

New EEOC Guidance on Transgender Bathroom Access



Given recent media attention surrounding the Federal Government's policy on transgender students' use of school bathrooms and locker rooms, many employers are wondering about their legal obligations regarding bathroom access for transgender employees. Earlier this month the Equal Employment Opportunity Commission (EEOC) released a "Fact Sheet" stating the Commission's position on the matter. According to the EEOC, an employer's failure to allow a transgender employee to use the restroom consistent with his or her gender identity violates Title VII of the Civil Rights Act of 1964 (Title VII), regardless of whether the employee has undergone any medical treatment for sex-reassignment, and regardless of other employees' or customers' discomfort, or any contrary requirement of state or local law. Although it is uncertain whether the agency's interpretation will be adopted by the courts, the Commission has signaled that it will vigorously enforce its position. Employers subject to Title VII who do not comply with the EEOC's guidance on transgender bathroom access therefore risk administrative enforcement proceedings as well as potential private litigation.

The EEOC Fact Sheet

The EEOC issued its *Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964*, <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm>, on May 2, 2016. The Fact Sheet affirms the Commission's view that "discrimination based on transgender status is sex discrimination in violation of Title VII." It also specifically states that "denying an employee equal access to a common restroom corresponding to the employee's gender identify is sex discrimination."

The Fact Sheet sets forth three important principles regarding transgender employees' access to restrooms, changing rooms, and similar intimate facilities in the workplace:

- An employer may not condition a transgender employee's use of a particular restroom on "proof of surgery or any other medical procedure."
- Transgender employees' bathroom access may not be limited based on "the desire to accommodate other people's prejudices or discomfort." This means that an employer may not ask a transgender employee to use a single-user restroom due to complaints from co-workers or customers, although the employer can make such a facility available to everyone.
- Compliance with "contrary state law is not a defense under Title VII." North Carolina's recently enacted Public Facilities Privacy & Security Act (or "HB2"), for example, provides that in government buildings, individuals may use only multiple-occupancy restrooms that correspond to the sex listed on their birth certificates. Employers covered by HB2 must now choose between violating state law and facing potential Title VII liability.

Legal Uncertainty

The EEOC Fact Sheet is guidance that does not have the force of law, and it is uncertain whether courts will accept the agency's position. Although several courts previously have held that Title VII's prohibition of sex discrimination does not include discrimination based on transgender status, others have recognized transgender discrimination claims based on the principle that Title VII prohibits discrimination based on sex stereotyping. The unsettled state of the law came into sharp focus earlier this month, when the Department of Justice and North Carolina filed lawsuits against each other on the same day over HB2's legality under Title VII.

The EEOC finds support for its position in a recent Fourth Circuit decision holding that Title IX of the Education Amendments of 1972 (Title IX) requires schools to give transgender students access to bathrooms consistent with their gender identify. That decision, however, was based on judicial deference to the Department of Education's interpretation of one its own regulations implementing Title IX—a regulation that is inapplicable to Title VII cases. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, ___ F.3d ___, 2016 WL 1567467 (4th Cir. April 19, 2016). In short, whether courts eventually will adopt the EEOC's views regarding transgender bathroom access under Title VII remains an open question.

Recent Enforcement Activity

The EEOC has made clear that it intends to vigorously enforce its position. The Commission's current Strategic Enforcement Plan lists enforcement of transgender employees' rights under Title VII as a top priority. The stakes for employers who do not comply with the EEOC's requirements are high. In January, for example, the EEOC settled a lawsuit brought on behalf of a transgender employee against a Minnesota financial services company for \$115,000. The case was based in part on the company's alleged refusal to allow the employee to use bathrooms consistent with her gender identity.

In addition to administrative enforcement actions, employers who restrict transgender employees' access to bathrooms and similar intimate facilities run the risk of private Title VII lawsuits by transgender employees.

Take-Aways for Employers

It will take some time before the courts determine whether the EEOC's position is valid. In the meantime, employers seeking to avoid the risk of costly enforcement proceedings and private litigation should follow the guidance set forth in the EEOC Fact Sheet regarding transgender employees' access to bathrooms, changing rooms, and similar facilities. Employers should develop plans for handling employee transitions. Transgender employees must be permitted equal access to restrooms corresponding to their gender identity, regardless of whether they have undergone medical treatment. In consultation with the transitioning employee, the employer should consider discussing the situation with co-workers. Where feasible, employers should consider installing unisex single-user facilities for those with privacy concerns. Privacy may also be enhanced in multiple-user facilities, for example, by extending bathroom stall walls from floor to ceiling.

In addition, employers need to be aware of applicable state and local laws concerning transgender employees. Some jurisdictions have laws expressly prohibiting employment discrimination based on gender identity (including, for example, California and the District of Columbia). Employers generally should comply with state and local laws related to transgender bathroom access that are consistent with the EEOC's position.

It is also possible that in the near future other jurisdictions may adopt laws similar to North Carolina's restricting transgender individuals' bathroom access. Employers in those states, as well as in North Carolina, should balance the risks of choosing to follow state law or the EEOC's position.

For more information about the EEOC's position on transgender discrimination under Title VII, and the state and local laws applicable to your workplace, please contact one of the authors of this Client Alert or the Hogan Lovells attorney with whom you regularly work.

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