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Employment and OSHA in the Workplace Bathroom: Transgender, ADA, Sanitation and Accessibility Issues

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✘ The Department of Justice (“DOJ”) and the Occupational Safety and Health Administration (“OSHA”) have long enforced accessibility and sanitation standards for restrooms for workers and the public – an idea that generally makes sense viewed as a health and safety concern. In the last few years, however, new policies at the state and federal levels on transgender issues mean all employers must pay particular attention to rules and enforcement regarding access to restrooms.

Indeed, OSHA has now found a way into the highly political and social issue of transgender equality by making its own policy pronouncements on access by workers to restrooms of the gender with which they identify. In 2015, Assistant Secretary of Labor for OSHA Dr. David Michaels explained the Agency’s position on this when he unveiled a new OSHA [Guide to Restroom Access for Transgender Workers](#), he said:

“The core principle is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity.”

The emergence of bathroom issues from a legal and regulatory standpoint is not limited to the transgender issue. This article addresses the complexities of this subject and how it affects regulatory compliance and employment law liabilities.

Transgender Issues from an Employment Law Perspective

There are numerous employment law obligations for employers in the transgender area. Title VII, for example, prohibits discrimination based on sex, which includes treating employees differently for failing to conform to sexual stereotypes. The [Attorney General has issued a memorandum](#) expressing that Title VII specifically prohibits discrimination because the employee is transitioning or has transitioned.



Likewise, the EEOC has determined that Title VII prohibits discrimination based on gender identity. Of note, the term “gender” is now defined to include gender:

- identity
- self-image
- appearance
- behavior; and
- expression.

In addition to federal agencies that have interpreted Title VII to prohibit discrimination based on gender identity or transgender status, a number of states, including Colorado, Delaware, Iowa, Vermont, Washington, and the District of Columbia, have enacted laws requiring employee access to restrooms in accordance with their gender identity, rather than their sex assigned at birth.

To minimize potential liability in this area, employers should evaluate and consider amending their non-discrimination and anti-harassment policies to include gender identity and conformity with gender-based preference, expectations or stereotypes. Other policies that may require some scrutiny are (gender-based) dress codes, and restroom and locker room access policies to ensure access in accordance with gender identity. A new policy that may be needed is a gender transition protocol, which can set clear expectations for management and the transitioning employee, as well as procedures for adjusting personnel records.

Employers should also take the time to educate / train their workforce about transgender issues and company policies, and to use preferred names and gender pronouns of employees.

ADA Concerns Remain

In addition to Title VII's requirements, the Americans with Disabilities Act ("ADA") presents numerous issues related to bathroom accessibility. ADA issues come into play when considering bathroom access for workers with physical or medical conditions (e.g. mobility impairments, prostate and bladder control issues, or pregnancy). In this day and age, employees assert that most conditions are a disability, and many have protection under Title I of the ADA. For this reason, employers must make every effort to have a discussion with the affected worker regarding a potential reasonable accommodation for their disability, such as potentially relocating that worker closer to a bathroom.



Second, pursuant to Title III of the ADA, places of public accommodation (such as hotels, spas, restaurants, retail stores, etc.) must be accessible to all individuals with disabilities, not just employees, and as a result, there are strict accessibility requirements associated with bathroom design and functionality. A company's failure to comply with these requirements could result in significant liability, including injunctive relief, substantial remediation costs, attorneys' fees and potentially (depending on the state) monetary damages as well. The DOJ could likewise bring an action for damages. Thus, it would be prudent as a cost savings measure to have ADA expert counsel inspect your workplace to ensure ADA compliance in all bathrooms open to the public.

OSHA Bathroom Requirements

In terms of bathroom access, there are two OSHA concerns primarily at play (aside from the new transgender issue), which often overlap:

1. providing employees with prompt access to a bathroom; and
2. ensuring the workplace bathroom is maintained in a sanitary condition.

Toilets must be provided and accessible to all employees at every fixed work site. This means a toilet that takes too long to get to, has too long of a line, or is unsanitary is *not* “available.” The underlying concept surrounding these issues is that OSHA draws a direct link to medical effects of not having ready access to a bathroom (i.e., having to hold it too long), and the health consequences of not having access to a *sanitary* bathroom (i.e., being exposed to contaminated unhealthy conditions in an unclean bathroom). These rules aim to ensure workers do not suffer adverse health effects like urinary tract infections, constipation, abdominal pain, diverticulitis and hemorrhoids. Accordingly, through specific regulations, OSHA sets requirements for workplace bathroom proximity, the number of available bathrooms based on the number of employees, and the frequency of cleaning and stocking bathrooms used by workers.

