

“And Justice for All” . . . Maybe: Transgender Employee Rights in America

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I. Introduction

Consider the case of Izza Lopez, formerly known as Raul Lopez, Jr.¹ She was diagnosed with Gender Identity Disorder. Though biologically male, she lived her life as a woman for years, consistent with the medical protocols for her condition and transition planning. Lopez applied for a position with Rivers Oaks, a medical clinic, as a scheduler. After two successful interviews, she was offered the position contingent on a successful background check and drug screen. After passing these tests, River Oaks formally extended an offer. Lopez subsequently resigned from her then-position with another employer and prepared for a new career with River Oaks. Before her scheduled start date, however, River Oaks discovered that Lopez was biologically male.²

How should River Oaks have reacted to this information? Could the offer be rescinded—legally? Should it be rescinded—morally? If the company chooses to continue with the hiring of Lopez, how should it best prepare for a smooth introduction of a transitioning employee to the workforce? Should the company inform Lopez’s future supervisor and co-workers of her transitioning status? Would doing so violate her privacy? What if her co-workers felt “uneasy” with her appearance and the dissonance between that and her biological gender in shared space—like an employee restroom? Should the company make changes to its benefits package to consider the future needs of a transitioning employee? These are complex, yet necessary decisions for any company in today’s society.

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1. Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 655–56 (S.D. Tex. 2008).

2. *Id.* at 656.

Despite the gravity of such decisions, River Oaks decided to rescind Lopez's offer.³ The company's decision led to a difficult and lengthy legal battle. Cross motions for summary judgment were filed, and neither party completely prevailed at the summary judgment phase.⁴ While plaintiff was given the opportunity to move forward with her claim of sex discrimination (under a sex stereotyping analysis),⁵ she and the Defendant ultimately reached an out of court resolution.⁶ Though the case law remains unsettled concerning the rights of transgender employees, *Lopez v. River Oaks* is a warning to all employers. It shows that a company's reaction, or failure to react appropriately, to take notice of a transitioning employee could increase its legal exposure. Also, a company's response can affect employee morale and the company's reputation and competitiveness in the job market. Therefore, employers should be mindful of issues affecting transgender and transitioning employees and treat all employees with dignity.

First, this article will explore what it means to be "transgender" and America's acceptance of the transgender community. Next, this article will examine relevant law concerning discrimination against transgender employees. Then, the article will review the dueling federal guidance on transgender discrimination issues. Finally, this article will discuss recommendations for employers to mitigate risk.

II. Overview and Definition of "Transgender"

The known history of "transgender" people in society stretches back over three millennia. One of the earliest transgender figures in history was Pharaoh-Queen Hatshepsut, who ruled Egypt in the fifteen century BC.⁷ She would occasionally dress in male attire and refer to herself as male—in part to cloak herself with the authority associated with males in leadership during that time.⁸ From the days of the Pharaoh Queen, there have been numerous milestones in the development of transgender history. For brevity, this article will only highlight a few relevant events. For a more comprehensive history, read *Nonbinary Gender Identities: History, Culture, Resources* by Charlie McNabb.⁹

3. *Id.*

4. *See id.* at 655 (noting that cross-motions for summary judgment were filed and that both should be denied).

5. *Id.* at 660–61.

6. Mediator's Report at 2, *Lopez*, 542 F. Supp. 2d 653 (No. H-06-3999), <https://www.courtlistener.com/recap/gov.uscourts.txsd.484467.42.0.pdf>.

7. *See generally* KARA COONEY, *THE WOMAN WHO WOULD BE KING: HATSHEPSUT'S RISE TO POWER IN ANCIENT EGYPT* (2015).

8. *See generally id.*

9. *See* CHARLIE McNABB, *NONBINARY GENDER IDENTITIES: HISTORY, CULTURE, RESOURCES* (2018).

A. *Development of the Term “Transgender”*

Long before the term “transgender” became part of the modern lexicon, members of society wanted to live their lives free of binary gender norms. In the mid-1500s and 1600s, European explorers wrote about the fluid gender practices within indigenous North American tribes.¹⁰ After colonization by Europeans, many of these indigenous tribes were forced to comply with strict gender roles or face extermination.¹¹

In 1755, one of the first transgender icons, actress Charlotte Clarke, publicly announced her transgender identity in a ground breaking novel, *A Narrative of the Life of Mrs. Charlotte Clarke (Youngest Daughter of Colley Cibber, Esq.)*.¹² In the novel, Clarke discussed the difficulties of living as a male in a binary, male-dominated society.¹³ In 1930, famed painter Lili Elbe became the first person to undergo gender reassignment surgery.¹⁴ Her transformation from male to female was documented in the novel, *Man Into Woman*,¹⁵ and later film, *The Danish Girl*.¹⁶ In both of the aforementioned historical novels, the authors revealed the struggle between personal truth and social norms. These novels shine a light on the struggle for equality that transgender individuals still face today.

The meaning of the term *transgender* has evolved over time. In 1969, the term “transgender” was coined by activist and magazine publisher Virginia Prince.¹⁷ Prince originally used the term as a way of distinguishing those who had not undergone surgical reassignment from those who were post-operation transsexuals.¹⁸ Over time, transgender became the umbrella term for all those engaging in non-normative gender practices.¹⁹ Currently, one’s transgender status is thought of as an expression of one’s gender identity.²⁰ Transgender status is not directly

10. JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 281–87 (1976).

11. Deborah A. Miranda, *Extermination of the Joyas: Gendercide in Spanish California*, 16 GLQ: J. LESBIAN & GAY STUD. 253, 257–60 (2010), <https://muse.jhu.edu/article/372454/pdf>.

12. Mercedes Allen, *Transgender History: Into the Modern Age (1700s–1932)*, BILERICO PROJECT (Feb. 26, 2008, 9:55 AM), http://www.bilerico.com/2008/02/transgender_history_into_the_modern_age.php#aDr0R8T3TmdsKf8M.99.

