

The Forgotten "T" in LGBT: Best Practices for Creating a Transgender- Inclusive Workplace

37TH ANNUAL ISCEBS
EMPLOYEE BENEFITS

Symposium

Todd Solomon
Partner
McDermott Will & Emery
Chicago, Illinois

The opinions expressed in this presentation are those of the speaker. The International Society and International Foundation disclaim responsibility for views expressed and statements made by the program speakers.

PARTNERS IN EDUCATIONAL EXCELLENCE



International Society
of Certified Employee Benefit Specialists

International Foundation
OF EMPLOYEE BENEFIT PLANS 

153021564v2

Overview

- Understanding Gender Identity and Gender Expression
- The Business Case for Transgender Inclusion
- Legal Trends
- Best Practices for Workplace Policies
- Transgender Employee Benefits
- Best Practices for Cultivating an Inclusive Workplace

Understanding Gender Identity and Gender Expression: Key Terms

- **Gender Identity** – One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.
- **Gender Expression** – External appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.
- **Transgender** – An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation.

Understanding Gender Identity and Gender Expression: Key Terms (cont.)

- **Gender Transition** – The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance. Some people socially transition, whereby they might begin dressing, using names and pronouns and/or be socially recognized as another gender. Others undergo physical transitions in which they modify their bodies through medical interventions.
- **Gender Dysphoria** – Clinically significant distress caused when a person's assigned birth gender is not the same as the one with which they identify.

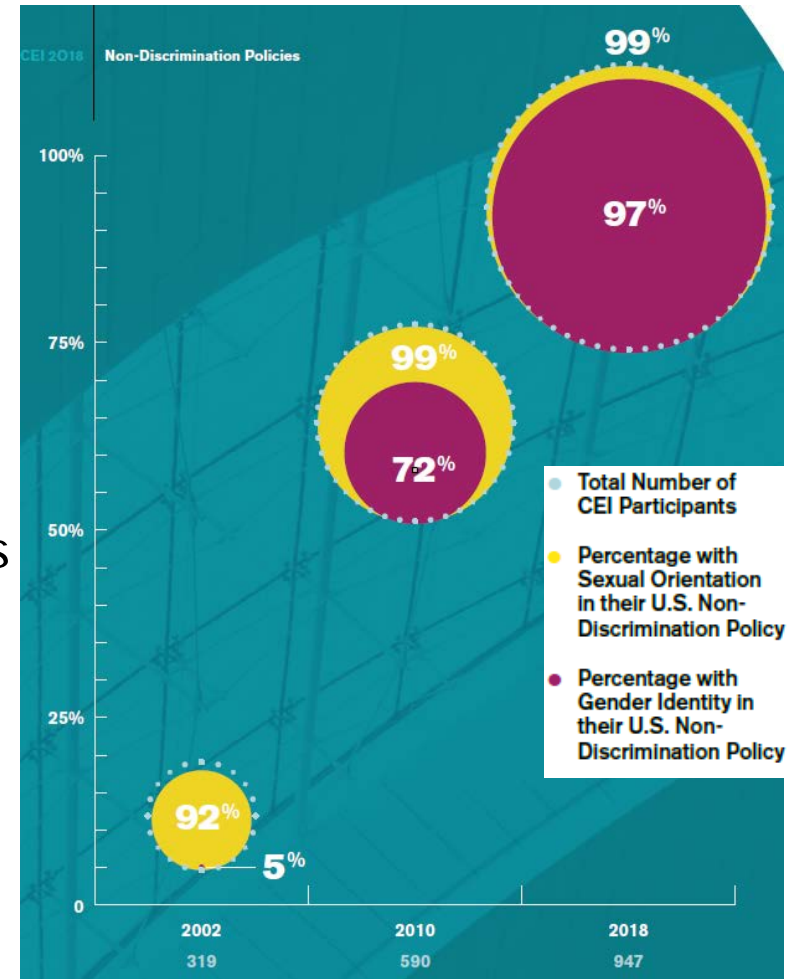
According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), the term—which replaces Gender Identity Disorder—is intended to better characterize the experiences of affected children, adolescents, and adults."

