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Transgender Access in the Workplace

By Phyllis W. Cheng & Daniel Lac

Introduction

Transgender¹ access has come under the national spotlight in recent months. President Barack Obama delivered the opening salvo on May 16, 2016, when he defended his administration's instructions to public schools allowing transgender students to use bathrooms matching their gender identity.² Days before, the U.S. Departments of Justice (DOJ) and Education (DOE) had released joint guidance to educators providing that under Title IX of the 1972 Education Amendments,³ transgender students are entitled to attend school in an environment free from sex discrimination, including

¹ "Transgender" forms part of the LGBT (lesbian, gay, bisexual and transgender) acronym. "Transgender describes those individuals whose gender identity is different from the sex they were assigned at birth. A transgender male is someone who identifies as male but was assigned the sex of female at birth; a transgender female is someone who identifies as female but was assigned the sex of male at birth." *Dear Colleague Letter on Transgender Students*, U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights, May 13, 2016, at 1, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

² Julie Hirschfeld Davis, *Obama Defends Transgender Directive for School Bathrooms*, NY TIMES, May 16, 2016, available at <http://www.nytimes.com/2016/05/17/us/politics/obama-defends-transgender-directive-for-school-bathrooms.html>.

³ Title IX of the 1972 Education Amendments, 20 U.S.C. § 1681 et seq., 34 C.F.R. § 106.1 et seq., prohibits discrimination on the basis of sex in any federally funded education program or activity in educational institutions.

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Transgender Access in the Workplace

By Phyllis W. Cheng & Daniel Lac

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use of bathrooms and locker rooms designated by sex assigned at birth.⁴

On the employment front, other federal agencies have issued parallel guidelines on transgender access in the workplace. In 2015, the Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) issued guidance on restroom access for transgender employees.⁵ Recently, the U.S. Equal Employment Opportunity Commission (EEOC) released a fact sheet⁶ on bathroom access for transgender employees under Title VII of the Civil Rights Act of 1964.⁷ Similarly, the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor, updated its sex discrimination guidelines for federal contractors that include bathroom access for transgender employees under Executive Order 11246.⁸

States, local jurisdictions and universities have responded to transgender access in different ways. Some support the policy, and have enacted or are introducing policies that advance transgender access.⁹ Others oppose transgender bathroom and locker room access other than by sex assigned at birth, and have passed or introduced legislation prohibiting any contrary policy.¹⁰ Indeed, eleven states, local jurisdictions, and state officials are actively challenging the administration's Title IX bathroom guidance by filing suit in Texas federal court.¹¹

This article focuses on the issue of transgender access in the workplace. We define the relevant terminology with respect to transgender persons, discuss the development of federal protections, examine current state protections, and outline employers' best practices on transgender access.

Terminology

DOJ and DOE define the essential terminology respecting transgender persons as follows.¹²

⁴ Press Release, *U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students*, U.S. Dept. of Justice, May 13, 2016, available at <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights>; *Dear Colleague Letter on Transgender Students*, *supra*, note 1.

⁵ *Restroom Access for Transgender Workers, Best Practices*, OSHA (2105).

⁶ *Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964*, EEOC, May 4, 2016, available at <https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm>.

⁷ 42 U.S.C. § 2000e, et seq. "Title IX borrows heavily from Title VII in its theory and approach to sex-based employment discrimination. It is generally accepted outside the sexual harassment context that the substantive standards and policies developed under Title VII apply with equal force to employment actions brought under Title IX." *Overview of Title IX: Interplay of Title IX with Title VI, Section 504, Title VII, and the Fourteenth Amendment*, TITLE IX LEGAL MANUAL, U.S. Dept. of Justice, Jan. 11, 2001, at 14, available at <https://www.justice.gov/crt/title-ix>.

⁸ Sex Discrimination Guidelines, OFCCP, Dep't of Labor, *Discrimination on the Basis of Sex*, 81 Fed. Reg. 39107, June 15, 2016 (to be codified at 41 C.F.R. pt. 60-20), available at <https://www.federalregister.gov/articles/2016/06/15/2016-13806/discrimination-on-the-basis-of-sex>.