13. *See id.*

14. *Lili Elbe Biography*, BIOGRAPHY (Apr. 12, 2019), <https://www.biography.com/people/lili-elbe-090815>.

15. LILI ELBE, *MAN INTO WOMAN: AN AUTHENTIC RECORD OF A CHANGE OF SEX* (Niels Hoyer ed., H.J. Stenning trans. 1933). The original work was published in 1931. LILI ELBE, *FRA MAND TIL KVINDE* (Hage & Clausen, 1931).

16. *THE DANISH GIRL* (Working Title Films 2015).

17. LILLIAN FADERMAN & STUART TIMMONS, *GAY L.A.: A HISTORY OF SEXUAL OUTLAWS, POWER POLITICS, AND LIPSTICK LESBIANS* 352 (2006).

18. *Id.*

19. *Id.*

20. *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited June 5, 2019).

related to one's sexual orientation.²¹ Rather, it is an expression of one's inner reflection of himself or herself as male, female, neither, or both.²²

During the 1990s, the term transgender was added to the popular acronym LGB (i.e., lesbian, gay, and bisexual) creating the acronym LGBT.²³ Since the engrafting of the term *transgender* to the alternative lifestyle/states of being acronym, other lifestyles/states of being have also been recognized. Today, the acronym has grown to recognize the queer and questioning community, the intersexual community, the asexual, allies of this community, and many others. Thus, a modern acronym is L.G.B.T.Q.I.A.+²⁴

B. Growing Acceptance of Transgender People in American Society

Through the media, members of the transgender community have tried to underscore their humanity to the general public.²⁵ According to a Harris poll, eighty-four percent of Americans do not personally know a transgender person.²⁶ Consequently, most Americans are only exposed to the transgender community through the media. For instance, articles have been a key avenue for transgender community members to educate the public about their identity and the issues they face.²⁷ Likewise, with popular "trans-focused" television programs like *RuPaul's Drag Race*²⁸ and *I Am Jazz*,²⁹ transgender individuals have been able to enter the living rooms of millions of Americans. It is reasonable to conclude that this growing mainstream media presence correlates to a greater sense of social acceptance.

Further, recent studies support the trend towards social acceptance. In a 2013 Pew Study, ninety-two percent of the LGBTQ community believes that society is more accepting of alternative lifestyles today than ten years ago.³⁰ Over ninety percent of the LGBTQ community believes that social acceptance will continually improve.³¹

Likewise, growing acceptance of transgender individuals is evidenced by the change in the Diagnostic and Statistical Manual of

21. *Id.*

22. *Id.*

23. Bea Mitchell, *How Has the LGBT+ Acronym Evolved?*, PINKNEWS (Nov. 6, 2017, 11:48 AM), <https://www.pinknews.co.uk/2017/11/06/how-has-the-lgbt-acronym-evolved>.

24. Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>.

25. TRANSGENDER IDENTITIES: TOWARDS A SOCIAL ANALYSIS OF GENDER DIVERSITY 59–60 (Sally Hines & Tam Sanger eds., 1st ed., Kindle ed. 2010).

26. GLAAD *Transgender Media Program*, GLAAD, <https://www.glaad.org/transgender> (last visited June 5, 2019).

27. *Id.*

28. RUPAUL'S DRAG RACE (World of Wonder Productions 2009).

29. I AM JAZZ (TLC 2015).

30. PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 30, 32 (2013), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/06/SDT_LGBT-Americans_06-2013.pdf.

31. *Id.* at 30, 33–34.

Mental Disorders (DSM) published by the American Psychiatric Association.³² In the first edition of DSM, the American Psychiatric Association listed non-binary behavior such as homosexuality as a sociopathic personality disturbance.³³ As a result, for decades, therapists sought to “cure” non-binary behavior.³⁴ Therapists used extreme means to accomplish this end, such as electric shock therapy.³⁵ Over time, the psychiatric community began to abandon the idea that non-binary behavior was indicative of a mental disorder.³⁶ In the 1970s, the American Psychiatric Association removed the term “homosexuality” from its list of psychiatric disorders.³⁷

More recently, in 2013, gender identity disorder was replaced by gender dysphoria.³⁸ Under the former disorder, one was deemed psychosomatic solely because she or he felt uncomfortable with her or his birth gender.³⁹ Gender dysphoria requires one to be distressed by the conflict between his or her ideal and birth genders.⁴⁰ Many in the transgender community live their lives as their ideal gender without distress. The new disorder reflects a shifting cultural opinion that non-conformity with one’s biological gender does not make one mentally ill.

The wave of social acceptance has even entered the corporate world. Nearly all, ninety-one percent, of Fortune 500 companies have established policies prohibiting discrimination based on sexual orientation.⁴¹ Moreover, eighty-three percent of Fortune 500 companies have prohibited discrimination on the basis of gender identity.⁴² This is a vast increase from 2000 when just three companies had policies against gender identity discrimination.⁴³

This cultural shift does not mean that the transgender community has gained acceptance in all aspects of society. In fact, ninety percent of transgender employees report harassment in the workplace.⁴⁴ Over

32. Compare AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1st ed. 1952), with AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed., 6th prt. 1974).

33. See *LGBT Rights Milestones Fast Facts*, CNN (Apr. 1, 2019, 9:18 AM ET), <https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html>.

34. Neel Burton, M.D., *When Homosexuality Stopped Being a Mental Disorder*, PSYCHOLOGY TODAY (Sept. 18, 2015), <https://www.psychologytoday.com/us/blog/hide-and-seek/201509/when-homosexuality-stopped-being-mental-disorder>.

35. *Id.*

36. *Id.*

37. *Id.*

38. Francine Russo, *Where Transgender Is No Longer a Diagnosis*, SCI.AM. (Jan. 6, 2017), <https://www.scientificamerican.com/article/where-transgender-is-no-longer-a-diagnosis>.

39. *Id.*

40. *Id.*

41. *LGBTQ Equality at the Fortune 500*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/lgbt-equality-at-the-fortune-500> (last visited June 5, 2019).

