism for residents to amend the sex marker on their birth certificates



Tennessee City Laws

- **Memphis City Code, Sec. 3-8-6 - No discrimination in city employment.**
There shall be no discrimination in city employment of personnel because of religion, race, sex, creed, political affiliation, national origin, ethnicity, age, disability, **sexual orientation, gender identity** or other non-merit factors, nor shall there be any discrimination in the promotion or demotion of city employees because of religion, race, sex, creed, political affiliation, national origin, ethnicity, age, disability, **sexual orientation, gender identity** or other non-merit factors. **Gender identity means the actual or perceived gender-related identity, appearance, or mannerisms, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.**
- **Knoxville City Code, Sec. 15-57 - Unlawful employment practices generally**
It shall be an unlawful employment practice for the city to discriminate against a qualified individual on the basis of non-merit factors such as race, ethnic origin, color, national origin, gender, **gender identity**, genetic information, **sexual orientation**, age except as otherwise specifically provided in this part, religion, creed, or disability in admission to, access to, or operations of its programs, services, or activities. Discrimination against any qualified individual in recruitment, examination, appointment, training, promotion, demotion, retention, discipline, or any other employment practices because of non-merit factors shall be prohibited.
- **Metropolitan Government of Nashville and Davidson County, 11-20-130 - Metropolitan government prohibited from discriminating.**
It is unlawful for the metropolitan government to fail or refuse to hire or promote, or to discharge any individual, because of such individual's race, religion, creed, gender, **gender identity, sexual orientation**, national origin, color, age, and/or disability. Nothing in this section shall be interpreted to give an employee a right to partner medical insurance or pension benefits.

Federal Law

- **Employment Non-Discrimination Act**
 - Congress has failed to approve ENDA, which would make it illegal for employers with 15+ full-time workers to refuse to hire, terminate, or otherwise discriminate against any individual on basis of their actual or perceived sexual orientation or gender identity
- **End Racial and Religious Profiling Act**
 - Introduced February 16, 2017
 - Would prohibit federal, state, and local law enforcement from targeting a person based on actual or perceived race, ethnicity, national origin, religion, gender, gender identity, or sexual orientation without trustworthy information that is relevant to linking a person to a crime



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Federal Contractors

On July 21, 2014, President Obama signed Executive Order 13672 to prohibit federal employees, contractors, and subcontractors from discriminating on the basis of sexual orientation or gender identity.



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The Trump Administration

What do we know so far...

- Candidate Trump claimed he would “do everything in [his] power to protect LGBTQ citizens”
- President-elect Trump stated that marriage equality was “settled”
- Trump Administration claimed Executive Order 13672 would remain intact ...



But Then The Trump Administration...

- Deleted the White House LGBT page on inauguration day
- Promised to appoint conservative justices to the U.S. Supreme Court
- Chose candidates for appointment who are strongly anti-LGBTQ (including VP Pence, Attorney General Sessions, Ben Carson, Betsy DeVos, Tom Price, etc.)
- Floated a draft religious freedom executive order and vowed to give churches more political power
- Deleted questions pertaining to sexual orientation from two federal surveys
- Announced (via tweet) of his plans to ban transgender individuals from serving in the military

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Federal Law

- Title VII prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion
- Title VII protected categories do **NOT** explicitly include sexual orientation or gender identity
- But ...
 - Several federal courts have found Title VII includes claims based on sexual orientation, transgender status
 - Discrimination or harassment based on "sex stereotypes" about how a man or woman should behave is "sex" discrimination and violates the law

Discrimination
The prejudicial treatment or consideration of a person, racial group, minority, or other group based on category rather than individual characteristics, such as excluding or restricting members of one group on the grounds of race, sex, or age.

