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OSHA Issues Guidance on Transgender Use of Company Restrooms

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In June 2015, the Occupational Safety and Health Administration (OSHA) published the Guide to Restroom Access for Transgender Workers setting forth the “core principle” that all employees, “including transgender employees, should have access to restrooms that correspond to their gender identify.” In other words, if a company employed Caitlyn Jenner, it would have to allow her to use the women’s restroom.

OSHA’s rationale for issuing this guidance is that employees can suffer “adverse health effects if toilets are not available when employees need them.” It is important to note, however, that this is only a guide from OSHA and does not have the force of law. But, it is a clear statement of OSHA’s position regarding transgender employees.

OSHA also addressed the issue of potential discomfort by co-workers with allowing transgender employees to use a restroom corresponding with his or her chosen gender identity, an identity that may not correspond with physical gender. OSHA referenced an April, 2015 Equal Employment Opportunity Commission interpretation of federal law that stated that “a transgender employee cannot be denied access to the common restrooms used by other employees of the same gender identity regardless of whether that employee has had any medical procedure or whether the employees’ may have negative reactions to allowing the employee to do so.”

OSHA’s guide also contains a warning to employers to follow specific laws, rules and regulations in each employer’s state or municipality and the application of federal anti-discrimination laws. Many employers are not aware that local municipalities may ban discrimination against transgender employees. As noted, the EEOC has also taken the position that transgender discrimination can be a form of “sex” discrimination under federal law.

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One strategy some employers utilize with transgender employees is the use of a gender neutral bathroom for both males and females. Under the best practices guide from OSHA, “[n]o employee should be required to use a segregated (gender neutral) facility apart from other employees because of their gender identity or transgender status.” Thus, another option could be to have single occupancy, unisex restrooms, either for transgender employees who may choose to use it, or for other employees who may prefer it to a restroom which may be used by other employees.

Again, the OSHA guide along with the recent EEOC guidance on this transgender status is only an administrative interpretation of the law. It does not carry the force of a statute or court ruling. However, with the increased federal agency action relating to gay and transgender employees, employers would be wise to determine the best ways to handle gender identity issues in the workplace. This includes allowing transgender employees to use the restroom corresponding to their gender identity. It may also include meeting with employees to discuss restroom access for transgender employees and note that harassment will not be tolerated.

If you would like more information, please do not hesitate to contact the author of this alert or your Butzel Long Labor and Employment Attorney.

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