

Chuhak & Tecson Employment Law Client Alert

IGNORANCE IS NO DEFENSE: KNOWING YOUR LEGAL OBLIGATIONS TO TRANSGENDER EMPLOYEES

Chuhak & Tecson, P.C.'s Employment Law Group

With more people publicly identifying themselves as transgender and the topic being widely discussed in the media, employers should identify their obligations and the rights of their employees in this changing landscape.

Federal Law

The Civil Rights Act of 1964

Title VII and Title IX of the 1964 Civil Rights Act protects individuals against discrimination on the basis of gender identity. Title VII protects employees against employment discrimination on the bases of race, color, national origin, sex and religion. In 2012, the Equal Employment Opportunity Commission (EEOC) held that Title VII protects employees who are discriminated against on the bases of gender identity. An employer can challenge the EEOC's interpretation in federal court but most, if not all, federal courts have ruled in conformity with the EEOC's decision and in favor of the transgender litigant.

Although there is not a specific federal law against the discrimination of employees based on their gender identity, the Employment Non-Discrimination Act (ENDA) is legislation that is currently being proposed in Congress. The ENDA would explicitly prohibit discrimination based on sexual orientation or gender identity.

An act of employment discrimination due to gender identity may result in a complaint with the EEOC or federal litigation.

Illinois Law

The Illinois Human Rights Act

In Illinois it is illegal to discriminate on the basis of gender identity in housing, employment and public accommodations pursuant to the Illinois Human Rights Act.¹ The Act protects persons from discrimination in all terms of conditions of employment, including hiring, selection, promotion, transfer, pay, tenure, discharge and discipline.

The Restroom Discussion

Whenever the issue of transgendered people is discussed in the context of an employment setting, people seem to ask about the restroom situation. Some employers are fearful that employees will complain about any policy implemented. So, what does the law say?

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) requires employers to make toilet facilities available so that employees can have access to the facilities when they need to. OSHA guidelines also prohibit the employer from imposing unreasonable restrictions on the employees' use of the facilities.

In October 2015, an Administrative Law Judge's decision became public regarding a discrimination complaint that was filed with the Illinois Human Rights Commission (IHRC), by a transgender employee against Hobby Lobby. The employee asked to use the women's restroom as she identified as female. Hobby Lobby denied the employee's request and the employee was forced to use the men's restroom or find a women's restroom at nearby businesses on her lunch break. The Administrative Law Judge's decision was a recommended ruling to the IHRC that Hobby Lobby directly violated the Illinois Human Rights Act by sexually discriminating against the employee. The IHRC has not issued a final ruling to date.

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Based on the OSHA guidelines, the Illinois Human Rights Act and the recent ruling by the IHRC Administrative Law Judge, as a general rule, employees should use the restroom of the gender that they identify with.

Discriminating against an employee based on gender identity may result in a complaint with the IHRC or state litigation due to violations of the Illinois Human Rights Act.

The Illinois Hate Crime Act

In 1991, Illinois passed the Illinois Hate Crime Act in which Illinois officially added “hate crimes” to its criminal code.ⁱⁱ The Illinois Hate Crime Act protects individuals based on their actual or perceived sexual orientation. Although gender identity was not specifically listed in the Act, gender identity cases could be prosecuted as perceived sexual orientation cases due to the fact that Illinois criminalizes attacks based on a person’s actual or perceived sexual orientation.

On May 20, 2015, the Illinois State Senate passed House Bill 3930 (effective January 1, 2016) which specifically added “gender identity” as a protected class under the Illinois Hate Crime Act.

If an employee suffers from property damage, threats, harassment or is otherwise a victim of a crime due to his/her gender identity, the person committing the crime may be charged with a Class 4 felony. The ICHA also provides for civil relief. Independent of any criminal prosecution, anyone suffering personal injury or property damage as a result of a hate crime may bring a civil suit for actual damages, punitive damages, attorneys’ fees and injunctive relief.

Summary

Not being aware of state and federal laws regarding the rights of transgendered employees could have very serious civil and possibly criminal implications for employers. It is important that employers document all complaints should their employees think they are being discriminated against or harassed due to their gender identity. Employers should follow the appropriate measures

they have instituted to deal with employee complaints.

Ignoring the issues transgendered employees face will almost certainly lead to a complaint with the Equal Employment Opportunity Commission or the Human Rights Commission. It could also lead to very costly civil litigation in state or federal court, or even a criminal investigation. If you feel your business is not equipped to implement the right procedures and policies to protect your employees’ rights, you should consult with an employment law attorney. Proactively tackling the issue will not only save your business a lot of unnecessary time and expense, it will also provide an overall healthier environment for your employees.

ⁱ 775 ILCS 5/1-101 *et seq.*

ⁱⁱ 720 ILCS Ill. Comp. Stat. Ann. 5/§12-7.1(a)

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