EEOC's Strategic Enforcement Plan 2017-2021

- The SEP identifies 6 substantive area priorities:
 - Issues that have "broad impact" in which "expertise of the Commission is particularly salient," which are "best addressed" by EEOC based on "access to information, data and research"
- EEOC identifies "protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex" as an "emerging and development issue"



EEOC's Strategic Enforcement Plan FY 2017-2021



- EEOC takes the view that discrimination based on sexual orientation constitutes sex discrimination in violation of Title VII
- According to the EEOC, coverage under Title VII includes:
 - Discrimination against an individual because that person is transgender
 - Discrimination against lesbian, gay and bisexual individuals based on sex-stereotypes, such as the belief that men should only date women or that women should only marry men
 - "Gender stereotyping"

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EEOC Gender Stereotyping

It is illegal for an employer to deny employment opportunities or permit harassment because:

- A woman does not dress or talk in a feminine manner
- A man dresses in an effeminate manner or enjoys a pastime (like crocheting) that is associated with women
- A female employee dates women instead of men
- A male employee plans to marry a man
- An employee transitions from female to male or male to female

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EEOC Fact Sheet

- On May 2, 2016, the EEOC issued a fact sheet addressing transgender employees' rights in the workplace.
- Titled "Bathroom Access for Transgender Employees Under Title VII of the Civil Rights Act of 1964," the fact sheet declares that employers may not discriminate against employees on the basis of gender identity and declares that employers may not restrict the ability of transgender employees to use restrooms consistent with their gender identity.
- Significantly, the EEOC also announced that contrary state laws are not a defense to a Title VII claim.
- Available at: <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm>

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Results of EEOC Enforcement Efforts

- In January 2013, the EEOC began tracking information on charges filed alleging discrimination based on LGBT status
- Charges alleging sex discrimination related to sexual orientation and/or gender identity/transgender status continue to increase
 - FY 2013 (January - September) = 808 charges
 - FY 2014 = 1,100 charges
 - FY 2015 = 1,412 charges
 - FY 2016 = 1,768 charges
- EEOC resolved a total of 1,649 LGBT charges in FY 2016, including through voluntary agreements providing approximately **\$4.4 million** in monetary relief for workers and achieving changes in employer policies so that discrimination would not recur



FMLA

- FMLA and Title VII require that medical leaves for medically necessary procedures be evaluated pursuant to the FMLA
- **General Rule:** If the medical issue satisfies the criteria for leave under the FMLA, it should be treated as such regardless of the basis for the procedure or need for leave
 - Examples of treatment that *may* qualify as a "serious health condition" would include sex reassignment surgery requiring overnight hospitalization, continued counseling, or hormone therapy
- Area of the law is in flux and more developments likely to occur in 2017

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Practical Tips for Managing the Workplace
and Reducing the Likelihood of a Charge
How Companies Can Become More LGBT Inclusive

Preventing a Charge

Culture and...

- Policy & Procedures (including Harassment & Discrimination)
- Training & Education
- Behavioral Expectations & Support
- Facilities

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Policies & Procedures

EEO, Anti-harassment, Non-discrimination, Code of Conduct:

- Include “sexual orientation,” “gender identity and expression”
- Prohibit problematic behavior, including LGBT-specific behavior
- Address accommodation issues, dress code for transitioning employees
- Commitment to provide a workplace free of harassment and discrimination

Culture and...

- Policy & Procedures (including Harassment & Discrimination)
- Training & Education
- Behavioral Expectations & Support
- Facilities

Training & Education

Train managers and employees about:

- Policies, expected behavior
- Role in supporting, enforcing policies
- Reporting and complaint structure
- Prevention of harassment and discrimination
- Diversity training, general education
- Potential consequences

Culture and...

