

**PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY**

=====
Meeting Date: October 2, 2007 [] Consent [x] Regular
[] Workshop [] Public Hearing

Department: Administration

Submitted By: Office of Equal Opportunity

I. EXECUTIVE BRIEF

Motion and Title: Staff requests Board direction regarding: amending the Equal Employment ordinance and the Fair Housing ordinance to prohibit discrimination based on "gender identity and expression."

Summary: At the September 11, 2007 meeting of the Board, the Board directed staff to request direction regarding amending the Equal Employment ordinance and the Fair Housing ordinance to prohibit discrimination based on gender identity and expression.

Background and Justification: Staff research discovered that 12 states and the District of Columbia have laws that make it illegal to discriminate against persons on account of gender identity and expression. Additionally, more than 90 cities and counties have enacted nondiscrimination laws that afford similar protections. The term "gender identity or expression" has become the umbrella term of choice for most legislators, the phrase generally has been defined to include those persons whose internal psychological sense of self differs from their external physical sex at birth, who have both male and female physical characteristics, or whose outward expression of gender does not conform to traditional feminine or masculine identities.

Amending the county's Equal Employment and Fair Housing ordinances would make it illegal for Palm Beach County employers and housing providers to discriminate on account of an individual's gender identity or expression. Other governmental entities such as the City of West Palm Beach, Lake Worth and Miami Beach have enacted ordinances prohibiting discrimination based on gender identity or expression. There is no federal law that explicitly affords protection against discrimination on account of gender identity or expression. The Florida Civil Rights Act has been interpreted to provide protection based upon disability discrimination because of gender identity or expression.

The issues to be considered in amending the ordinances to prohibit discrimination based on gender identity and expression include defining the term and determining what conduct will be unlawful.

Attachments:

- 1. Jurisdictions with Explicitly Transgender-Inclusive Nondiscrimination Laws
- 2. Gender Identity and Expression (Employment Law 360 report)

=====
Recommended by: [Signature] 09-19-07
Department Director Date

Approved by: [Signature] 9/27/07
Assistant County Administrator Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

	2008	2009	2010	2011	2012
Fiscal Years					
Capital Expenditures					
Operating Costs					
External Revenues					
Program Income (County)					
In-Kind Match (County)					
NET FISCAL IMPACT	_____	_____	_____	_____	_____

ADDITIONAL FTE
POSITIONS (Cumulative)

Is Item Included In Current Budget? Yes X No

Budget Account No.: Fund 1250 Agency 400 Org. 4251 Object 8201
Reporting Category

B. Recommended Sources of Funds/Summary of Fiscal Impact:


C. Departmental Fiscal Review:

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Dev. and Control Comments:

 _____ OFMB 9/25/07 9/25/11	 _____ Contract Dev. and Control E. Jones 9/26/07
--	--

B. Legal Sufficiency:



 Assistant County Attorney 9/27/07

C. Other Department Review:

Department Director

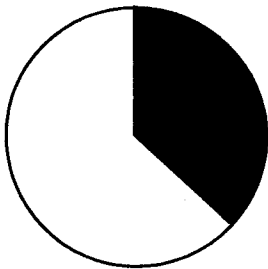
Jurisdictions with Explicitly Transgender-Inclusive Nondiscrimination Laws

National Gay and Lesbian Task Force



■ U.S. Population Covered by a Transgender-Inclusive Nondiscrimination Law: 104,118,084 = 37%

□ U.S. Population Not Covered = 63%
(Total U.S. Population: 281,421,906)



STATE LAWS (13 and D.C.)

California – 33,871,648	Maine – 1,274,923
Colorado – 4,301,261	Minnesota – 4,919,479
District of Columbia – 572,059	New Jersey – 8,414,350
Hawai'i – 1,211,537 (housing and public accommodations only)	New Mexico – 1,819,046
Illinois – 12,419,293	Oregon – 3,421,399 ¹
Iowa – 2,926,324	Rhode Island – 1,048,319
	Vermont – 608,827
	Washington – 5,894,121

CITY AND COUNTY LAWS (91)

