

Gender Identity In the Workplace: Continuing Legal Education

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1

Presenter



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2

Presentation Overview

- Glossary of Terms
- Federal Laws Impacting Gender Identity
- State Laws Impacting Gender Identity
- Pronouns and Restrooms
- Religious and Medical Considerations
- Helpful Tips and Case Studies



3

Thoughts to Guide Our Discussion

- It is our intention to have an open, honest and respectful conversation about how gender identity and expression impact the workplace
- Remember: All people have unique life experiences that guide their perceptions and beliefs
- Questions are encouraged!



4

Sobering Statistics

- 2017 NPR Survey
 - 1.4% of Americans identify as transgender, gender queer or gender non-conforming
 - 57% of LGTBQ Americans have experienced slurs about their sexual orientation or gender identity
 - Discrimination/harassment/assault against LGTBQ people of color occurs at the highest rates
- 2015 National Center for Transgender Equality Survey
 - 47% sexually assaulted during their lifetimes
 - 46% verbally harassed for being transgender
- Transgender and non-binary individuals experience physical and sexual assault at higher rates than cisgender people



5

Sobering Statistics

- September 2021 Survey by UCLA School of Law
 - 1 in 10 LGBTQ workers experienced discrimination at work in the last year
 - LGBTQ employees of color were more likely to report being denied jobs and verbal harassment
 - 50% of LGBTQ employees are not out to their current supervisor; 26% are not out to any coworkers
 - 34% of LGBTQ employees have left a job due to treatment by their employer



6

Glossary of Terms

HELLO
MY NAME IS

*What's in a
Name?*

7

Glossary of Terms: LTGBQ+

- **Lesbian**: A woman who is sexually and/or romantically attracted to other women
- **Gay**: Most often associated with men, but broadly means a person who is sexually and/or romantically attracted to people of the same gender
- **Bisexual**: A person who is sexually and/or romantically attracted to men and women
- **Transgender**: A person whose gender identity does not correspond to the gender they were assigned at birth
- **Questioning**: A person who is unsure about their orientation and/or gender identity
- **Plus (+)**: The inclusion of all gender identities and expressions

8

LGBTQQIAA2SPP

- **Queer**: Term used to define any orientation that is not straight, or gender that is not cisgender
- **Intersex**: When chromosomes or biological sex are not typical
- **Asexual**: Low or absent sexual attraction
- **Ally**: A person not part of the LGBTQ+ community, but who advocates for the rights of people in that group
- **Two-Spirit**: Indigenous North American term meaning people who have the spirit of both man and woman/third gender
- **Pansexual**: Sexually attracted to people regardless of their gender
- **Polyamorous**: Engaging in more than one sexual/romantic relationship simultaneously

Glossary of Terms

- **Sexual Orientation**: The part of a person's identity related to whom they are sexually attracted
- **Cisgender**: A person whose gender identity matches the sex they were assigned at birth
- **Straight**: A man attracted to a woman and vice versa
- **Non-Binary**: A person who does not identify as a male or female. They might identify as both, neither, or non-gendered
- **Gender-fluid**: A person whose gender identity fluctuates

Are there more terms? You bet!

- | | |
|-------------------|------------------|
| -Aromantic | -Gender identity |
| -Agender | -Transman |
| -Bioromantic | -Transwoman |
| -Drag Queen/King | -Panromantic |
| -MSM | -Androgynous |
| -Demisexual | -Homoflexible |
| -Gender expansive | -Intergender |
| -Genderqueer | -Gender Variant |

Why so many terms? Because inclusivity in identity and discussion matters



11

Glossary of Terms: Disfavored Terms

- Transvestite/Transsexual
- Sex Reassignment Surgery
- Lifestyle Choice or Alternative Lifestyle
- Sexual Preference
- Preferred pronouns
- Hermaphrodite
- Gender Non-Conforming?

In general, use the terms that people use for themselves or that they ask you to use



12

What If I Make A Mistake?

- Even well-meaning people can make mistakes
- When that happens:
 - Don't avoid the mistake
 - Apologize quickly and politely – “excuse me example”
 - Don't over-apologize
- When starting a conversation: “I mean to be respectful, please forgive me if I mess up at first, and please feel free to correct me.”