42. *Id.*

43. *Id.*

44. Christianna Silva, *Almost Every Transgender Employee Experiences Harassment or Mistreatment on the Job, Study Shows*, NEWSWEEK (Nov. 29, 2017), <https://www.newsweek.com/transgender-employees-experience-harassment-job-726494>.

fifty percent of all LGBTQ people report that they receive lower wages than their heterosexual counterparts, have difficulty finding employment, and have been fired from jobs due to their sexual orientation or gender identity.⁴⁵

Though social acceptance of alternative lifestyles or existences has significantly improved, much work remains undone in the area of employment discrimination. Employment law guidance is split on whether transgender employees are protected from discrimination on the basis of gender identity or sexual orientation. This split has only been deepened by conflicting federal guidance from the Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC). The next sections will explore the dueling opinions and discuss a historical overview of relevant employment law, federal guidance, and recommendations for mitigating risk caused by transgender discrimination.

III. Overview of the Relevant Law Concerning Discrimination Against Transgender Employees

A. *Federal Law Provides No Explicit Protection from Employment Discrimination on the Basis of Gender Identity*

Congress has not chosen to create a law that explicitly protects transgender employees from workplace discrimination. Title VII of the Civil Rights Act of 1964 (Title VII) has established only five protected categories: race, color, religion, sex, and national origin.⁴⁶ Numerous proposals have been made to add sexual orientation as a protected category.⁴⁷ A total of ten amendments were presented to the 94th and 95th Congress without success.⁴⁸ Despite these failures, Congress has attempted to enact separate laws to protect members of the LGBTQ community.

The most successful attempt to establish a national law protecting LGBTQ employees was the proposed Employment Non-Discrimination Act (ENDA) of 2013. The proposed legislation would have prohibited discrimination on the basis of sexual orientation and gender identity.⁴⁹ Senators Ted Kennedy and Gerry Studds first proposed ENDA in 1994.⁵⁰ In 2013, ENDA finally passed the Senate with bipartisan

45. *Id.*

46. 42 U.S.C. § 2000e-3 (2012).

47. *See Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (discussing proposals to Congress to add sexual preference as a protected category).

48. *See Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–62 (9th Cir. 1977).

49. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013), <https://www.congress.gov/bill/113th-congress/senate-bill/815>.

50. Ed O'Keefe, *ENDA, Explained*, WASH. POST (Nov. 4, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-non-discrimination-act-enda/?utm_term=.c88b52c409d3.

support.⁵¹ Nonetheless, the bill died in the House.⁵² Other efforts to establish a more inclusive anti-discrimination federal law have met a similar fate.

B. Federal Circuit Courts Are Split on Whether Transgender Employees Are Implicitly Protected by Title VII

Whether federal law implicitly prohibits discrimination on the basis of gender identity or sexual orientation is currently undecided. A number of early court opinions held that transgender individuals were not protected under Title VII.⁵³ Many courts held that the term “sex” should be interpreted narrowly.⁵⁴ Under this interpretation, “sex” was characterized by one’s biological or anatomical attributes.⁵⁵

The rationale behind this interpretation is discussed by the United States Court of Appeals for the Seventh Circuit in *Ulane v. Eastern Airlines*.⁵⁶ The Court noted that the sex category was added as a last minute floor amendment without any prior debate.⁵⁷ The Court explained that the legislative history did not include any discussion regarding the extension of protection based on gender identity.⁵⁸ Furthermore, the Court noted that Congress repeatedly rejected amendments aimed at extending Title VII to include sexual orientation.⁵⁹ Therefore, Congress intended the term “sex” to have a traditional definition.⁶⁰

Other circuits have also declined to recognize transgender plaintiffs’ Title VII sex discrimination claims.⁶¹ Two examples of this reasoning are *Sommers v. Budget Marketing, Inc.*⁶² and *Holloway v. Arthur*

51. *Roll Call Vote 113th Congress—1st Session*, U.S. SENATE (Nov. 7, 2013, 1:51 PM), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00232.

52. *All Actions H.R. 1755— 113th Congress (2013–2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/1755/all-actions?overview=closed#tabs> (last visited June 7, 2019).

53. *See, e.g., Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982); *Holloway*, 566 F.2d at 662–63.

54. *E.g., Ulane*, 742 F.2d at 1084–85; *Sommers*, 667 F.2d at 750; *Holloway*, 566 F.2d at 662–63.

55. *Ulane*, 742 F.2d at 1084–85; *Sommers*, 667 F.2d at 750; *Holloway*, 566 F.2d at 662–63.

56. 742 F.2d at 1084–85.

57. *Id.* at 1085 (citing *Holloway*, 566 F.2d at 662; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971)).

58. *Id.*

59. *Id.*

60. *Id.* at 1086.

61. *See, e.g., Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977); *Grossman v. Bernards Twp. Bd. of Educ.*, 538 F.2d 319 (3d Cir. 1976) (unpublished table decision), *aff’g* *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at *10–11 (D.N.J. Sept. 10, 1975)).

62. 667 F.2d at 750 (denying a claim sex discrimination claim by a transgender claimant).

*Andersen & Co.*⁶³ In both of these cases, a transgender employee's claim of sex discrimination was denied.