In Arizona Tucson: 486,699	In Illinois Carbondale: 20,681 Champaign: 67,518 Cook County: 5,376,741 Incl. Chicago: 2,896,016 Decatur: 81,860 DeKalb: 39,018 Evanston: 74,239 Peoria: 112,936 Springfield: 111,454 Urbana: 36,395	In Michigan Ann Arbor: 114,024 East Lansing: 46,525 Ferndale: 22,105 Grand Rapids: 197,800 Huntington Woods: 6,151 Lansing: 119,128 Saugatuck: 3,590 Ypsilanti: 22,362	In New York Albany: 95,658 Buffalo: 292,648 New York City: 8,008,278 Rochester: 219,773 Suffolk County: 1,419,369 Tompkins County: 96,501 Incl. Ithaca: 28,775	In Pennsylvania Allentown: 106,632 Easton: 26,263 Erie County: 280,843 Harrisburg: 48,950 Lansdowne: 11,044 New Hope: 2,252 Philadelphia: 1,517,550 Pittsburgh: 334,563 Scranton: 76,415 Swarthmore: 6,170 West Chester: 17,861 York: 40,862
In California Los Angeles: 3,694,820 Oakland: 339,337 San Francisco: 776,733 San Diego: 1,223,400 Santa Cruz County: 55,602 Incl. Santa Cruz: 54,593 West Hollywood: 35,716	In Indiana Bloomington: 69,291 Indianapolis/Marion County ² : 781,870	In Minnesota Minneapolis: 382,618 St. Paul: 287,151	In Ohio Cincinnati: 331,285 Toledo: 313,619	In Texas Austin: 656,562 Dallas: 1,188,580 El Paso: 563,662
In Colorado Boulder: 94,673 Denver: 554,636	In Iowa Decorah: 8,172 Iowa City: 62,220 Johnson County: 21,559 ³	In Louisiana New Orleans: 484,674	In Oregon Beaverton: 76,129 Bend: 52,029 Benton County: 78,153 Hillsboro: 70,186 Lake Oswego: 35,278 Lincoln City: 7,437 Multnomah County ⁴ : 660,486 Incl. Portland: 529,121 Salem: 136,924	In Washington King County: 1,737,034 Incl. Burien: 31,881 Incl. Seattle: 563,374 Olympia: 42,514 Tacoma: 193,556
In Florida Gulfport: 12,527 Lake Worth: 35,133 Miami Beach: 87,933 Monroe County: 79,589 Incl. Key West: 25,478 West Palm Beach: 82,103	In Kentucky Covington: 43,370 Jefferson County ² : 693,604 Incl. Louisville ² : 256,231 Lexington-Fayette Urban County: 260,512	In Maryland Baltimore: 651,154	In Wisconsin Madison: 208,054	
In Georgia Atlanta: 416,474		In Massachusetts Boston: 589,141 Cambridge: 101,355 Northampton: 28,978		
		In Missouri University City: 37,428		

¹The Oregon law takes effect January 1, 2008, but may face a challenge if opposition succeeds getting it placed on a ballot measure.

²Metro Louisville, the merged Louisville and Jefferson County government, repassed and combined these laws in 2004 to apply to Metro Louisville. Indianapolis and Marion County's shared governmental structure passed this law.

³The law passed in Johnson County only applies to unincorporated areas of the county, population 21,559, although the national statistics are unaffected because Iowa now has a statewide law.

⁴2,135 Portlanders live outside of Multnomah County and that 2,274 Lake Oswegoans live inside of Multnomah County, however this doesn't affect the national statistics because Oregon now has a statewide law.

NOTE: Only laws that reach private entities are included above. Additional states and cities have policies against discrimination against public employees. Population data from 2000 Census. Last updated July 2007.

EMPLOYMENT LAW360

Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Gender Identity And Expression: The Next Frontier

Portfolio Media, New York (September 4, 2007)

Now more than ever, employers are required to provide an inclusive environment to all employees. State and local legislatures have endorsed increasingly greater protections based upon "gender identity or expression," (i.e. protection against discrimination for "transgender" employees).

While the term gender identity or expression has become the umbrella term of choice for legislators, the phrase generally has been defined to include those employees whose internal psychological sense of self differs from their external physical sex at birth, who have both male and female physical characteristics, or whose outward expression of gender does not conform to traditional feminine or masculine identities.

As a result of this current trend toward greater protection on account of gender identity or expression, employers across the U.S. should review their policies and practices to ensure compliance with new antidiscrimination requirements in their state, county or local municipalities.

*** Protection on Account of Gender Identity or Expression Grows to Include Over One-Third of the U.S. Population ***

The State of Oregon, whose newly-enacted nondiscrimination law will be effective as of Jan. 1, 2008, is the most recent addition to states with explicit nondiscrimination laws that protect employees' gender identity or expression.