The Business Case for Transgender Inclusion

- Creating a gender identity and/or expression inclusive workplace allows employers to:
 - Attract and retain talented employees
 - Boost engagement and productivity
 - Mitigate risks of legal claims

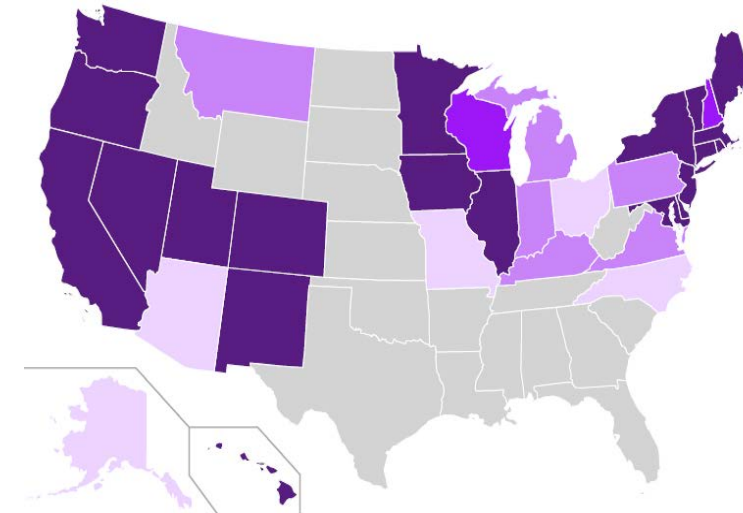
The Business Case for Transgender Inclusion (cont.)

- 2018 Human Rights Campaign Foundation Corporate Equality Index (CEI) findings:
 - 97% of CEI-rated employers include gender identity in their non-discrimination policies
 - A record 459 CEI-rated employers reported having gender transition guidelines
 - 79% of CEI-rated employers provide transgender-inclusive health care coverage options



Legal Trends

- Federal Equal Employment Opportunity Commission accepting complaints of gender identity discrimination
 - Macy v. Holder (EEOC 2012)
 - Federal courts have begun recognizing gender identity discrimination under Title VII
 - EEOC v. R.G. & G.R. Harris Funeral Homes, Inc. (6th Cir. 2018)
 - But, there have been setbacks: a federal court recently dismissed a case involving gender-transition health insurance coverage
 - Baker v. Aetna (N.D. Texas 2018)
- 20 States and the District of Columbia prohibit employment discrimination based on gender identity
- Over 225 cities and counties prohibit employment discrimination based on gender identity



- **Prohibit discrimination based on sexual orientation and gender identity** (20 states & D.C.): California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington
- **Prohibit discrimination based on sexual orientation only** (2 states): New Hampshire, Wisconsin
- **Prohibit discrimination against public employees based on sexual orientation and gender identity** (6 states): Indiana, Kentucky, Michigan, Montana, Pennsylvania, Virginia
- **Prohibit discrimination against public employees based on sexual orientation only** (5 states): Alaska, Arizona, Missouri, North Carolina, Ohio

What Does Section 1557 Require?

- ACA Section 1557 prohibits discrimination by entities receiving federal funding (e.g., hospitals, social services agencies)
- This arguably requires transgender benefits coverage by such entities
- Lawsuits have been filed against non-compliant employer plans (including claims for damages/penalties)
- Challenges to ACA are still possible, so it is possible that this might be overturned

Best Practices for Workplace Policies: Gender Transition Guidelines

- Gender transition guidelines are a written set of guidelines to manage an on-the-job gender transition, which can:
 - Assist transitioning employees, HR professionals, managers and co-workers by providing a framework for the transition process
 - Eliminate confusion and the potential for mismanagement by setting clear expectations
 - Allow for case-by-case flexibility for the transitioning employee (“constitution”, not “playbook”)
- Model guidelines are available from the Human Rights Campaign

Best Practices for Workplace Policies: Gender Transition Guidelines (cont.)

