

Navigating the Void: Responding to Restroom Accommodation Requests For Transgender Employees

Fifty-two years ago Bob Dylan penned the now famous lyrics: “The times they are a changin’.” True enough Mr. Dylan, but for many, changes come slowly and, as the late David Bowie sang: “The days still seem the same.” This can be true in law, which sometimes struggles to keep pace with changes in society. Would it surprise you to learn that only last May Congress removed archaic racial terminology like “Oriental” and “Negro” from the federal lexicon?

For employers dealing with transgender related issues, the changing times have exposed a legal void of uncertainty. Time Magazine recently called transgender issues the “New Civil Rights Frontier.” Yet, despite a shifting and dynamic public perspective on transgender issues, Congress and federal agencies have provided little guidance to employers. As a result, many employers have been left in the dark, trying to divine the best way to deal with various related issues; none as vexing as those concerning restroom accommodations.

When it comes to restroom accommodations for transgender employees, the questions that arise are seemingly endless. For example, how should an employer respond to an employee’s request to use the facilities that match his, her, or their gender identity? Should an employer request a medical professional’s confirmation? Should it matter if the person has already transitioned or has no intention of doing so in any outwardly noticeable way? How should an employer educate and/or deal with other employees who express their own discomfort or other concerns?

Coincidentally, Congress enacted the Civil Rights Act (also known as Title VII) in 1964, the same year that Dylan wrote “The Times They Are A Chanin’.” Although Title VII had the effect over time of reducing discrimination on the basis of one’s race, color, national origin, sex, and religion, it did not create any protections for individuals who identify as transgender. To this day, Title VII does not expressly recognize any protection for transgender individuals. While the EEOC has declared that the term “sex” in Title VII includes transgender protection, that interpretation has not been vetted extensively by the courts and may not be resolved until *United States v. The State of North Carolina et al.* (the bathroom bill case) works its way to the U.S. Supreme Court in two to three years. Even then, a ruling might not provide the guidance one might expect or want.

To date, only OSHA has published some form of legal guidance grounded in specific statutes and regulations on how employers should address restroom accommodations for transgender employees. Extrapolating from an employer’s obligation to provide safe, sanitary restrooms, OSHA advised that, as a model practice, employers should establish unisex or multi-occupant gender neutral bathrooms or allow transgender workers to use the facilities with which they identify, regardless of where that person is in the transition process. This means that employers would be instructed to allow a person who identifies as male to use the men’s restroom and vice-versa. OSHA emphasizes that restricting employees to using the facilities affiliated with their biology, “singles those employees out and may make them fear for their physical safety.” According to OSHA, restroom restrictions can result in employees avoiding using restrooms

entirely while at work, which can lead to potentially serious physical injury or illness—an ostensible violation of OSHA.

As potentially instructive as OSHA's guidance may be, it is only a published guidance, not the law. At least as things stand now, employers must look to their state legislatures for more definitive guidance. Here in New England, every state, except New Hampshire, has adopted some version of a restroom accommodation law. Most recently, on July 8, 2016, Massachusetts enacted the Transgender Public Accommodation Bill, which legislates that a transgender person now has the right to use the restroom and locker room that matches that person's gender identity. On the opposite side of the spectrum, and the subject of media coverage, North Carolina passed a bathroom bill that requires individuals to select facilities based on their biological identity, as opposed to their gender identity.

For employers in Massachusetts or North Carolina, the law is clear and their obligations as an employer are clear. For employers in New Hampshire, the best general advice we can offer in this legal void is to communicate more with everyone involved; insist on a respectful dialogue at all times; and accommodate whenever reasonably possible. This dialogue and good faith attempt to find common ground might result in creation of a private restroom, or permission for a person to use the restroom that matches his, her, or their gender identity.

Until more clear laws are established on this issue, employers in states like New Hampshire must navigate the legal void, balance risks, and when necessary, address their concerns with competent legal counsel.