⁹ *Know Your Rights: Transgender People and the Law*, ACLU, available at <https://www.aclu.org/know-your-rights/transgender-people-and-law>; Katy Steinmetz, *The Gender-Neutral Bathroom Revolution Is Growing*, TIME, Jan. 11, 2016, available at <http://time.com/4175774/san-francisco-gender-neutral-bathrooms/>.

¹⁰ *LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, ACLU, available at <https://www.aclu.org/lgbt-nondiscrimination-and-anti-lgbt-bills-across-country#antitransbills>.

¹¹ Mark Berman & Moriah Balingit, *Eleven States Sue Obama Administration over Bathroom Guidance for Transgender Students*, WASHINGTON POST, May 25, 2016, available at https://www.washingtonpost.com/news/post-nation/wp/2016/05/25/texas-governor-says-state-will-sue-obama-administration-over-bathroom-directive/?utm_term=.0c47058f79b2; see Complaint, *Texas v. U.S.*, No. 7:16-cv-00054-0, United States District Court (N.D. Tex. 2016) available at https://www.washingtonpost.com/apps/g/page/politics/lawsuit-challenging-obamas-guidance-on-transgender-facilities-in-schools/2040/?tid=a_inl.

¹² *Dear Colleague Letter on Transgender Students*, *supra*, note 1, at 2-8.

Gender identity refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth.

Sex assigned at birth refers to the sex designation recorded on an infant's birth certificate should such a record be provided at birth.

Transgender describes those individuals whose gender identity is different from the sex they were assigned at birth. A transgender male is someone who identifies as male but was assigned the sex of female at birth; a transgender female is someone who identifies as female but was assigned the sex of male at birth.

Gender transition refers to the process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition, individuals begin to live and identify as the sex consistent with their gender identity and may dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

Development of Federal Protection

Title VII

Title VII prohibits discrimination in employment "because of . . . race, color, religion, sex, or national origin."¹³ Early on, courts interpreted the phrase "because of . . . sex" narrowly to protect discrimination due only to one's biological sex. In *Holloway v. Arthur Andersen & Company*, a transgender employee claimed she was terminated on the basis of her sex in violation of Title VII.¹⁴ The Ninth Circuit Court of Appeals held that the plain meaning of the statute and legislative activity showed that Congress intended the word "sex" to be understood traditionally in order to "place women on an equal footing with men" and not to protect transgender employees.¹⁵ Similarly, in 1979, the Ninth Circuit rejected a claim that discrimination based on sexual orientation was sex discrimination

under Title VII, declaring that one may not "bootstrap Title VII protection for homosexuals" and that sexual orientation was not protected because it was something that affects both females and males equally.¹⁶ The Sixth Circuit ruled similarly in dismissing the claim of a male postal service employee who was taunted, ostracized, and physically beaten because his co-workers believed he was gay. The court found that such actions, "although cruel, are not made illegal by Title VII."¹⁷

Price Waterhouse and its Progeny

The United States Supreme Court's ruling in *Price Waterhouse v. Hopkins* was pivotal in changing this narrow view of Title VII. In reversing the lower courts' interpretation of the phrase "because of sex," the Supreme Court held that the Congressional intent behind Title VII was to forbid employers from taking *gender* into account in making employment decisions and that actions on the basis of a person's conformity or non-conformity are necessarily actions "on the basis of gender."¹⁸ Under *Price Waterhouse*, discrimination on the basis of "sex" is not limited solely to discrimination against one's biological sex, but also to one's gender or the socially-constructed roles, behaviors, and attributes that society considers appropriate for men and women.

After *Price Waterhouse*, several federal courts applied this sex-stereotyping theory to overrule prior cases. In *Nichols v. Azteca Restaurant Enterprises, Inc.*, the Ninth Circuit expressly relied on *Price Waterhouse* in abrogating its previous holding, and upheld a discrimination claim of a male employee who was referred to by feminine pronouns and subjected to verbal abuse due to his female mannerisms. The court noted that the prohibition on discriminating against a woman for being too masculine applies "with equal force to a man who is discriminated against for acting too feminine."¹⁹ The Sixth Circuit followed this trend in *Smith v. City of Salem*, where a former lieutenant brought suit alleging that his supervisors terminated him due to his increasingly feminine appearance.²⁰ The court held that the

¹³ 42 U.S.C. § 2000e-2.