- Policy & Procedures (including Harassment & Discrimination)
- Training & Education
- Behavioral Expectations & Support
- Facilities

Behavioral Expectations

Make sure employees understand expectations:

- Name, pronoun usage for employees undergoing gender transition
- Privacy – employee, co-workers
- What is unacceptable



Facilities Access

Restrooms, Locker Rooms:

- Should permit access according to gender presentation
- Address privacy concerns by minor facilities modifications, as needed
- DOL/OSHA guidelines available at:
<https://www.osha.gov/Publications/OSHA3795.pdf>



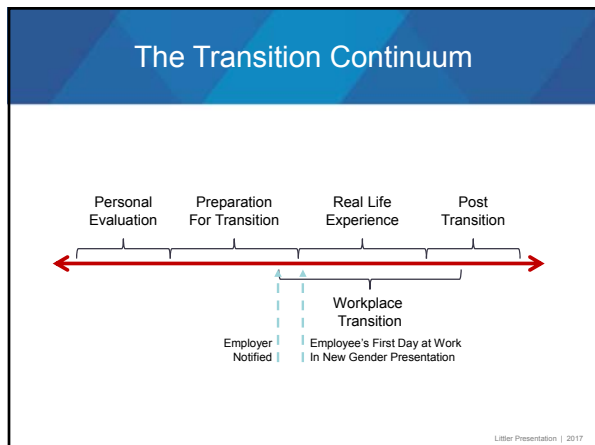
The Bathroom

- HR should discuss restroom access with employee to determine whether employee feels comfortable using restroom of their affirmed gender during the early stages of their transition
- Co-workers need to understand that employee is going through an extremely personal process and not trying to get into the women's/men's bathroom
- Wherever possible, single-stall or single-occupant bathrooms or dressing rooms should be made available to transgender employees if they choose
- Otherwise, allow employee to use restroom or dressing room that correlates with their gender identity (full-time gender presentation) even if that makes others uncomfortable and regardless of the employee's surgical history



How to Support a Transitioning Employee

What HR Can Do To Help




What Does It Mean To "Transition"?

- From the Human Rights Campaign
 - "*Transition* is a process that some transgender people undergo when they decide to live as the gender with which they identify, rather than the one they were assigned at birth"
 - "A transgender person transitioning is not 'becoming' a man or a woman; they are starting to live openly as their true gender"
 - Transitioning can (but doesn't always) include medical components such as hormone therapy and surgery
 - "Recognize that, while public, transitioning is a very personal process and everyone has a right to privacy"

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What Should You Consider?

- Establish Gender Transition Guidelines
- Establish a Gender Transition Plan with the employee
- Modify existing policies and personnel records
 - Dress codes
 - Facilities access
- Communication plan for coworkers
- Resources available to the transitioning employee/coworkers



Establish Gender Transition Guidelines

Institute guidelines for gender transitions that clearly delineate responsibilities and expectations of transitioning employees, their supervisors, coworkers, and other staff


- Utilize senior management to demonstrate the organization's support for the employee
- Have the guidelines easily accessible
 - Intranet
 - Employee Assistance Program resources (e.g., make available to EAP representatives)
 - HR hotline resources
- Guidelines should be accessible to all HR professionals

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Establish Gender Transition Guidelines

Guidelines should address:

1. Who in the business is charged with helping the transitioning employee manage his/her workplace transition
2. What a transitioning employee can expect from management
3. What management's expectations are for staff, transitioning employees, and any existing LGBT employee group in facilitating a successful workplace transition
4. What the general procedure is for implementing transition-related workplace changes
5. Answers to frequently asked questions about dress codes and restroom use



Establish a Gender Transition Plan with the Employee

An employee has informed HR about his or her transition – now what?

1. Initial employee meeting

A time to talk to the employee about what he or she and the organization should expect through the transition process

2. Initial management/HR meeting

To go over the transition plan and address any questions or concerns

3. Joint meeting with employee and supervisor/HR

A separate meeting with the person's supervisor to give the supervisor information about the process and to review the company's policy and procedures

4. Informing co-workers

Employees who will have regular contact with the transitioning employee need at least basic information about the individual's plans, along with a reminder about company policy, expected behavior and how to deal with any concerns they might have. It can be helpful if the transitioning or transgender employee is **not** at this session, so that employees feel more comfortable asking questions.