Conversely, many courts have rejected the narrow interpretation of the "sex" category. *Price Waterhouse v. Hopkins* is the seminal case which expanded the term "sex" beyond biological or anatomical attributes.⁶⁴ In *Price Waterhouse*, the U.S. Supreme Court explained that by adding the term "sex" to Title VII, Congress intended to prohibit the entire "spectrum of disparate treatment of men and women resulting from sex stereotypes."⁶⁵ The Court noted that Congress's goal was for employers to focus on the qualifications of applicants and employees without regard to attributes involving sex.⁶⁶ In the post-*Price Waterhouse* era, many federal courts, including the Sixth, Ninth, and Eleventh Circuits, have found that a transgender employee can state a prima facie sex discrimination claim on the basis of sex stereotypes.⁶⁷

C. *The Americans with Disabilities Act Generally Excludes Conditions Related to Transgender Employees But Some Arguments Have Been Made for Inclusion*

The Americans with Disabilities Act (ADA) explicitly prohibits coverage for the conditions of homosexuality, bisexuality, transvestism, transsexualism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.⁶⁸ Despite this litany of sex-based exclusions, the ADA provides narrow scenarios wherein transgender employees might garner protection. For example, transgender employees may argue that their gender identity disorder resulted from a *physical impairment*. Interestingly, several studies have concluded that gender identity may result from a physical condition.⁶⁹ For instance, transgender individuals tend to have brain structures that are consistent with their gender identities.⁷⁰ This means female-to-male transsexuals have brain structures similar to males, and male-to-female transsexuals have brain structures similar

63. 566 F.2d at 664 (denying a claim sex discrimination claim by a transgender claimant).

64. 490 U.S. 228, 250–51 (1989) (superseded by statute on other grounds).

65. *Id.* at 251 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

66. *Id.* at 243–44.

67. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493–94 (9th Cir. 2009); *Myers v. Cuyahoga Cty.*, 182 F. App'x 510, 519 (6th Cir. 2006); *Schroer v. Billington*, 577 F. Supp. 2d 293, 301 (D.D.C. 2008).

68. 42 U.S.C. § 12211 (b)(1) (2012).

69. Katherine J. Wu, *Between the (Gender) Lines: The Science of Transgender Identity*, HARV. GRADUATE SCH. OF ARTS & SCI. (Oct. 25, 2016), <http://sitn.hms.harvard.edu/flash/2016/gender-lines-science-transgender-identity/>.

70. *Id.*

to females.⁷¹ Thus, the question of protection could rest on whether an “impairment” is the same as a “condition.”

The answer to the question above appears to be no. Plaintiffs have been unsuccessful in arguing that their gender identity disorder resulted from a physical impairment and should be covered by the ADA. Discussions of this argument appear in *Johnson v. Fresh Mark, Inc.*⁷² and *Doe v. United Consumer Financial Services*.⁷³

Additionally, transgender employees who suffer with gender dysphoria have other options for seeking protection under the ADA. As discussed earlier, gender dysphoria differs from gender identity disorder. Unlike gender identity disorder, gender dysphoria is characterized by distress and is recognized as a psychological disorder.⁷⁴ This argument is discussed in *Blatt v. Cabela’s Retail, Inc.*⁷⁵ In this case, the U.S. District Court for the Eastern District of Pennsylvania noted that a canon of statutory interpretation is that exceptions to a statute should be read narrowly.⁷⁶ Thus, the ADA exclusion of gender identity disorder should be read in a way that excludes the least amount of possible claimants.⁷⁷ Furthermore, the Court focused on the clinical distinction between gender identity disorder and gender dysphoria,⁷⁸ the latter of which could be the source of disabling distress.⁷⁹ The court, therefore, held that the exclusion of gender identity disorder from the ADA did not also automatically preclude gender dysphoria.⁸⁰

Yet the *Blatt* ruling is not universal. In *Michaels v. Akal Security, Inc.*, the U.S. District Court for the District of Colorado reviewed a plaintiff’s claim under the Rehabilitation Act, which also excludes those suffering from gender identity disorder from receiving the Act’s protection.⁸¹ There, the plaintiff was diagnosed with gender dysphoria.⁸² The Court held that the statutory exclusion of gender identity disorder also excluded gender dysphoria.⁸³

71. *Id.*

72. 337 F. Supp. 2d 996, 1001–02 (N.D. Ohio 2003).

73. No. 1:01 CV 1112, 2001 WL 34350174, at *5–6 (N.D. Ohio Nov. 9, 2001).

74. Russo, *supra* note 38.

75. No. 5:14-cv-04822, 2017 U.S. Dist. LEXIS 75665, at *6–9 (E.D. Pa. May 18, 2017).

76. *Id.* at *8.

77. *See id.*

78. *Id.* at *6–7.

79. *Id.*

80. *Id.* at *9.

81. No. 09-cv-01300-ZLW-CBS, 2010 U.S. Dist. LEXIS 62954, at *17 (D. Colo. June 24, 2010).

82. *Id.* at *4

83. *Id.* at *17

D. Transgender Employees May Seek Protection Through the Fourteenth Amendment and State Laws

As an alternative to Title VII and the ADA, transgender employees may find protection from employment discrimination under the U.S. Constitution. Some courts have found that transgender individuals are protected from discriminatory practices under the Equal Protection Clause of the Fourteenth Amendment.⁸⁴ The application of the Equal Protection Clause in a transgender discrimination case was discussed by the U.S. Court of Appeals for the Eleventh Circuit in *Glenn v. Brumby*.⁸⁵ In *Glenn*, a transitioning employee was fired from a state agency.⁸⁶ The employee claimed that her termination violated the Equal Protection Clause because it was based on sex and her medical condition of gender identity disorder.⁸⁷ A state agency representative testified that plaintiff was terminated because she dressed in female attire at work.⁸⁸ The state agency did not offer any sex neutral explanation.⁸⁹

The Court explained that the government or an agency operating under color of law is required to treat similarly situated persons alike and to avoid classifications that reflect “a bare . . . desire to harm a politically unpopular group.”⁹⁰ The Court added that different treatment based on suspect classification, such as gender, must be substantially related to a sufficiently important government interest.⁹¹ Relying partly on *Price Waterhouse*, the Court found that discrimination based on gender nonconformity was a form of sex discrimination.⁹² The agency representative’s testimony confirmed that the employee was terminated because of her nonconformity.⁹³ Therefore, the Court

84. See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 578 (6th Cir. 2004); see *Rush v. Parham*, 625 F.2d 1150, 1156–57 (5th Cir. 1980) (interpreting the Social Security Act and remanding an equal protection challenge to the district court to determine whether in state agency’s decision to deny gender affirming surgery the state had a policy prohibiting experimental services and if so whether its determination that the surgery was experimental was reasonable); *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980) (holding, in an equal protection and due process challenge, that denial of surgery as treatment for “transsexual” plaintiff was arbitrary under applicable Medicaid regulations).