¹⁴ *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

¹⁵ 566 F.2d at 662.

¹⁶ *De Santis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 332 (9th Cir. 1979) ("discrimination because of effeminacy, like discrimination because of homosexuality . . . , does not fall within the purview of Title VII").

¹⁷ *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at *22 (6th Cir. Jan. 15, 1992) ("homosexuality is not an impermissible criteria on which to discriminate with regard to terms and conditions of employment").

¹⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

¹⁹ *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874 (9th Cir. 2001).

²⁰ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

employee stated a claim under Title VII for discrimination “because of sex” as a result of his gender non-conformity.²¹ Several other circuit courts have since applied *Price Waterhouse* in similar contexts.²²

However, *Price Waterhouse* and its progeny did not offer the sweeping protections for which LGBT litigants hoped. Federal courts hesitated to extend protection to conduct that was not linked to gender-stereotyping. In *Vickers v. Fairfield Medical Center*, the Sixth Circuit limited its prior holding in *Smith* and cautioned that “a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.”²³ The court distinguished the case on grounds that although the employee alleged harassment due to his perceived homosexuality, he did not contend that his appearance or mannerisms were perceived as gender non-conforming and were the basis for his discrimination.²⁴

Other courts have been similarly hesitant to extend the *Price Waterhouse* sex stereotyping theory to cover situations where the plaintiff is discriminated against because of their LGBT status, absent any additional evidence of gender stereotyping or non-conformity.²⁵

The EEOC’s Initiatives

While this limited view of Title VII still persists in the federal courts, the EEOC has taken the lead in dismantling the judicially-created distinction between

discrimination based on stereotypes versus discrimination based on sexual orientation, gender identity, or gender expression. In its *Macy v. Holder* decision, the EEOC flatly concluded that when an employer discriminates against someone because of their transgender status, the employer has discriminated because of sex.²⁶ It noted that evidence of gender stereotyping is simply one means of proving sex discrimination and not a prerequisite to bringing a Title VII claim.²⁷

In line with the agency’s expanded view of Title VII, the EEOC published its 2013-2016 Strategic Enforcement Plan with a core objective to address coverage of lesbian, gay, bisexual, and transgender individuals under Title VII’s sex discrimination provisions.²⁸ Recent EEOC activity has demonstrated a firm commitment to its objective. In 2014, the agency filed the first two lawsuits in its history alleging sex discrimination against transgender individuals under Title VII.²⁹

In April 2015, in *Lusardi v. McHugh*, the EEOC found that the Department of the Army discriminated against a transgender employee when it required her to use a single-user restroom until she completed gender reassignment surgery. There, the EEOC declared that “an agency may not condition access to facilities - or to other terms, conditions, or privileges of employment - on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individuals’ gender identity.”³⁰

²¹ 378 F.3d at 573-75.

²² See *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (discrimination based on the fact that an applicant planned to transition was sex discrimination under Title VII, making an analogy to religious discrimination against converts); *Glenn v. Brumby*, 663 F. 3d 1312 (11th Cir. 2011) (terminating a transgender woman for dressing femininely and disclosing plans to transition was sex discrimination under Title VII).

²³ *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).

²⁴ 453 F.3d at 764-65.

²⁵ See *Eure v. Sage Corp.*, 61 F. Supp. 3d 651 (W.D. Tex. 2014) (granting summary judgment against transgender employee’s discrimination claim); *Burrows v. College of Central Florida*, No. 5:14-cv-00197-JSM-PRL, 2015 U.S. Dist. LEXIS 90576 (M.D. Fla. July 13, 2015) (rejecting gender stereotype claim because female employee’s relationship with another woman was not a characteristic that was “readily demonstrable in the workplace”), reconsideration denied, 2015 U.S. Dist. LEXIS 119940 (M.D. Fla., Sept. 9, 2015).

