

PUBLICATION

OSHA Issues Guidance Regarding Transgender Employees

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As transgender issues seem to dominate the headlines, another federal agency has stepped into the debate. Last week, the Occupational Health and Safety Administration (OSHA) issued guidance strongly urging employers to give transgender employees access to restrooms that correspond to their gender identity.

OSHA's guidance comes on the heels of the EEOC's ruling in April that denying a transgender employee access to common restrooms that other employees of the same gender identity use can constitute sex discrimination under Title VII. According to the EEOC, transgender employees are entitled to equal access to common restrooms of their gender identity regardless of whether the transgender employee has had any medical procedure and despite the negative reactions of other employees.

OSHA's new guidance explains why this issue also concerns health and safety in the workplace. Specifically, OSHA explains that singling out transgender employees through restrictions on restrooms can result in these employees avoiding regular restroom use while at work, which can lead to serious physical injury or illness. Thus, OSHA concludes that it is essential for transgender employees "to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity." OSHA cites the Williams Institute at the University of California–Los Angeles, which estimates that "700,000 adults in the United States are transgender, meaning their internal gender identity is different from the sex they were assigned at birth."

The core principle of OSHA's guidance, which does not carry the force of law, is that "all employees, including transgender employees, should have access to restrooms that correspond to their gender identity." Current OSHA regulations require employers to provide their employees with toilet facilities because of the negative health effects created when toilets are not available. OSHA's most recent guidance goes a step further and specifically addresses which employees should have access to which restrooms.

According to OSHA, the best practice for employers is to have a written policy that ensures all employees have access to facilities that correspond with their gender identity and allow employees to determine which option is safest and most appropriate. OSHA also suggests additional restroom options that employees may choose, but are not required, to use. These additional options include single-occupancy, gender-neutral restrooms, as well as multi-occupant, gender-neutral restrooms with lockable single-occupant stalls. Earlier this year, before OSHA issued its updated guidance, the Obama administration adopted OSHA's suggestions and for the first time designated a gender-neutral restroom in the Executive Office Building.

Importantly, OSHA's guidance advises employers against asking for legal or medical documentation supporting or confirming gender identity. And again, the EEOC has made their position clear: transgender employees are entitled to equal access to common restrooms that correspond to their gender identity. Gender identity issues are quickly becoming more common in the workplace. At this time, employers must cautiously approach these issues, and employers need to update policies and training material to address them.