85. 663 F.3d 1312 (11th Cir. 2011).

86. *Id.* at 1313–14.

87. *Id.*

88. *Id.* at 1314.

89. See *id.*

90. *Id.* at 1315 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985)) (internal quotation marks omitted).

91. *Id.* at 1316.

92. *Id.*

93. *Id.*

upheld summary judgment in favor of the employee.⁹⁴ But, this is a minority position among federal courts.

Most federal courts, including the U.S. Court of Appeals for the Ninth Circuit, have held transgender individuals are not members of a suspect class under the Equal Protection Clause.⁹⁵ Therefore, only the rational basis standard applies.⁹⁶ Additional discussion on the application of the Equal Protection Clause to transgender discrimination cases is provided in *Smith v. City of Salem*⁹⁷ and *Kaeo-Tomaselli v. Butts*.⁹⁸

Further, state law and state courts may expand the possible causes of action available to a particular group of workers. Specifically, various state laws may provide employment discrimination protection for transgender individuals. Starting as early as the 1980s, several states expanded their employment discrimination laws by adding a prohibition against discrimination on the basis of sexual orientation.⁹⁹ In 1993, Minnesota became the first to prohibit discrimination based on gender identity.¹⁰⁰ As of 2018, nearly half of the states and Washington, D.C. now prohibit discrimination based on both sexual orientation and gender identity by public and private employers.¹⁰¹ Additional other states provide protect for some LGBTQ employees in the public sector.¹⁰²

94. *Id.* at 1321.

95. See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

96. *Casillas v. Daines*, 580 F. Supp. 2d 235, 246 (S.D.N.Y. 2008).

97. 378 F.3d 566 (6th Cir. 2004).

98. No. 11-00670 LEK/BMK, 2013 U.S. Dist. LEXIS 13280 (D. Haw. Jan. 31, 2013).

99. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 356–61 (1999).

100. 1993 Minn. Laws ch. 22-H.F. No. 585 (codified at MINN. STAT. § 363A.08 (2018)).

101. See CAL. GOV'T CODE § 12940 (2018); COLO. REV. STAT. § 24-34-402 (2018); CONN. GEN. STAT. § 46a-60 (2018); 19 DEL. CODE ANN. § 711 (2018); D.C. CODE § 2-1402.11 (2018); HAW. REV. STAT. § 378-2 (2018); 775 ILL. COMP. STAT. 5/2-102 (2018); IOWA CODE § 216.86 (2018); IOWA CODE § 216.6A (2018); MD. CODE ANN., STATE GOV'T §20-606 (LexisNexis 2018); MASS. GEN. LAWS, ch. 151B, § 4 (2018); MINN. STAT. § 363A.08 (2018); NEV. REV. STAT. § 613.330 (2018); N.H. REV. STAT. ANN. § 354-A:6; N.J. STAT. ANN. § 10:5-12 (West 2018); N.M. STAT. ANN. §28-1-7 (2018); N.Y. EXEC. LAW § 296 (McKinney 2018); OR. REV. STAT. § 659A.030 (2018); 28 R.I. GEN. LAWS § 28-5-7 (2018); UTAH CODE ANN. 34A-5-106 (LexisNexis 2018); VT. STAT. ANN. tit. 21, § 495 (2018); WASH. REV. CODE § 49-60-180 (2018); WIS. STAT. §§ 111.321, 111.322, 111.36 (2018); Pa. Human Relations Comm'n, Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act (2018), <https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf>.

102. 2015 Bill Text NC H.B. 2B (2016); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017); NBC4 Staff, *Gov. Kasich Issues Executive Order Barring 'Gender Identity' Discrimination*, NBC4 (Dec 19, 2018, 11:39 PM EST), <https://www.nbc4i.com/news/local-news/gov-kasich-issues-executive-order-barring-gender-identity-discrimination>; Ianthe Metzger, *Michigan Governor Gretchen Whitmer Signs Executive Directive Protecting LGBTQ State Employees*, HUMAN RIGHTS CAMPAIGN.

A. *Post-Price Waterhouse Era*

Prior to *Price Waterhouse*, the EEOC applied the narrow interpretation of the term sex.¹⁰³ The EEOC consistently denied discrimination claims that were based on gender identity or transgender status.¹⁰⁴ Although it did not happen immediately, post-*Price Waterhouse*, the EEOC reversed its position with the groundbreaking decision in *Macy v. Holder*.¹⁰⁵ In *Macy*, the complainant, who was an experienced detective, applied for a position with a contractor for the Bureau of Alcohol, Tobacco, Firearms and Explosives.¹⁰⁶ The complainant was duly qualified for the position.¹⁰⁷ She was promised the position pending a successful background check.¹⁰⁸ During the background process, the complainant notified the contractor of her plan to transition from male to female.¹⁰⁹ Within five days of notifying the contractor of her transgender status, the complainant was told by the contractor that the position was no longer available.¹¹⁰ The complainant alleged that the loss of the position was the result of discrimination based on gender identity, sex, or transgender status.¹¹¹

The EEOC ruled that discrimination based on gender identity or transgender status was actionable as a form of sex discrimination (similar to the EEOC’s position regarding discrimination based on sex stereotypes).¹¹² The EEOC took the position that the term “sex” encompassed both the traditional biological meaning and the more expansive meaning of gender.¹¹³ As explained by the EEOC, the term *gender* incorporates cultural and social characteristics associated with masculinity and femininity.¹¹⁴ Therefore, the EEOC determined that a transgender complainant who has been discriminated against based on his or her gender identity or transgender status may establish a prima facie case for sex discrimination under Title VII.¹¹⁵

Following the lead of the EEOC, then-U.S. Attorney General Eric Holder released a memorandum concerning the treatment of

103. See, e.g., *Casoni v. U.S. Postal Service*, EEOC Decision No. 01840104 (Sept. 28, 1984).

104. See *id.*

105. EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012). The EEOC had issued two decisions after *Price Waterhouse* denying discrimination claims based on gender identity. *Kowalczyk v. Dep’t of Veterans Affairs*, EEOC Appeal No. 01942053 (Mar. 14, 1996); *Campbell v. Dep’t of Agric.*, EEOC Appeal No. 01931703 (July 21, 1994).

