



DELAWARE

EMPLOYMENT LAW LETTER

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DISCRIMINATION

Revisiting gender identity discrimination

by Lauren Moak Russell

We have addressed the issue of gender identity discrimination several times. As transgender individuals enter the mainstream of popular culture and employees become more comfortable disclosing their gender identity, employers can expect to see this issue arise with increasing frequency. The following is some guidance on how to stay out of trouble.

General employment advice

In 2013, the Delaware General Assembly amended the Delaware Discrimination in Employment Act (DDEA) to prohibit discrimination on the basis of gender identity. The provisions of the DDEA apply to any Delaware employer with four or more employees. In other words, unless your workforce is extremely small, this is an issue that should concern you.

The best place to start when considering a new class of protected employees is training. All employers should provide antiharassment training to employees, and it should be refreshed on a regular basis. So if your employees haven't had antiharassment training in the last one to two years, consider providing the training in-house or contracting with a third party.

Among the issues to address is "joking." Inappropriate jokes are one of the most common sources of harassment claims. Employees, feeling they're among friends, crack a joke that is hurtful to one of their peers. The peer laughs along — sometimes for months — until the joking becomes too much and he or she makes a complaint. Employees should be reminded in no uncertain terms that jokes related to *any* protected characteristic aren't appropriate workplace banter. They should also be reminded of the

company's reporting policy and the requirement that they report any conduct they believe is harassing.

Bathrooms are another issue that frequently creates conflict with transgender employees. In the absence of legislation, many employers elect to permit transgender employees to use handicapped bathrooms, where they're afforded more privacy. This practice is likely unlawful in Delaware. Transgender employees are to be treated equally, and there is no exception for bathroom use. If nontransgender employees complain about transgender employees being permitted to use communal bathrooms, it is the complaining employee who should be directed to the handicapped restroom.

Although harassment and bathroom access are frequent issues, each business will experience its own unique problems as employees publicly identify as transgendered. When navigating unexpected issues, you should establish open lines of communication and ask the employee at issue how she or he wishes to be treated. Although transgender employees aren't entitled to dictate workplace policies, their experiences should be considered in resolving conflicts.

Employers operating public facilities

Employers that operate public accommodations — spaces open to public use — have additional obligations under Delaware's Equal Accommodations Law. Not only are employees entitled to be treated fairly, but members of the public are also protected from discrimination or harassment on the basis of gender identity. Examples of public accommodations include restaurants, hotels, stores, and gyms.

The rules of thumb for dealing with the public are similar to those for dealing with your employees. All employees who interact with the public should be trained on their obligations under the Equal Accommodations Law and reminded to be respectful when dealing with the public and when they may be within earshot of customers.

A frequent pitfall for business is a "joke" shared between two employees that is overheard by a customer. Often, the joke is at the customer's expense. After the customer overhears the joke, a perceived problem with the service provided may be attributed to discrimination. From there, it's a short trip to filing a complaint with the Delaware Human Relations Commission.

Issues related to bathrooms are also similar for *most* businesses operating public accommodations: Customers should be permitted to use the bathroom of their professed gender. There is an exception for facilities operating locker rooms (or similar spaces) where patrons may be expected to undress. In such cases, the business may offer a reasonable accommodation, including "a separate or private place for the use of persons whose gender-related identity, appearance or expression is different from their assigned sex at birth, provided that such reasonable accommodations are not inconsistent with the gender-related identity of such persons." In other words, a separate changing area may be offered to

transgender patrons.

As part of their training, employees may also be provided a script to address public inquiries about gender identity. The script should be simple and reaffirm the business's commitment to equal accommodations. For example:

Our company provides equal accommodations on the basis of an individual's professed gender identity. If you have specific concerns regarding access to our services, please contact [name] at [telephone number and e-mail address].

Such a script permits the company to direct inquiries to a designated manager, who should be well versed in the company's legal obligations under the Equal Accommodations Law.

Bottom line

The law related to gender identity nondiscrimination remains largely undeveloped. As the concept of gender identity becomes more acceptable in our society, employment lawyers expect to see an increase in the number of claims filed by transgender employees. You should be aware of the risk and take proactive steps to prevent discrimination, harassment, and the resulting litigation.

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