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Establish a Gender Transition Plan with the Employee

Topics to discuss with the transitioning employee

1. Pronoun preference
2. Changing the employee's name and photo on company documents
3. Coverage under employer health and other benefits plans
4. Communication (and timing of those communications) to the organization/workgroup
5. Security clearances
6. Restroom and facilities use
7. Dress code
8. Expectations about employee conduct and how to handle difficult conversations and potential conflict
9. Manager and employee training if needed
10. HR lead – person who will answer all questions and provide guidance during the transition

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Communication Plan with Coworkers

Make sure employees understand expectations

- Respect for diversity and prevention of harassment/discrimination
- EEO Policy
- Reporting and complaint structure
- Name, pronoun usage for employees undergoing gender transition
- Privacy – employee, co-workers
- Restroom access

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Employee Resources

- Human Rights Campaign
 - <http://www.hrc.org/>
- Spectrum Center, The University of Michigan
 - <https://spectrumcenter.umich.edu/>
- GLAAD
 - <http://www.glaad.org/transgender/resources>

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Behavior that Could Lead to a Charge of Discrimination or Harassment

True or False: Some Scenarios to Consider

Scenario #1: True or False?

The following facts could be used to support a claim of discrimination/harassment:

- Employee performed duties satisfactorily throughout employment
- After employee began to present as a woman and informed her employer she was transgender, she was fired



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Scenario #2: True or False?

The following facts could be used to support a claim of discrimination/harassment:

- Employee announces they will be transitioning their gender to female
- Employer asks for proof of surgical modification before the employee will be permitted to begin presenting as female



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Scenario #3: True or False?

The following facts could be used to support a claim of discrimination/harassment:

- Employee is invited to dinner with senior-level managers and told to bring a guest if she would like
- Employee arrives at dinner with her spouse, who is female
- The CFO asks employee the nature of their relationship and how he should refer to her guest



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Scenario #4: True or False?

The following facts could be used to support a claim of discrimination/harassment:

- Applicant applies for a position as a female and is hired
- A reference check reveals the employee's gender marker previously was listed as male
- Employer sends the employee home for violating the dress code because the employee is wearing women's clothing, make-up, and earrings



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Scenario #5: True or False?

The following facts could be used to support a claim of discrimination/harassment:

- Employee announces their intention to transition to male and asks to be called Joseph
- Employer permits Joseph to begin presenting as male, and uses Joseph and male pronouns to refer to the employee
- Employer requests that Joseph provide proof of a legal name change before modifying Joseph's name in its payroll system



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Scenario #6: True or False?

The following facts could be used to support a claim of discrimination/harassment:



- Employer requires all employees to wear pants
- Employee objected, claiming the employer was subjecting its female employees to discrimination by forcing them to "dress more masculine" in a way that is demeaning to women

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Scenario #7: True or False?

The following facts could be used to support a claim of discrimination/harassment:

- Employee enters the male restroom, sees a co-worker who is undergoing a gender transition and complains to Human Resources
- Human Resources asks the transgender employee to use a separate unisex restroom on another floor



Scenario #8: True or False?

The following facts could be used to support a claim of discrimination/harassment:



- Employee undergoing a gender transition asks to be called by female pronouns and by the name Erin
- Co-worker refuses to call her Erin and refuses to use female pronouns because the co-worker thinks the employee is "still a male"

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Scenario #9: True or False?

The following facts could be used to support a claim of discrimination/harassment:

- New employee asks Human Resources to approve a medical leave of absence for procedures relating to gender transition
- Employee's supervisor asks Human Resources for details relating to the employee's leave
- Human Resources discloses to the supervisor that employee is having sex reassignment surgery

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Scenario #10: True or False?

The following facts could be used to support a claim of discrimination/harassment:

- At the time of hire, employee was perceived to be male
- After submitting the employee's information to the state agency, the employer received a "no match" letter indicating that the employee's name and gender marker did not match state records
- The employer asks the employee whether he previously was known by a different name



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Questions?



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Thank You!

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