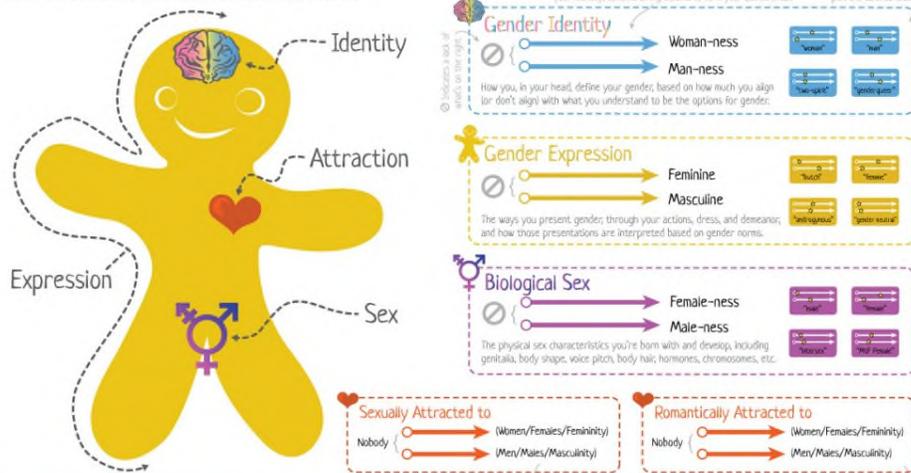


13

The Genderbread Person v3.3

by its pronounced METROsexual.com

Gender is one of those things everyone thinks they understand, but most people don't. Like inception. Gender isn't binary. It's not either/or. In many cases it's both/and. A bit of this, a dash of that. This tasty little guide is meant to be an appetizer for gender understanding. It's okay if you're hungry for more. In fact, that's the idea.



For a bigger bite, read more at <http://bit.ly/genderbread>



14

Federal Laws and Gender Identity



Bostock v. Clayton County

- Gerald Bostock worked for Clayton County, GA, as a child welfare coordinator
- In 2013, he began playing in a recreational softball league for gay men
- County officials criticized his participation in the league
- One month later, he was terminated for “conduct unbecoming of a County employee”

Zarda v. Altitude Express, Inc.

- Donald Zarda was a skydiving instructor working for Altitude Express in Long Island, New York
- He disclosed his sexual orientation to women who were concerned about being strapped closely to him while he was skydiving with them
- The Company found out that he was disclosing this information
- In June 2010, Mr. Zarda was terminated for “sharing inappropriate information about his personal life” with a client of the business



17

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.

- Aimee Stephens worked as a funeral director and embalmer at Harris Funeral Homes in Livonia, Michigan
- Ms. Stephens was assigned the male gender at birth
- In 2014, after working for Harris as a male for several years, told her employer in a letter that she would be coming to work as her authentic self, wearing women’s clothing
- Two weeks later, Ms. Stephens was terminated because the funeral homes felt her gender identity would be upsetting to customers, and that her gender identity was a violation of the owner’s religious beliefs



18

Supreme Court Decision(s)

- The Court held that Title VII protects gender identity and sexual orientation, as connected to “sex,” which Title VII has long protected
- The Court wrote:
“An employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”



19

Impact of the Decision

- Employees who believe they have been discriminated against, retaliated against, or harassed based on their sexual orientation or gender identity can now bring claims in federal court
- Claims under Title VII, if successful, can involve:
 - Back pay to the individual
 - Compensatory damages for emotional distress (up to \$300,000, based on the size of the employer)
 - Punitive damages (capped)
- Employees have 180/300 calendar days after last act of discrimination to file a charge with the EEOC



20

Supreme Court Declines to Hear *Grimm* Case

- On June 29, 2021, the Supreme Court announced that it would not hear the case of *Gloucester County School Board v. Gavin Grimm*
 - This refusal leaves in place the Fourth Circuit decision that mandated that Grimm be allowed to use the restrooms that corresponded with his gender identity
 - This signals that the Supreme Court will not hear similar cases in the future, *i.e.*, that other courts can rule the same way the as Fourth Circuit

New York Laws on Gender Identity



Gender Expression Non-Discrimination Act (GENDA)

- GENDA amended the Human Rights Law in 2019 by adding “gender identity or expression” as a protected category, defined as:

“A person’s actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender”
- Protects the way a person expresses gender through speech, dress, and behavior



23

NYS Human Rights Law

- Makes it illegal for an employer to discriminate on the basis of age, creed, race, color, sex, sexual orientation, gender identity or expression, national origin, marital status, disability, military status, domestic violence victim status, criminal or arrest record, predisposing genetic characteristics or a known association with any of these
- Retaliation against an individual for filing a complaint, opposing an unlawful practice, or testifying or assisting in an investigation or proceeding is also illegal



