



Associations Must Recognize Rights of Transgender Employees, Members and Guests

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Transgender Defined

Transgender individuals are people with a gender identity that is different than the sex assigned to them at birth. Gender identity is defined as an individual's internal sense of being male or female. On December 15, 2014, U.S. Attorney General Eric Holder issued a memorandum announcing that from this time forward, the Department of Justice (DOJ) will consider any discrimination based on a person's gender identity as a form of sex discrimination prohibited under Title VII of the Civil Rights Act.

Employer Obligations

What does this mean for associations? This means that associations cannot discriminate against any employee, member or guest on the basis of that person's gender identification or on the basis of the fact that that person may have transitioned or be transitioning from one gender to another. The position of the DOJ confirms that the 2012 ruling of the EEOC in the case of *Massey v. Holder* (declaring that discrimination on the basis of gender identity is discrimination on the basis of sex) will be followed by the DOJ and all federal agencies with antidiscrimination enforcement jurisdiction.

OSHA Transgender Guideline

Following the December 2014 Department of Justice ruling on June 1, 2015, OSHA issued a Best Practices Guide for restroom access for transgender workers. The OSHA Guideline made it very clear that employers must treat transgender employees in exactly the same way as they treat other employees of the gender with which the transgender employee identifies. Specifically, if an employee identifies as being female, and the employer provides employees with two restrooms, one for female employees and one for male employees, the employee who identifies herself as being female must have equal access to the female employee's restroom even if that employee's sex assigned to her at birth was male. It doesn't matter whether the employee had transitioned prior to becoming an employee of the company or whether the employee transitioned after becoming an employee of the company. It doesn't matter whether the employee had any surgical procedures in support of the transition. All that matters is that the employee now considers himself or herself as being of a certain gender. Once the employee has made such identification, the employer must treat the employee as a member of the gender to which the employee has transitioned. This same rationale would apply to attendees at association meetings and conventions.

Prohibited Workplace Conduct

Associations cannot permit any discrimination or harassment of transgender employees in the workplace. If other employees harass the transgender individual by referring to him or her by the name used prior to the transition, that's a form of discrimination prohibited by Title VII. If other employees use pejorative terms to describe the transitioned employee, that's discrimination prohibited by Title VII. If the association is informed that other employees are harassing or making life difficult for the transgender employee, the association must take affirmative steps to stop the offensive conduct and the harassment.

Restrooms

It is not sufficient that the association provide a separate unisex restroom for transgender employees. Transgender employees must be permitted to use the restroom provided for employees of the gender to which the transgender employee has transitioned.

In certain workplaces where, as an example a male employee has transitioned to having a female identity, other female employees have objected to having the transgender employee use the restroom assigned to female employees. They may claim that the transgender employee is still of the gender assigned at birth in that the employee has many or all the physical attributes of a male. Although that may be true, it does not give the association the right to discriminate against the employee who has transitioned and now identifies as being female. If all the other female employees are permitted to use the female restroom, the transgender employee has the same right to use that restroom. Requiring the transgender employee to use an alternative, such as a unisex restroom, is discriminatory. The Civil Rights Act does not recognize the concept of "separate but equal." The same rationale would apply to restrooms at association meetings.

OSHA estimates there are currently over 700,000 transgender adult employees in the workforce. The recent Vanity Fair magazine article involving the transition of the Olympic Gold Medal Winner Bruce Jenner to a new identity as Caitlyn Jenner has highlighted transgender issues and will serve as a focal point for transgender employees to demand that employers recognize that workplaces must be free of transgender discrimination.

Action Necessary

It is imperative that associations revise their employee handbooks to include language recognizing the rights of transgender employees. The association's position with regard to providing a discrimination free workplace and a workplace free of sexual harassment should recognize that transgender employees are a protected class fully covered by the antidiscrimination provisions of Title VII of the Civil Rights Act. Associations should make sure that the hotels where the association holds meetings have affirmative policies to prevent transgender discrimination.

Many states have adopted legislation or regulations recognizing that transgender individuals are fully protected by antidiscrimination provisions of employment laws, housing laws and laws governing access to public facilities such as schools, court houses, museums and movie theatres. Associations

should check the laws relating to transgender discrimination in the states in which they do business to make sure that their practices comply with these laws.

If you need help revising your association handbook, contact Steve Fellman at sfellman@gkglaw.com.