- Gender transition guidelines should include:
 - who in the business is charged with helping a transitioning employee manage his/her workplace transition
 - what a transitioning employee can expect from management
 - what management's expectations are for staff, transitioning employees, and any existing LGBTQ employee group in facilitating a successful workplace transition
 - what the general procedure is for implementing transition-related workplace changes, such as adjusting personnel and administrative records, as well as a communication plan for coworkers and clients
 - answers to frequently asked questions about dress codes and restroom use
 - How to deal with employees (or customers) with religious or other objections

Best Practices for Workplace Policies: Gender Neutral Dress Codes

- Dress codes should be gender neutral, apply consistently to all employees, and avoid gender stereotypes.
- For employers who have a “male” and “female” version of a uniform, employees should be allowed to wear the uniform that corresponds with their gender identity.

Best Practices for Workplace Policies: Equal Access to Restrooms

- Employers should adopt a policy stating that employees, guests, and customers should use the restroom and locker room that corresponds with their gender identity.
- For multiple-occupant restrooms and locker rooms, employers should take steps to increase privacy for all employees.
- Whenever possible, employers should also provide single-occupancy, gender-neutral restrooms.
- OSHA requires employers to provide reasonable access to restroom facilities and has issued guidance on best practices for transgender restroom access.

Best Practices for Workplace Policies: Non-Disclosure & Confidentiality

- While the transgender status of an employee who transitions on the job may require some disclosure, existing transgender status and details of the employee's medical treatment should remain private and confidential.
- Employers should limit access to information about the employee's health status and medical treatments to HR professionals on a need-to-know basis.
- Employers should provide for preferred names and gender self-identification on administrative records and forms.

Transgender Employee Benefits

- Employers should provide transgender healthcare benefits as a medical necessity as recommended by the guidelines of the World Professional Association of Transgender Health (WPATH).
- In the past, medical coverage was limited to hormone therapy and gender reassignment surgery, but today many employers are also covering cosmetic surgery necessary related to gender transition.
- There is a growing trend of courts and administrative bodies recognizing that transition-related medical care is the accepted treatment for gender dysphoria.
- Some employers also provide additional medical leave or paid time off for transitioning employees.

Transgender Employee Benefits (cont.)

- Taxation of Transgender Benefits
 - Medical care related to diagnosis, treatment or prevention of diseases or for the treatment related to any part or function of the body is generally exempt from employer payroll and individual income tax purposes.
 - Expenses related to cosmetic surgery are generally extended favorable tax treatment only if the procedures are medically necessary to treat a physical deformity existing at birth or arising by accident or disease.
 - Taxation of medical care related to treatment of gender identity disorder (GID) is confusing since many of the treatments are cosmetic in nature.
 - 2010 U.S. Tax Court held hormone therapy and gender reassignment surgery were deductible medical expenses because they are “well-recognized and accepted treatments for severe GID.” Breast augmentation surgery was not deductible because there was insufficient evidence that surgery was medically necessary for individual involved in this case. Ruling was based on specific facts and circumstances involved and leaves open the possibility that breast augmentation could be medically necessary for another individual with GID.

Best Practices for Cultivating an Inclusive Culture

- Educate employees about gender identity, gender expression and the relevant anti-discrimination policy
- Use inclusive language in policies and in practices
- Be aware of barriers to name and gender changes and ensure proper use of pronouns for transgender employees
- Offer mentoring opportunities through an LGBT committee
- Engage senior management in announcing an employee's plan to transition (assuming employee consent)

Your Questions



Todd A. Solomon

McDermott Will & Emery LLP
444 West Lake Street Suite, Suite 4000
Chicago, IL 60606-0029
312-984-7513
tsolomon@mwe.com

37TH ANNUAL ISCEBS
EMPLOYEE BENEFITS

Symposium

The opinions expressed in this presentation are those of the speaker. The International Society and International Foundation disclaim responsibility for views expressed and statements made by the program speakers.

PARTNERS IN EDUCATIONAL EXCELLENCE



International Society
of Certified Employee Benefit Specialists

International Foundation
OF EMPLOYEE BENEFIT PLANS 