In terms of location and number of restrooms, OSHA’s regulations at [29 CFR 1910.141](#) and 29 CFR 1926.51 set specific expectations for the number of toilet facilities needed at general industry and construction workplaces based on the number of employees working there. Employers may utilize separate bathrooms for each gender OR lockable, single-occupant toilet rooms within a common bathroom facility. To meet the General Industry standard for prompt access to a toilet facility when needed, employers must provide at least the minimum number of toilet facilities per the table below:



Construction bathroom rules are modeled closely on the general industry requirements except the numbers of toilet facilities required are different, and toilets do not have the general industry requirement to be fully plumbed. Job sites lacking a sanitary sewer must provide at least the minimum number of one of the following types of bathroom facilities per the table below:



- privies (aka outhouses)
- chemical toilets
- recirculating toilets
- or combustion toilets.

OSHA has enforced the bathroom accessibility requirement not just based on location, but also for employees having to go through unreasonable steps to get permission to stop work to use the bathroom. Any restriction, such as locking restroom doors or requiring a supervisor’s express permission must be reasonable and may not cause extended delays. Likewise, assembly lines (or other operations that can be easily disrupted by one worker’s restroom break) must provide enough relief workers that employees need not wait an unreasonably long time to stop to use the bathroom.

In terms of the sanitation requirement, OSHA’s standard operates more like a performance standard; i.e., the regulation requires bathrooms, washing facilities, and lavatories be maintained in a “sanitary condition,” but does not specify the methodology employers must follow to accomplish that performance goal. OSHA does, however, reference ANSI Z4.3-1995 as a guide. The ANSI industry consensus guidance calls for a toilet used by up to 20

people to be serviced at least twice per week. The concept of sanitary also includes supplying adequate toilet paper, hand-washing supplies and clean drying towels.

Chemical-Specific Regulations with Bathroom Requirements

Workplaces with potential occupational exposures to certain hazardous chemicals, such as lead and asbestos, must include change rooms and showers. Under these chemical-specific standards, employees must shower post-shift and leave behind contaminated work clothes. Moreover, whenever protective clothing is required because of possible contamination with toxic materials, change rooms with storage facilities for street clothes and separate storage for protective clothing shall be provided.

OSHA Tackles Transgender Issues

While once it may have seemed strange that OSHA's mission would encompass transgender equality, the Agency managed a way to insert itself into the national battle over transgender rights when it issued a "Bathroom Guidance" geared toward the issue in 2015.



This Bathroom Guidance reiterates adverse health risks from restrictions to bathroom access. It notes that requiring transgender employees to use a bathroom inconsistent with their gender identity may cause them to feel unsafe or otherwise avoid using restrooms entirely while at work – thus triggering the same kinds of health concerns as other forms of lack of accessibility.

The new Bathroom Guidance offers "model practices" including implementing a written policy ensuring all employees have prompt access to appropriate sanitary facilities and bathroom options, such as single-occupancy unisex toilet facilities, or multiple-occupant gender-neutral restrooms with lockable single-occupant stalls.

OSHA also cautions employers not to ask employees for medical / legal records to verify their gender identity in order to get access to a specific toilet facility, and not to require transgender workers to use segregated bathrooms in other parts of the workplace. Although OSHA's guidance is non-mandatory, enforcement is possible under the accessibility requirements discussed above, as well as general duty clause violations related to workplace violence, and worker retaliation complaints. In recent years, OSHA has been vigorously enforcing the latter two issues.

Closing Thoughts

The incoming Trump Administration will inherit these issues, and will almost certainly take a different view than the outgoing Obama Administration. Going forward, OSHA and the EEOC may not be as proactive in enforcing these issues for a lack of accessibility regarding gender identity. Indeed, the agencies could archive guidance and interpretations to that effect altogether. Still, bathroom-related and gender-identity issues will continue to be an important subject for U.S. employers, as this great patchwork of state laws and policies continues to evolve. Thus, these issues are here to stay, at least in some capacity. Therefore, employers should stay fully apprised of developments in the sensitive area of bathroom accommodations to avoid costly litigation and/or

regulatory enforcement actions (fair or otherwise) down the road.

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For more information and OSHA and employment law issues related to the workplace bathroom, check out this recording of a [webinar](#) by attorneys at [Conn Maciel Carey](#):

[youtube https://www.youtube.com/watch?v=p_GKhsVrDEA?showinfo=0&w=560&h=315]