106. EEOC Decision No. 0120120821, 2012 WL 1435995 at *1.

107. *Id.*

108. *Id.*

109. *Id.* at *2.

110. *Id.*

111. *Id.*

112. *Id.* at *4.

113. *Id.* at *6–7.

114. *Id.* at *9.

115. *Id.* at *13–14.

transgender discrimination under Title VII.¹¹⁶ Attorney General Holder stated:

After considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, I have determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. The most straightforward reading of Title VII is that discrimination "because of . . . sex" [encompasses both] discrimination [based on] an employee's gender identification . . . as a member of a particular sex [and discrimination based on the employee's choice to transition] to another sex. As the Court explained in *Price Waterhouse*, by using "the simple words 'because of,' . . . Congress meant to obligate" a Title VII plaintiff to prove only "that the employer relied upon sex-based considerations in coming to its decision." It follows that, as a matter of plain meaning, Title VII's prohibition against discrimination "because of . . . sex" encompasses discrimination founded on sex-based considerations, including discrimination based on an employee's transitioning to, or identifying as, a different sex altogether. Although Congress may not have had such claims in mind when it enacted Title VII, the Supreme Court has made clear that Title VII must be interpreted according to its plain text, noting that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."¹¹⁷

Thus, the Attorney General declared that the Department of Justice (DOJ) would no longer assert that claimants who experience discrimination on the basis of gender identity or transgender status were automatically excluded from bringing Title VII sex discrimination claims.¹¹⁸ This declaration by the DOJ, along with the EEOC's decision in *Macy*, marked a significant development in the government's position concerning transgender rights. With this change, transgender employees could better hold employers accountable for discriminatory practices.

B. *Trump Era*

However, after the election of President Donald Trump, the government's position dramatically changed on transgender discrimination issues. In 2017, then-Attorney General Jeff Sessions issued a memorandum, which in part stated, "Title VII does not prohibit discrimination based on gender identity per se."¹¹⁹ Attorney General Ses-

116. Memorandum from the Office of the Attorney Gen. to U.S. Attorneys Heads of Department Components, Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014), <https://www.justice.gov/file/188671/download>.

117. *Id.* at 2 (citations omitted).

118. *Id.*

119. Memorandum from the Office of the Attorney Gen. to United States Attorneys Heads of Department Components, Revised Treatment of Transgender Employment

sions concluded that “sex” commonly means the biological differences between male and female.¹²⁰ He noted that Congress did not explicitly list gender identity in Title VII.¹²¹ He pointed out that Congress has explicitly listed sex and gender in the text of other statutes, such as the Public Health and Welfare statute.¹²² Therefore, the fact that Congress did not include gender identity in Title VII means that Congress only meant to prohibit discrimination based on the ordinary meaning of sex.¹²³ In other words, the Attorney General reinstated the pre *Price Waterhouse* narrow interpretation of Title VII, which excluded claims for discrimination on the basis of gender identity and sex orientation.

Attorney General Sessions’ guidance is consistent with a series of acts taken under the Trump administration to roll back federal protections for transgender people. For example, on August 25, 2017, President Trump issued a directive reinstating a ban prohibiting transgender individuals from military service.¹²⁴ On September 7, 2017, the Department of Justice filed an amicus brief in the case of *Masterpiece Cake Shop v. Colorado Civil Rights Commission*.¹²⁵ In the brief, the Department of Justice argued that some businesses have a constitutional right to discriminate against members of the LGBTQ community.¹²⁶

In a recently leaked memorandum, the U.S. Department of Health and Human Services proposed establishing a uniform definition of gender based “on a biological basis that is clear, grounded in science, objective and administrable.”¹²⁷ If established, this definition would be applied by every agency and department including the EEOC and

Discrimination Claims Under Title VII of the Civil Rights Act of 1964, at 1 (Oct. 4, 2017), <https://www.justice.gov/ag/page/file/1006981/download> [hereinafter Sessions Memorandum].

120. *Id.*

121. *Id.*

122. *Id.* at 1–2; *see also* 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925 (b)(13)(A) (2018).

123. Sessions Memorandum, *supra* note 119, at 2.

124. Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security, Military Service by Transgender Individuals (Aug. 25, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security>.

125. ACLU Comment on Justice Department Position in *Masterpiece Cake Shop* SCOTUS Case (Sept. 7, 2017), <https://www.aclu.org/news/aclu-comment-justice-department-position-masterpiece-cakeshop-scotus-case>; *see* *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

126. Brief for the United States as Amicus Curiae Supporting Petitioners at 23–33, *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719 (No. 16-111), 2017 U.S. S. Ct. Briefs LEXIS 3525.

127. Kalhan Rosenblatt, *Trump Administration Considering Narrowing Definition of Gender*, NBC NEWS (Oct. 21, 2018, 3:38 PM CDT), <https://www.nbcnews.com/feature/nbc-out/trump-administration-considering-narrowing-definition-gender-n922591> (citing Erica L. Green, Katie Benner & Robert Pear, “*Transgender*” Could Be Defined out of Existence Under Trump Administration, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>).