²⁶ *Macy v. Holder*, EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751, slip op. at *1 (Apr. 20, 2012), available at <http://www.lgbtinthesouth.com/wp-content/uploads/2016/03/Macy-EEOC-Ruling.pdf>.

²⁷ EEOC Appeal No. 0120120821, at *10 (“Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations”).

²⁸ EEOC, *Strategic Enforcement Plan (SEP)*, FY 2013-2016, at 10 (Dec. 17, 2012), available at <https://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

²⁹ See *Complaint, EEOC v. Lakeland Eye Clinic, P.A.*, No. 8:14-cv-2421-MSS-AEP, United States District Court (M.D. Fla. Sept. 25, 2014) (alleging sex discrimination under Title VII where employer fired an employee because she is transgender, was transitioning from male to female, and/or did not conform to the employer’s gender-based expectations, preferences, or stereotypes); *Complaint, EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, No. 2:14-cv-13710-SFC-DRG, United States District Court (E.D. Mich. Sept. 25, 2014) (same).

³⁰ *Lusardi v. McHugh*, EEOC Appeal No. 0120133395, Agency No. ARREDSTON11SEP05574, slip. op. at 9 (Apr. 1, 2015), available at <http://transgenderlawcenter.org/wp-content/uploads/2015/04/EEOC-Lusardi-Decision.pdf>.

The EEOC has not slowed down its efforts. In March 2016, the EEOC filed its first lawsuits against private employers alleging gender bias and discrimination on the basis of sexual orientation. In *EEOC v. Scott Medical Health Center*,³¹ the agency alleges that a gay male employee was subject to harassment by his manager in the form of anti-gay epithets and highly offensive comments about his sexuality and sex life.³² The employee complained to management but quit when no action was taken. Similarly, in *EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc.*,³³ the agency claimed that a supervisor allegedly made vulgar comments to a lesbian employee such as “I want to turn you back into a woman” and “you would look good in a dress.”³⁴ The supervisor also allegedly blew a kiss and circled his tongue at the employee.³⁵

While the EEOC’s recent activity is a promising development for LGBT litigants, its decisions are only binding on federal agencies. Until the Supreme Court declares *per se* protection for LGBT individuals under Title VII, federal courts still retain discretion to reject claims of discrimination because of one’s LGBT status.

Recent Federal Cases

Responding to an Employee’s Notice of Transition

Employers who are on notice of an employee’s transition must ensure that its supervisors and managers are equipped to respond to this new workplace dynamic. Many find themselves unprepared to properly respond to such employee’s gender transition. Since gender transitioning has not been a common issue historically and involves deeply personal matters that may be uncomfortable to talk about, employers may find it easier to ignore the matter altogether.

This willful blindness to the issue can typically lead to liability when supervisors and managers are not trained on how to properly respond to an employee’s transition. For instance, in *EEOC v. Lakeland Eye Clinic, PA.*, an

employee who started to present as female became subject to derogatory comments and isolation in the workplace.³⁶ The clinic’s administrator asked another employee “What do you think of this Michael/Michele thing?” and further remarked, “next time I’ll be more careful in my interviewing skills.” Coworkers also allegedly rolled their eyes, snickered, and refused to socialize with plaintiff after she began presenting as a female at work, and the clinic eventually eliminated her position.³⁷ Following the EEOC’s lawsuit, the parties reached a court-approved settlement for \$150,000. The settlement also requires the clinic to implement a new gender discrimination policy, provide annual training to all employees, and institute guidelines on how to handle LGBT stereotyping complaints made by applicants, employees, and customers.

Single Sex Facilities

Employers also face practical challenges in creating a transgender-friendly workplace. As discussed above, the EEOC takes the position that an employer may not condition access to restroom, locker room, or other facilities on certain medical milestones, such as an employee’s gender reassignment surgery.³⁸ Coworker confusion or anxiety about a transitioning employee’s restroom use does not justify restricted restroom use.

