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Transgender Employees: Six Recommendations For Employers

The debate over transgender bathroom access has gained nationwide attention. With the ongoing public bathroom controversy in North Carolina, the pending California public bathroom law, and numerous pending state sexual orientation and gender identity nondiscrimination bills, the media continues to give more attention to, and the public learns more about gender identity issues. In light of this increased attention and scrutiny, here are six recommendations for employers:

1. Do Not Discriminate Based on Transgender Status

While the language of Title VII does not explicitly protect transgender status, the U.S. Equal Employment Opportunity Commission ("EEOC") takes the position that discrimination on the basis of sexual orientation, gender identity, change of sex and/or transgender status is prohibited "sex discrimination" under Title VII. The EEOC vigorously pursues such discrimination complaints, placing a great deal of pressure on federal circuit courts to revisit and change their positions on this issue. The EEOC advises employers to consider sexual orientation, gender identity, change of sex, and/or transgender status as protected classes regardless of contrary state laws, such as North Carolina's Public Facilities Privacy and Security law.

2. Co-workers' Discomfort Does Not Justify Discrimination

Gender-based stereotypes, perceptions or comfort levels must not interfere with any employee's ability (and right) to work free from discrimination and harassment. The anxiety, confusion, discomfort and prejudices of employees, supervisors, customers or anyone else in the workplace does not justify discriminatory treatment of transgender employees.

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3. Transgender Employees Must Be Allowed Access to the Bathroom of their Gender Identity

According to the EEOC, denying any employee equal access to the bathroom that corresponds to the employee's gender identity is sex discrimination. Employers must not: (a) condition an employee's right to use the bathroom of his/her gender identity upon the employee undergoing, or providing proof of, medical procedures; (b) restrict a transgender employee to a single-user bathroom; nor (c) require an employee to use a bathroom located an unreasonably long distance from the employee's work station.

4. Do Not Require Transgender Employees to Conform to Specific Gender-Related Dress and Appearance Policies

Once an employee informs the employer that he/she is transitioning to the other gender, the employer should apply and enforce the dress code in the same manner it is applied and enforced upon other employees of that gender. Employers should also consider eliminating unnecessary gender-specific dress and appearance rules from dress codes and grooming policies.

5. Use Transgender Employees' Preferred Names and Pronouns

Employer representatives, including managers, supervisors and co workers must use the preferred names and pronouns of transgender employees. Similarly, employee personnel records and directories should reflect the preferred names and pronouns. An employer's continued and intentional misuse of names and pronouns could result in litigation and liability.

6. Update Nondiscrimination Policies

Employers should ensure that their nondiscrimination and harassment policies prohibit discrimination and harassment based on sexual orientation, gender identity, change of sex and/or transgender status, and similarly ensure that their Human Resource professionals are properly trained to handle complaints related to transgender issues.

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Failing to address transgender protections and treatment in the workplace creates a substantial risk of litigation and liability. Addressing this issue proactively can greatly diminish this liability, as well as serve to ensure employees and supervisors can maintain their focus on the work they are there to perform.

If you have any questions about this material or would like assistance in modifying your employment policies, please contact Katie D. Triska or your Reinhart attorney.

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