24

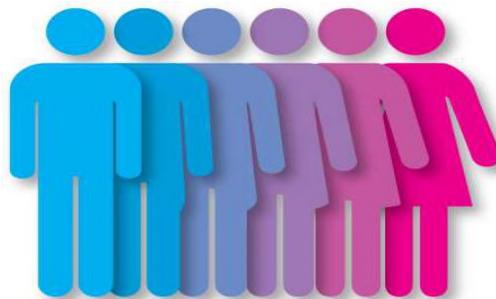
Gender Recognition Act (GRA)

- GRA allows individuals to change their names and gender markers on NYS identification documents in a streamlined process.
 - No publication requirement
 - Attestation forms
-
- Effective December 21, 2021.
- Failure to honor the name/gender marker on an ID is a violation of the NY Human Rights law.



25

Pronouns and Restrooms



26

Gender Pronouns

HE/SHE	HIM/HER	HIS/HER	HIS/HERS	HIMSELF/HERSELF
zie	zim	zir	zis	zieself
sie	sie	hir	hirs	hirsself
ey	em	eir	eirs	eirself
ve	ver	vis	vers	verself
tey	ter	tem	ters	terself
e	em	eir	eirs	emself

Fun Fact: One of the oldest known uses of a gender-neutral pronoun in the English language is from 1789, and the pronoun is “ou”



27

Pronoun Use

- Failure to use correct pronouns for individuals in the workplace is discrimination
- Correct pronouns may include: they/them, he/him, she/her or ze/zem
- Illegal under NYC and NYS law; if use of incorrect pronouns is “severe and pervasive” harassment, illegal under Title VII as well
 - In NYC, violators are subject to civil penalties of \$125,000, and up to \$250,000 for “willful” violations



28

Restrooms and Gender Identity

- There is no evidence that gender-segregated restrooms are safer for cisgender women than unisex restrooms
 - In the 18 states that have policies allowing people to use the restrooms that align with their gender identity, there has not been a single report of a trans person behaving inappropriately in a restroom (UCLA Report, 2016)
- Rather, transgender individuals are far more likely to be harassed or harmed in restrooms than any other gender identity
 - UCLA 2013 Study: 70% of respondents said they were denied access, harassed or assaulted in public restrooms



29

Restrooms

- Occupational Safety and Health Administration:
 - Using OSHA's sanitation standard, the agency explicitly favors allowing employees to use the restroom consistent with their gender identity, as failure to do so could become a workplace safety concern
- NY/NYC Human Rights Law:
 - Employers must allow employees to use the restroom of their choice
- Federal Law:
 - The Supreme Court is silent on the impact of its decision on restrooms; however, it is likely that a harassment claim would result if a workplace does not allow usage consistent with an employee's gender identity



30

Restrooms and Gender Identity

- Transgender and gender expansive employees must be provided access to facilities (restrooms, locker rooms, or changing rooms) consistent with their gender identity asserted at work
 - Employees cannot be required to use a single-gender facility that conflicts with that person's gender identity asserted in the workplace
- Employers must provide reasonable alternative arrangements for any employee who expresses a need or desire for increased privacy

31



31

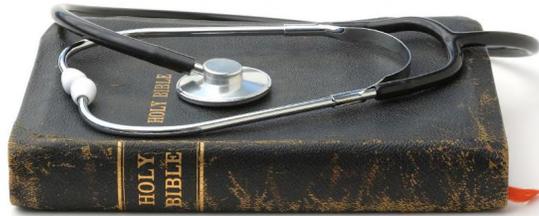
Restrooms: Options

- Create single use restrooms that anyone, regardless of gender identity, can use
- Use gender neutral signs for restrooms and indicate the same in policy language
- Educate managers and other employees regarding transgender rights and restrooms



32

Religious and Medical Considerations



33

 **BOND** SCHOENECK
& KING ATTORNEYS

33

Religious Considerations

- The NY/NYC Human Rights Laws, as well as Title VII, prevent discrimination on the basis of an employee's religion
- An employer's actual or perceived religious objections do not justify discrimination, nor do a co-worker's beliefs justify the same
- It is not a violation of an employee's religious rights in the workplace to require the employee to follow the law
- Note: For religious institutions, Title VII does not apply to employees in "ministerial" positions

 **BOND** SCHOENECK
& KING ATTORNEYS

34

Religious Considerations

- To refuse to use correct pronouns, work with, or use the restroom with a non-binary or trans person is legally the same level of discrimination as refusing to use to do any of those things with anyone else because of their membership in a protected category
- Example: I refuse to use the bathroom with Susan because she is a transgender woman is the same as I refuse to use the bathroom with Susan because of her race