In *Chavez v. Credit Nation Auto Sales*, a male-to-female transgender employee claimed that her employer discriminated against her by not allowing her to use a unisex bathroom reserved for customers and office personnel.³⁹ The lower court held that the employer’s policy was justified because it prevented the garage employees from tracking dirt and grease inside the customers’ restroom.⁴⁰ On appeal, the Eleventh Circuit, *per curiam*, reversed in part the grant of summary judgment against the plaintiff’s sex discrimination claim because it was motivated in-part by an impermissible bias against her transgender status.⁴¹

³¹ See Complaint, *EEOC v. Scott Medical Health Center*, No. 2:16-cv-00225-CB, United States District Court (W.D. Pa. Mar. 1, 2016), available at <http://hr.cch.com/ELD/Scott-MedicalComplaint.pdf>.

³² Complaint, *Scott Med. Health Ctr.*, *supra* note 31, at 11.

³³ See Complaint, *EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc.*, No. 1:16-cv-00595-RDB, United States District Court (D. Md. Mar. 1, 2016).

³⁴ Complaint, *Pallet Companies*, *supra* note 33, at 15-17.

³⁵ Complaint, *Pallet Companies*, *supra* note 33, at 15-17.

³⁶ See Complaint, *Lakeland Eye Clinic*, *supra* note 29.

³⁷ Complaint, *Lakeland Eye Clinic*, *supra* note 29, at 15.

³⁸ *Lusardi*, EEOC Appeal No. 0120133395, *supra* note 30, at 9.

³⁹ *Chavez v. Credit Nation Auto Sales*, 49 F. Supp. 3d 1163 (2014), *aff’d in part, reversed in part*, 2016 U.S. App. LEXIS 598 (11th Cir. Jan. 14, 2016).

⁴⁰ 49 F. Supp. 3d at 1202.

⁴¹ *Chavez v. Credit Nation Auto Sales*, No. 14-14596, 2016 U.S. App. LEXIS 598 (11th Cir. Jan. 14, 2016).

Dress Codes and Appearance Standards

Courts have generally upheld dress codes and appearance standards where they do not disparately impact or impose an unequal burden on one sex. Yet as issues of gender identity and expression become more prevalent, analyses of disparate impact become less clear and create novel issues of liability in the workplace.

In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the EEOC claimed a funeral home discriminated against a transgender employee in part by not providing her with an allowance for a female work uniform after she disclosed her gender identity.⁴² The court ruled that the employer's defense that it was simply enforcing its dress code was unavailing because the issue was whether the employer disparately impacted female employees by providing work clothing or allowances for male workers.

In *Broussard v. First Tower Loan, LLC*, a female-to-male transgender employee claimed sex discrimination where the employer required him to sign a written statement declaring that his "preference to act and dress as male" was not "in compliance with Tower Loan's personnel policies."⁴³ Tower Loan also indicated that when an overnight room is required for out-of-town meetings, the employee would be assigned to a room with a female.⁴⁴ The EEOC filed a motion to intervene as an additional plaintiff, which was granted. The case has since proceeded to arbitration.

Benefits and Leave

Issues surrounding gender transition necessarily involve employer benefit and leave policies, and an employer must take care to avoid disparate treatment of gender transitioning employees in the application of its myriad policies, such as health and life insurance, retirement benefits, compensation packages, and leaves of absence.

In a case not directly involving Title VII, an employee brought a claim against FedEx under Title I of the Employee Retirement Income Security Act (ERISA) for denying plaintiff spousal pension benefits because

she was married to another woman.⁴⁵ FedEx's defense relied on the pension plan's incorporation of the federal Defense of Marriage Act (DOMA), which failed when DOMA was struck down by the Supreme Court. The court denied FedEx's motion to dismiss on the grounds that plaintiff "adequately alleged that FedEx has violated Title I of ERISA by acting contrary to federal law and failing to provide plaintiff with a benefit mandated by ERISA."⁴⁶ In doing so, the court explained that "ERISA plans, by definition, must treat couples in same-sex marriages as married for the purposes of spousal benefits prescribed under ERISA, such as survivor benefits."⁴⁷

