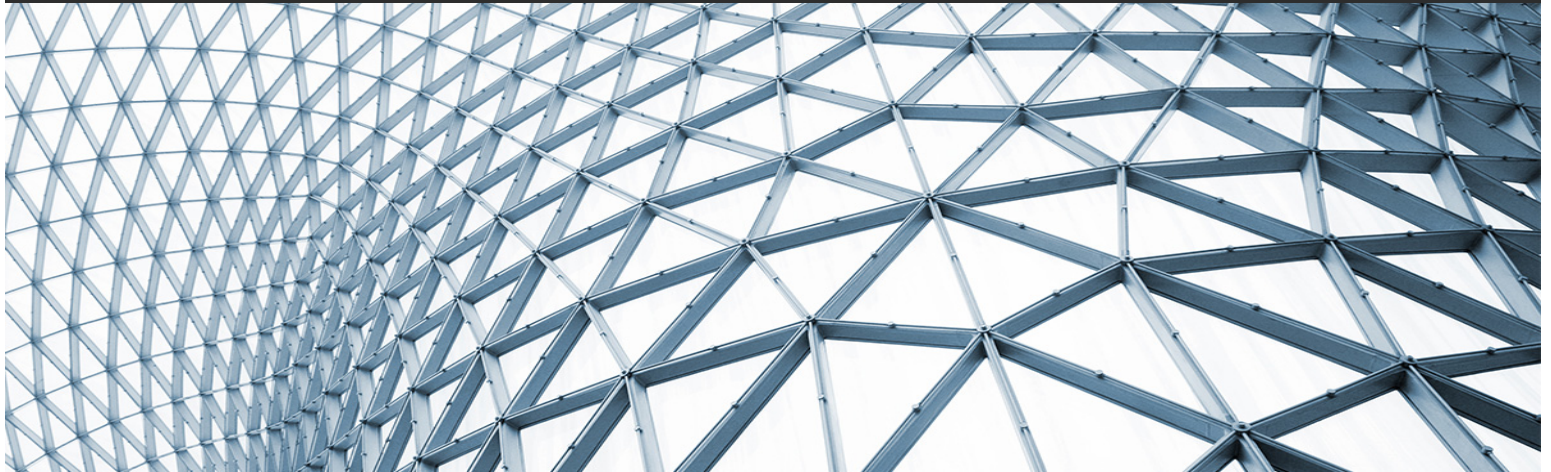


Practical Approaches to Making Workplaces Inclusive of Transgender Workers



By Wendy Johnson Lario, Kristine J. Feher, and Raquel S. Lord | March 18, 2020 | New Jersey Law Journal

New Jersey employers have long understood that the New Jersey Law Against Discrimination prohibits discrimination against individuals in protected classes, including sexual orientation. Most have established policies and trained their managers and employees on legal requirements and best practices to prevent and properly handle complaints of workplace harassment and discrimination. A recent public spotlight on transgender individuals, however, raises the question of whether employers are properly equipped to ensure the lawful and appropriate treatment of transgender workers, who are protected from harassment and discrimination based on their gender identity. This article aims to identify the unique issues facing employers of transgender workers, and to provide guidance to assist employers in navigating practical workplace challenges and fostering an inclusive work environment.

The Law

The New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 et seq., prohibits the harassment of and discrimination against individuals in the workplace based on membership in any one of several enumerated classes, including race, creed, color, national origin, ancestry, age, marital status, pregnancy, sex, gender, sexual orientation, and disability. Prior to 2006, this list did not include gender identity. In 2006, the state legislature expanded the LAD's protections to include "gender identity or expression." The phrase "gender identity" is commonly defined as "a person's perception of having a particular gender, which may or may not correspond with their birth sex." "Gender expression" means the "external appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice." Thus, the legal protections for transgender individuals in New Jersey are not new. However, recent campaigns for education and inclusion have focused new attention on the issue of equality for transgender individuals, including their treatment in the workplace.

Practical Workplace Considerations

Creating and fostering a lawful and inclusive workplace for transgender employees requires employers to think about certain unique issues that they simply may not yet have had to consider.

• Employee-Selected Names and Pronouns

Transgender employees may elect to go by names other than their legal names. For some, this is part of the “social transitioning” process, and it is important for employers to allow employees to use their preferred names in the workplace. Employers may also permit employees to review and amend their employment records, if they wish, to reflect their chosen names (except where the use of an employee’s legal name is required, such as on tax forms). Means of identification such as email addresses, office nameplates, ID cards, and business cards can also reflect an employee’s preferred name. If transgender employees legally change their names, then tax and benefit forms, payroll records, and W-2s can also be revised.