DOJ (even after Jeff Sessions' recent departure from the Department of Justice).¹²⁸

Notwithstanding Sessions' memo and other actions taken under this administration, the EEOC has not yet abandoned its decision in *Macy*. The EEOC's official position is still that Title VII forbids any employment discrimination based on gender identity or sexual orientation.¹²⁹ The EEOC has continued to intervene on the behalf of LGBTQ claimants.¹³⁰ In fact, the EEOC has increased the number of successful settlements and resolutions for LGBTQ-related discrimination claims.¹³¹

In conclusion, the Trump administration has not developed a uniform position on discrimination issues facing members of the transgender community. On one hand, the DOJ has expressed that transgender employees are not protected from discrimination based on gender identity or sexual orientation under Title VII. The DOJ's opinion is consistent with other actions taken by the current administration that have decreased federal protection for transgender people. On the other hand, the EEOC continues to assist transgender employees in pursuing discrimination claims based on gender identity and/or sexual orientation. This contrast indicates that the debate over whether Title VII prohibits discrimination against transgender employees is still unsettled.

V. Recommendations to Employers for Risk Mitigation

Simply put, whether transgender employees are protected from discrimination on the basis of sexual orientation or gender identity is uncertain. The case law is riddled with contradicting opinions. The government guidance is also inconsistent. Nevertheless, a prudent employer should seek to minimize unnecessary risk.

Companies that do not proactively discourage discrimination against transgender employees face great risk. Since 2013, the EEOC has obtained approximately \$22.2 million in monetary relief for individuals in voluntary resolutions of LGBTQ-related discrimination matters.¹³² Employers may also face liability for discrimination under state law and, in the public sector, the U.S. Constitution. Furthermore, failure to establish adequate anti-discrimination practices can make a company less attractive to new recruits. Thus, companies should follow

128. *See id.*

129. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited June 8, 2019).

130. *LGBT-Based Sex Discrimination Charges*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt_sex_based.cfm (last visited June 8, 2019).

131. *Id.*

132. *Id.*

best practices when building inclusive anti-discrimination policies, transition guidelines, and training programs.

A. *Building an Inclusive Anti-Discrimination Policy*

As stated earlier, the vast majority of Fortune 500 companies have built inclusive anti-discrimination policies.¹³³ This trend suggests that having inclusive policies offers a benefit in the workplace.¹³⁴ Not only would such a policy mitigate legal risk, it could increase worker morale and productivity.

Companies that have not established an inclusive anti-discrimination policy can do so quite easily. First, employers should add the terms “sexual orientation” and “gender identity or expression” to the company’s existing anti-discrimination policy.¹³⁵ Second, companies should update their websites with the new policy.¹³⁶ Third, this policy should be clearly communicated to employees, contractors, vendors, clients, and customers.¹³⁷

A written policy alone is not enough. The updated policy must be accompanied by consistent enforcement. The company should have repercussions for violations.¹³⁸ The policy should clearly reflect that harassment will not be tolerated from any party, including customers.¹³⁹ Failure to enforce the anti-discrimination policy could result in liability.

B. *Creating Transition Guidelines*

Over two million transgender employees are a part of the U.S. workforce.¹⁴⁰ With the increasing prevalence of transgender workers, on-the-job transitions will become more common. Such transitions will affect not only the transitioning employee, but also the workplace as a whole. Therefore, establishing written guidelines addressing on the job transitions are a necessity.

Most importantly, written guidelines are an opportunity for management to set the tone for the company.¹⁴¹ Management should

133. *LGBTQ Equality at the Fortune 500*, *supra* note 41.

134. *Employment Policies: Adding Gender Identity as a Protected Category*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/employment-policies-adding-gender-identity-as-a-protected-category> (last visited June 8, 2019).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. CROSBY BURNS, KIMBERLY BARTON & SOPHIA KERBY, CTR. FOR AM. PROGRESS, *THE STATE OF DIVERSITY IN TODAY’S WORKFORCE* (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/07/pdf/diversity_brief.pdf.

141. HUMAN RIGHTS CAMPAIGN, *TRANSGENER INCLUSION IN THE WORKPLACE: A TOOLKIT FOR EMPLOYERS* 38 (2016), https://assets2.hrc.org/files/assets/resources/Transgender_Inclusion_in_the_Workplace_A_Toolkit_for_Employers_Version_10_14_2016.pdf?_ga=2.93374301.11072410.1541384482-296635112.1541384482.

consider setting a tone of inclusion, open-mindedness, and sensitivity.¹⁴² Likewise, management should use written guidelines to establish clear expectations for transitioning employees, co-workers, and supervisors.¹⁴³ To encourage a smooth transition for all involved, some advocacy groups suggest a member of senior management should be assigned as a sponsor for the transitioning employee.¹⁴⁴ Co-workers should see that management is taking an active and supportive role in the transition process.¹⁴⁵

According to the Human Rights Campaign (HRC), the personnel or the “who” directing, assisting with, and/or impacted by the transitioning of an employee is very important. Employers should determine who is charged with helping a transitioning employee manage his or her workplace transition;¹⁴⁶ who the point of contact for education and resources will be;¹⁴⁷ and, finally, who should be informed of the transition. If the employee has a manager who has not been informed, but will be impacted, the manager should be notified shortly before other co-workers.¹⁴⁸ Also, the transitioning employee should have a voice in whether his or her transition is discussed publicly or handled discreetly.¹⁴⁹

The HRC also suggests that the protocols or steps needed to assist employees with the changing of everyday words and items used in the workplace should be clear. For example, legal name and gender changes may be time-consuming. Even before the legal process is completed, employers should consider making an effort to respect the transitioning employee’s choice of name, gender marker, and pronoun.¹⁵⁰ Badges, email, directories and name plates should be updated as soon as possible.¹⁵¹ Previous EEOC guidance suggests that employers not require employees to provide medical records verifying their transgender status.¹⁵² The only exception should be when the law requires the employee’s legal name to be used on documents such as insurance and payroll forms.¹⁵³ According to the EEOC, continual and intentional

142. *Id.* at 41.

143. *Id.* at 37; *see also id.* at 28.

144. *See id.* at 38.

145. *Id.*

146. *Id.* at 28.

147. *Id.* at 41.

148. *Id.* at 43.

149. *Id.* at 41.

150. *Id.* at 45.