Similarly, in *Hall v. BNSF Railway Company*, an employee challenged the employer's policy of providing health insurance coverage for employees' legally married opposite-sex spouses, but not to same-sex spouses.⁴⁸ A Washington district court denied the employer's motion to dismiss the Title VII sex discrimination claim, observing that "[n]othing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone," and finding that the allegations were sufficient to allege discrimination based on the sex of the employee.⁴⁹

The States' Perspective, Laboratories for Change

Those seeking protection beyond Title VII may increasingly turn to protections afforded by the states. As of early 2016, 23 states have enacted laws prohibiting sexual orientation discrimination, with Utah as the most recent state to do so.⁵⁰ Of those, 21 states also prohibit gender identity or expression discrimination.

While each of these states offer some form of protection to LGBT individuals, the extent of that protection is far from uniform. The states may have different definitions of "gender" and "sexual orientation" discrimination, if at all, and offer varying degrees of protection.

⁴² See Complaint, *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, No. 2:14-cv-13710-SFC-DRG, United States District Court (E.D. Mich. Sept. 25, 2014).

⁴³ *Broussard v. First Tower Loan, LLC*, No. 15-1161, 2015 U.S. Dist. LEXIS 165636, at *8 (E.D. La. Dec. 9, 2015).

⁴⁴ 2015 U.S. Dist. LEXIS 165636, at *8.

⁴⁵ *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155 (N.D. Cal. 2016).

⁴⁶ 119 F. Supp. 3d at 1166.

⁴⁷ 119 F. Supp. 3d at 1166.

⁴⁸ *Hall v. BNSF Railway Co.*, No. C13-2160 RSM, 2014 U.S. Dist. LEXIS 132878 (W.D. Wash. Sept. 22, 2014).

⁴⁹ 2014 U.S. Dist. LEXIS 132878, at *4 (citing *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002)).

⁵⁰ See Utah S.B. 296, Antidiscrimination and Religious Freedom Amendments, 2015 Gen. Sess. (NS), amending Utah Code Ann. § 34A-5-106.

upon a transgender employee.⁵⁷ In addition, the DFEH Fair Employment and Housing Council has noticed rulemaking on Transgender Identity and Gender Expression under the FEHA that will further expand guidance on these protections.⁵⁸

Similarly, in December 2015, the NYC Commission on Human Rights issued expansive guidance on gender identity and expression discrimination, providing in part that grooming policies and dress codes that differentiate based on actual or perceived gender are per se discriminatory.⁵⁹ The guidance also states that individuals should be referred to by pronouns that reflect their chosen gender identity, and be permitted to use restrooms, use locker rooms and participate in programs consistent with their gender identity regardless of sex assigned at birth, anatomy, medical history, or appearance.

While a few states have taken the lead on these issues, over half of the states in the country still offer no protection whatsoever to LGBT individuals. Local governments that have attempted to address this need have faced significant hurdles in courts and at the polls. For instance, in May 2014, the Houston City Council passed the Houston Equal Rights Ordinance (HERO), purporting to ban discrimination based on sexual orientation and gender identity.⁶⁰ This success was short lived, as the ordinance was challenged in court, culminating in the Texas Supreme Court's decision to suspend the ordinance and to put it up for a vote. The public campaign against the ordinance was contentious,

as evidenced by a radio ad starring former Houston Astros' baseball star Lance Berkman, who declared that the bill would allow "troubled men to enter women's public bathrooms, showers, and locker rooms."⁶¹ The ordinance was eventually repealed by voters (61 percent to 39 percent) in November 2015.⁶²

Looking Ahead, Are We Close to Comprehensive Policy Change?

Transgender employees seeking protection have been forced to make do with the cobbled-together set of protections described above. Yet, there are indicators that comprehensive policy change is closer than we think. As was the case with same-sex marriage equality, the timing and conditions for legal change largely correlate with public opinion and attention, albeit with some delay. By examining public opinion on LGBT issues and transgender rights, we can determine the necessary conditions for policy change and the likelihood of that change in certain states.