An employee may also request that a particular pronoun be used to refer to that employee. This includes not only “him” and “her,” but also the plural gender-neutral pronoun “they.” Honoring such requests and taking steps to ensure that an employee’s colleagues are also doing so, to the extent requested, may go a long way. Some employers permit employees to include gender pronouns in their e-mail signature blocks so that those with whom they interact know how to address them. Measures like this may be significant in making transgender employees feel supported at work.

• Dress Code and Personal Appearance

Many employers maintain policies addressing employee appearance. Particularly where employers have different dress codes for employees of different genders, policies may need to be adjusted to accommodate transgender employees. Employers are permitted to require neat and workplace-appropriate dress, but may also permit employees to wear clothing consistent with their gender identity, including the use of makeup, earrings, and wigs where an employee so chooses, and where such choices do not present a safety risk to the employee or others.

• Use of Restrooms

Transgender employees may request to use the restroom that corresponds with the gender with which they identify. To address such requests, some employers have established gender non-specific facilities, including restrooms and changing rooms. Other employers offer single-occupant restrooms and changing rooms and are careful not to require transgender employees to use single-occupant facilities while permitting other employees to choose single-occupant or multi-occupant facilities, as this may be considered discriminatory. Clarifying that single-occupant restrooms may be used by individuals of any gender is key.

It is possible that an employer may receive a complaint from an employee who expresses discomfort sharing a restroom with a transgender colleague. In that situation, the employer may wish to instruct the complaining employee to use a different facility if one is available. If there is no such alternative, the employer may wish to explain to the employee that the company is legally required to, and desires to, maintain an inclusive workplace where transgender employees feel comfortable and protected, and that includes allowing them to access the restroom facility of their choosing. It may also help to remind the employee that all employees are protected from harassment based on protected characteristics, including harassment by coworkers.

- *Medical Transitioning*

At some point, a transgender worker may advise their employer that they will be transitioning to a different gender. Employers can prepare for such an event by giving advance consideration to how a transition will be handled in the workplace. For example, a transitioning employee will likely need additional support, and it may make sense to assign a member of Human Resources to serve as the primary contact and resource for the employee. Similar to the interactive process employers undertake with employees who require accommodations for disabilities or religious observance, employers may engage in an open and respectful dialogue with a transitioning employee to learn whether they have any specific workplace needs. If, after transitioning, an employee legally changes their name, an employer can expect to work with the employee and any agencies and vendors to effectuate this change on the employee's legal documents.

Employer Policies

Employers striving to create a transgender-inclusive workplace may wish to start by conducting a review of their handbooks and policies, as updates may be necessary to ensure that provisions on harassment and discrimination cover "gender identity" and "gender expression." But this may not be enough. The proactive employer may also want to include policy provisions that explicitly protect its transgender employees and those who identify as non-binary (meaning they do not identify with either the male or female gender). Such provisions might address the issues discussed above, such as use of an employee's favored name and pronoun, dress code, and restroom usage. Properly drafted policies not only send an internal message that the organization values its transgender employees and does not tolerate harassment or discrimination against them, but may also potentially benefit an employer defending against a legal claim. Employers may also wish to review their anti-harassment and anti-discrimination policies to evaluate whether they set forth a specific complaint procedure that provides employees with multiple avenues to report complaints, and make clear that no employee will suffer retaliation for having made a report or having participated in an investigation of a complaint of harassment or discrimination.

Training Management

As most employers know, it is not enough to implement policies without accompanying training to ensure that managers and supervisors understand and are familiar with the company's and their individual legal obligations toward protected employees. Conducting training to raise awareness among management of specific employment issues relating to transgender employees and sensitize managers to gender identity and expression can be an effective tool. Training individuals involved in the hiring process on issues relating to transgender candidates that may arise during recruitment and hiring is also important. This may include an explanation to managers that, regardless of any personal beliefs they may have about transgender individuals, they are to conduct themselves appropriately and in compliance with company policies and treat transgender colleagues with the same respect shown to other workers and applicants. When a transgender employee announces that he/she/they will be transitioning, additional targeted training for that employee's managers and/or coworkers may be advisable.

A 2016 statistic from the Williams Institute indicates that nearly one and a half million Americans identify as transgender, and that number may have since increased. Therefore, it is likely that many employers will, at some point, need to confront the issues and questions discussed here. By being proactive and getting their policies and practices in order, employers will be well-situated to address the needs of transgender employees and to provide a legally compliant and inclusive workplace.

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About the Authors:

Wendy Johnson Lario is a shareholder with Greenberg Traurig in Florham Park. She chairs the New Jersey Labor & Employment Practice. Kristine J. Feher is a shareholder at the firm whose practice focuses on representing employers and managers in employment discrimination and wrongful discharge cases. Raquel S. Lord is of counsel at the firm, focusing her practice on employment matters.



Wendy Johnson Lario
lariow@gtlaw.com



Kristine J. Feher
feherk@gtlaw.com



Raquel S. Lord
lordr@gtlaw.com