Medical Considerations

- The American Psychiatric Association defines gender dysphoria as a conflict between a person's physical or assigned gender and the gender with which they identify; this may cause significant distress and/or problems functioning
 - This is a somewhat controversial term, as many non-binary or transgender people do not believe that they have a psychiatric illness
- NY/NYC Human Rights Laws view gender dysphoria as a disability and requires reasonable accommodations from employers

Medical Considerations

- Non-disabling conditions concerning sexual orientation and identity are not protected under the ADA
 - ADA regulations also state that transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders are not protected
 - Note that much of this language could be deemed offensive
- In 2017, a federal court in Pennsylvania held that gender dysphoria could be a disability under the ADA because of the associated physical symptoms
- After this decision, there may be grounds to find that gender dysphoria must be reasonably accommodated



37

Medical Considerations

- The Human Rights Law lists gender identity or expressions as protected categories, but also views gender dysphoria as a disability
- Employers must engage in the interactive process and reasonably accommodate all individuals with a medical diagnosis of gender dysphoria
- This is a case where you could ask for medical documentation



38

Medical Considerations

- To qualify for FMLA leave, a transgender employee must have a “serious medical condition” related to their transgender status
- These can include:
 - Surgery
 - Continued counseling
 - Hormone therapy
- FMLA leave may also be available for treatments for gender dysphoria
- Individual circumstances will dictate outcomes

Helpful Tips and Case Studies



Happy National
Coming Out Day

Beware of Stereotypes

Transgender/gender expansive people do not have to do any of the following to be legally protected:

- Change their legal names or ask to be called by a different name
- Change their pronouns
- Have surgery or take medications, including hormones
- Dress in a certain way
- Produce medical records “verifying” a transition

What to Say

When someone comes out to you, it generally means that they trust you. Honor that by saying:

- “Thank you for trusting me enough to share this with me.”
- “I’m glad you can be yourself around me.”
- “How can I support you?” or “Is there anything I can do to help you?”
- “I want to make sure I’m protecting your privacy. I won’t share this with anyone else unless you want me to.”

Let the person coming out take the lead in the conversation

What Not to Say

When someone comes out to you, it generally means that they trust you. So, please don't say:

- "Are you sure? Perhaps its just a phase?"
- "I already knew that."
- "Oh, that doesn't matter to me."
- "When did you decide to be gay/trans/etc.?"
- "Are you going to have the surgery?"
- "How do you know that you're gay/trans etc.?"
- "I love you/like you/respect you anyway."

43



43

Other Tips

- When referring to transgender people at a time in their lives before they transitioned, use their current pronouns/names
 - Ex. Caitlyn Jenner went to the Olympics
- **Do not ask for a person's former name (pre-transition)**
- Do not ask whether a person has had/will have a medical procedure or is on medication



44

Other Tips

- Use gender neutral terms whenever possible
 - Avoid terms like: “sir,” “ma’am,” “ladies” or “guys”
 - Use instead: “folks,” “people,” “everyone” or “y’all”
- If you are unsure about a pronoun but must use one, ask: “How may I address you?”
- If you ask everyone what pronouns they use in a group setting, then no one is singled out



45

Case Study 1:

- Briana has supervised the same group of people for ten years. A few months ago, one of Briana’s team members, Adam, transitioned from female to male.
- Briana calls Adam by the female pronoun repeatedly, and Adam corrects her each time.
- Three months after Adam’s transition, Briana is still using the incorrect pronoun, and is not correcting other employees who do the same.

Is this illegal?



46

Case Study 2:

- Sandra was hired by XYZ Company two months ago and has been using the women's restroom ever since.
- Recently, one of Sandra's coworkers learned from a mutual friend that Sandra is a transgender woman.
- This co-worker refuses to use the women's bathroom with Sandra anymore and told HR that she feels "unsafe" doing so. She demands that the Company stop Sandra from using the women's restroom, saying that it is giving her stress and anxiety at work to share with Sandra.

What should the Company do?



47

Case Study 3:

- Adam has been an employee at XYZ Company for ten years and is devoutly religious.
- He has recently learned that one of the co-workers, Eve, identifies as a non-binary individual. Yesterday, Eve said to Adam, "The pronouns that should be used for me are 'ze, zem or zer.'"
- Adam refuses to use Eve's correct pronouns, and when the HR Director tells him that he has to, he threatens to sue the Company for religious discrimination.

What should XYZ Company do?



48

Questions?



49

Thank You

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It is not to be considered as legal advice.
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50

50