A national survey conducted by the Public Religion Research Institute in 2010 asked respondents in each state whether "Congress should pass laws to protect transgender people from job discrimination."⁶³ The results of the study show the average level of support across the states is 75 percent, with a range of opinion between 66 percent and 90 percent.

⁵⁷ DFEH, *Transgender Rights in the Workplace*, DFEH-162TGR (Feb. 17, 2016), available at <http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2016/DFEH163TGR.pdf>.

⁵⁸ DFEH, Initial Statement of Reasons, *Fair Employment and Housing Council Regulations Regarding Transgender Identity and Expression*, available at <http://www.dfeh.ca.gov/res/docs/FEHC/RulingTransgender/InitStmtofReasons-RegTransgenderIdentityExpression.pdf>.

⁵⁹ NYC Comm. on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); N.Y.C. Admin. Code § 8-102(23)*, available at http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf.

⁶⁰ HOUSTON, TEX., ORDINANCE NO. 2014-530, available at https://www.houstontx.gov/equal_rights_ordinance.pdf.

⁶¹ Justin Wm. Moyer, *Why Houston's Gay Rights Ordinance Failed: Fear of Men in Women's Bathrooms*, WASH. POST, Nov. 4, 2015, available at <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/why-houstons-gay-rights-ordinance-failed-bathrooms/>.

⁶² *City of Houston Anti-Discrimination HERO Veto Referendum, Proposition 1*, BALLOTPEDIA (Nov. 2015), available at [https://ballotpedia.org/City_of_Houston_Anti-Discrimination_HERO_Veto_Referendum,_Proposition_1_\(November_2015\)](https://ballotpedia.org/City_of_Houston_Anti-Discrimination_HERO_Veto_Referendum,_Proposition_1_(November_2015)).

⁶³ Press Release, Public Religion Research Institute (PRRI), *Strong Majorities Favor Rights & Legal Protections for Transgender People*, Nov. 3, 2011, available at: http://publicreligion.org/newsroom/2011/11/news-release-strong-majorities-favor-rights-and-legal-protections-for-transgender-people/#.VtN_bfkrKM9.

Table 1. Opinion estimates and summary statistics.

State	Transgender inclusive non-discrimination	Congruent (in 2010)
	% favor [95% credible interval]	
Alabama	69 [60, 77]	
Alaska	72 [62, 84]	
Arizona	77 [69, 84]	
Arkansas	70 [63, 77]	
California	86 [81, 90]	✓
Colorado	81 [74, 87]	✓
Connecticut	85 [77, 90]	✓
Delaware	87 [80, 91]	✓
Florida	78 [71, 83]	
Georgia	76 [70, 82]	
Hawaii	90 [81, 94]	✓
Idaho	71 [61, 82]	
Illinois	82 [72, 88]	✓
Indiana	75 [67, 82]	
Iowa	77 [68, 83]	✓
Kansas	68 [58, 76]	
Kentucky	70 [62, 77]	
Louisiana	72 [65, 80]	
Maine	84 [77, 90]	✓
Maryland	87 [80, 91]	✓
Massachusetts	87 [80, 91]	
Michigan	79 [70, 85]	
Minnesota	78 [68, 84]	✓
Mississippi	73 [66, 81]	
Missouri	75 [67, 82]	
Montana	78 [71, 85]	
Nebraska	69 [59, 79]	
Nevada	83 [76, 88]	✓
New Hampshire	81 [73, 88]	

New Jersey	85 [79, 91]	✓
New Mexico	83 [77, 89]	✓
New York	87 [82, 91]	
North Carolina	77 [70, 82]	
North Dakota	71 [61, 79]	
Ohio	76 [67, 82]	
Oklahoma	66 [56, 78]	
Oregon	84 [78, 90]	✓
Pennsylvania	82 [75, 88]	
Rhode Island	87 [79, 92]	✓
South Carolina	74 [66, 80]	
South Dakota	71 [62, 79]	
Tennessee	72 [65, 79]	
Texas	73 [67, 78]	
Utah ^a	71 [60, 83]	
Vermont	88 [81, 93]	✓
Virginia	79 [72, 85]	
Washington	84 [77, 89]	✓
West Virginia	72 [66, 80]	
Wisconsin	79 [71, 85]	
Wyoming	67 [56, 82]	
Mean	78 [76, 80] ^b	
National Average	75 [72, 78] ^b	
Total Congruent		18