151. *Id.*

152. Robin Shea, *Transgender Roadmap: 10 Steps the EEOC Thinks Employers Should Take*, COSTANGY, BROOKS, SMITH & PROPHETE LLP: EMPLOYMENT & LABOR INSIDER (Jan. 22, 2016), <https://www.constangy.com/employment-labor-insider/transgender-roadmap-10-steps-the-eec-thinks-employers-should-take>.

153. *Id.*

use of the employee’s former name and/or pronoun could be considered harassment.¹⁵⁴

Third, the HRC recommends clear guidance on “how” transitioning employees utilize benefits to which they are entitled and interface with the public while working. Transitioning employees face unique medical challenges. Employees may need medical care to support their transition including hormone therapy and reassignment surgery.¹⁵⁵ The transition guidelines should direct employees to the appropriate medical plan to meet their needs.¹⁵⁶ Additionally, and especially in customer-facing work environments, transition guidelines should address how to prepare for the transition of an employee who works directly with customers.¹⁵⁷ A meeting should be held with transitioning employees at least one to two weeks before they begin presenting their new gender to customers.¹⁵⁸ This meeting should be used to discuss different situations that may occur and how to handle them.¹⁵⁹ Regardless of customer response, employees should be held to the same appearance and behavior standards as all other employees.¹⁶⁰

Fourth, the HRC recognizes that a transition is normally handled in stages and may take several years. Therefore, it recommends that employers create a tentative transition schedule. The schedule should include the timeframe for certain milestones such as name changes, reassignment and medical leave, assigning stakeholders, and developing a program for educating the workforce.¹⁶¹

Finally, the HRC recommends that employers clearly define a safe place and person where all employees can reach out for education and support.¹⁶² Some employers have established Employee Assistance Programs or Employee Resource Groups to aid in the transition process.¹⁶³ Additionally, and perhaps most interestingly, employers are strongly encouraged to determine “where” employees may use restroom facilities.

In 2016, the nation witnessed a heated debate over North Carolina’s “bathroom bill” (also known as House Bill 2).¹⁶⁴ The bathroom bill debate demonstrated how facility issues can become contentious. Thus,

154. *Id.*; see also HUMAN RIGHTS CAMPAIGN, *supra* note 141, at 45.

155. HUMAN RIGHTS CAMPAIGN *supra* note 141, at 21–24.

156. *Id.* at 22.

157. *Id.* at 43.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 52.

162. *Id.* at 41.

163. *Id.* at 40.

164. Amber Phillips, *How North Carolina’s Controversial “Bathroom Bill” Could Backfire on Republicans*, WASH. POST (Mar. 24, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/03/24/like-indiana-north-carolinas-controversial-lgbt-law-could-be-a-blessing-in-disguise-for-democrats/?utm_term=.f8921c49c826.

employers must set forth clear guidelines that provide all employees with adequate facility access.¹⁶⁵ The HRC suggests that employers allow employees to use the bathroom that matches their gender identity.¹⁶⁶

C. *Implementing Anti-discrimination Training Programs*

Adequate training is necessary to the success of a company's anti-discrimination. Comprehensive training across the enterprise should be given when introducing the company's new anti-discrimination policies and transition guidelines.¹⁶⁷ Training should be given periodically following policy introduction.¹⁶⁸ Individual or small group training should be given for new hires and divisions that are directly affected by a co-worker's transition.¹⁶⁹

When designing and scheduling training, a company must consider state law requirements. For example, California requires that trainings be at least two hours and must be given at least every two years.¹⁷⁰ A good training program should be interactive and include clear examples of what would be considered discrimination on the basis of sexual orientation and gender identity or expression.¹⁷¹

There are also things companies should avoid when planning training. Some suggest that companies not have mental health professionals conduct the training.¹⁷² By having a mental health professional conduct the training, the training could inadvertently stigmatize the transition process.¹⁷³

In conclusion, employment law concerning transgender discrimination is still developing. In spite of actions under the current presidential administration, the social and legal trends indicate that companies likely have a responsibility to protect transgender employees from workplace discrimination. Companies should put forth their best efforts to update their anti-discrimination policies, guidelines, and trainings. For more guidance on updating a company's anti-discrimination program, companies can review *Transgender Inclusion in the Workplace: A Toolkit for Employers* by the Human Rights Campaign¹⁷⁴

165. HUMAN RIGHTS CAMPAIGN, *supra* note 141, at 36.

166. *Id.* at 31–33; see *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015).

167. HUMAN RIGHTS CAMPAIGN, *supra* note 141, at 47, 62.

168. *Id.* at 60–62.

169. *See id.* at 62.

170. Dana Rosen, *Sexual Harassment Training Requirements by State*, OPEN SESAME (June 24, 2015), <https://www.opensesame.com/blog/sexual-harassment-training-by-state>.

171. *Diversity Training on Gender Identity and Gender Expression*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/diversity-training-on-gender-identity-and-gender-expression> (last visited June 8, 2019).

172. *Id.*

173. *Id.*

174. HUMAN RIGHTS CAMPAIGN, *supra* note 141.

or other similar resources.¹⁷⁵ Also, regardless of personal thoughts, if a company has a core value of “respect” for all employees, corporate leaders and their counsel could also glean guidance from transgender advocate Sarah McBride when she says, “I want to make sure that people understand that, behind this national conversation around transgender rights, there are real people who hurt when they’re mocked, who hurt when they’re discriminated against, and who just want to be treated with dignity and respect.”¹⁷⁶

175. See *SEXUAL ORIENTATION AND TRANSGENDER ISSUES IN ORGANIZATIONS: GLOBAL PERSPECTIVES ON LGBT WORKFORCE DIVERSITY* (Thomas Köller ed., 2016); Olivia Folick, *Diversity and Inclusion: A Beginner’s Guide for HR Professionals*, IDEAL (May 7, 2019), <https://ideal.com/diversity-and-inclusion>.

176. *Transgender Advocate Sarah McBride Joins Yahoo News at the DNC*, YAHOO NEWS (July 27, 2016), <https://www.yahoo.com/news/meet-sarah-mcbride-transgender-woman-000000464.html>.