Figure 2. Andrew Flores, Jody L Herman, and Christy Mallory, *Transgender Inclusion in State Non-Discrimination Policies: The Democratic Deficit and Political Powerlessness*, The Williams Institute, UCLA School of Law, Research and Politics, Oct.-Dec. 2015, at 4.

Notably, the survey confirms that public opinion can be a bellwether for policy change. The states with the greatest levels of support - including California, New York, and Vermont - are states that have enacted legislation protecting against sexual orientation discrimination.

The Williams Institute at UCLA School of Law suggests that once public opinion reaches a “tipping-point,” there is a high probability of policy adoption.⁶⁴ However, it appears that more than a simple majority is required to effect change. Based on the data, a “super-majority” of 81 percent is required before the policy is likely to be adopted. The study further notes that likelihood of policy change is also affected by the partisan make-up of the legislature. Legislatures with a high percentage of Democrats are more likely to be responsive to majority

opinion, while legislatures with a low percentage of Democrats appear unresponsive.⁶⁵

As of 2010, national acceptance was 75 percent in favor of federal law prohibiting gender identity and expression discrimination, and several more states were near the 81 percent “tipping point” of public opinion.

Just six years later, transgender issues have become even more prominent. They are increasingly portrayed in mainstream media, debated in the political arena, and championed by activist groups. More individuals than ever before report knowing a transgender person and employers face situations in dealing with a growing transgender workforce. Federal and state agencies tasked with enforcing anti-discrimination laws have taken note and are increasingly scrutinizing these growing issues. It should come as no surprise then that policy change in favor comprehensive transgender protections is underway and inevitable. As attention to these issues continues to grow, employers will be compelled to address them head-on in the workplace

⁶⁴ Andrew Flores, Jody L Herman & Christy Mallory, *Transgender Inclusion in State Non-Discrimination Policies: The Democratic Deficit and Political Powerlessness*, The Williams Institute, UCLA School of Law, Research and Politics, Oct.-Dec. 2015, at 1-8.

⁶⁵ Flores, et al., *supra* note 66, at 5.

with policies and procedures that are mindful of LGBT inclusion, accommodation, and acceptance.

Employers' Best Practices

Given the rapid changes in enforcement of transgender access in the workplace, employers should observe these best practices:

Employment Inquiries:

- Refrain from asking questions designed to detect a person's sexual orientation or gender identity, including asking about his/her marital status, spouse's name, or relation of household members to one another.
- Refrain from asking questions about a person's body or whether they plan to have surgery because this information is generally protected by the Health Insurance Portability and Accountability Act⁶⁶ (HIPAA).

Dress Codes and Grooming Standards:

- Refrain from denying an employee the right to dress in a manner suitable for that employee's gender identity.
- Enforce any dress code in a non-discriminatory manner.

Bathroom, Showers and Locker Room Access:

- All employees have a right to safe and appropriate restroom and locker room facilities. This includes the right to use a restroom or locker room that corresponds to the employee's gender identity, regardless of the employee's assigned sex at birth.
- Where possible, provide an easily accessible unisex single stall bathroom for use by any employee who desires increased privacy, regardless of the underlying reason.
 - A private restroom can also be used by an employee who does not want to share a restroom with a transgender coworker.
 - Use of a unisex single stall restroom should always be a matter of choice.
 - No employee should be forced to use a unisex single stall either as a matter of policy or due to continuing harassment in a gender appropriate facility.

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⁶⁶ Pub. L. No. 104-191, 110 Stat. 1936 (Aug. 21, 1996) (codified, as amended, in scattered sections of 18, 26, 29 and 42 U.S.C.).