By the time Oregon's nondiscrimination law takes effect, twelve states, plus the District of Columbia, will have laws making it illegal for employers to discriminate against employees on account of gender identity or expression. These states include California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington.

Several other states, including Connecticut, Florida, Hawaii, Massachusetts and New York have interpreted statutory bans on sex and/or disability discrimination to protect employees from discrimination based upon gender identity or expression.

In addition to these state-wide protections against gender identity or expression discrimination, more than ninety municipalities have enacted nondiscrimination provisions that afford similar protections for employees.

By virtue of such protections, approximately 37 percent of the U.S. population now is covered by antidiscrimination legislation that provides workplace protection based upon gender identity or expression.[1]

In an effort to fill in the gap left by state and local laws – and in the absence of federal

law providing explicit protection against gender identity or expression employment discrimination – individual employers increasingly are expanding their workplace non-discrimination policies to include gender identity and expression.

According to a recent report by the Human Rights Campaign Foundation, the number of Fortune 500 companies that ban workplace discrimination against Americans because of gender identity or expression has risen 60 percent since January 2006 and quadrupled since 2003.[2]

*** Expanded Protections Based Upon Gender Identity or Expression ***

Each of the states and municipalities providing protection on account of gender identity or expression define those terms slightly differently. While the specifics of the various state and municipal legal protections differ, in general the following individuals are protected from discrimination by employers:

Individuals whose gender identity - that is, their internal psychological sense of self - differs from their external physical sex at birth, including those individuals who are preparing to undergo, are undergoing, or have undergone, gender-affirming modification to their bodily appearance and/or function;

Intersex individuals who may have both male and female physical characteristics and/or who have sex chromosomes that differ from the female (XX) or male (XY) "norm";

Cross-dressers; and

Individuals whose gender expression does not conform to traditional feminine or masculine identities.

As a general rule, employers in states or municipalities that recognize gender identity or expression as a protected class should consider all employees covered, whether they have a typical or nontypical gender identity or expression.

*** Typical Prohibitions on Hiring and Employment Practices ***

States and municipalities that do afford protection based upon gender identity or expression generally make it illegal for employers to make hiring or other employment decisions premised upon an individual's gender identity or expression. The specific provisions vary from state to state.

For example, Oregon's nondiscrimination provision makes it impermissible for an employer to hire, fire, or discriminate against an individual in compensation or other terms of employment; for a labor organization to exclude or expel an individual; for an employer, employment agency, or labor organization to limit prospective employment opportunities for an individual; or for an employment agency to refuse to refer an individual for employment on account of that individual's "sexual orientation."

Oregon law defines sexual orientation to include an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.[3]

In Iowa, where the antidiscrimination provision was revised effective July 1, 2007, the following employment practices are considered unfair or discriminatory: (1) for any person to make any hiring or other employment decision based upon an applicant's or employee's membership in a protected group; (2) for any labor union to refuse to admit as a member any individual because of a protected ground; or (3) for an employer, employment agency, or labor organization to indicate that an individual belonging to a protected group is unwelcome. Iowa law includes "gender identity" in its list of protected groups. Much like other state's laws, which generally apply only to certain employers, depending upon size, Iowa's nondiscrimination provision, applies only to employers with

four or more employees.[4]

New Jersey's Law Against Discrimination ("NJLAD") recently was amended to include gender identity or expression. Effective June 17, 2007, the NJLAD made it illegal for employers to refuse to hire, employ, discharge or require to retire an individual based upon that person's gender identity or expression.

It further prohibits discrimination by employers premised upon these protected characteristics with respect to compensation or other terms, conditions or privileges of employment.

The NJLAD also prohibits the printing or circulation by an employer any statement, advertisement or other publication that expresses, either directly or indirectly, limitations on employment opportunities based upon one of the protected characteristics. This includes an employer's applications for employment or other pre-employment inquiries or practices.[5]

Other states and municipalities' nondiscrimination statutes include similar protections for employees on account of gender identity or expression. Employers should take care to review the nature of protections to which their employees may be entitled.

*** Federal Protection Against Gender Identity or Expression Discrimination ***

At the national level, there currently is no federal law that explicitly affords protection against employment discrimination on account of gender identity or expression. Nevertheless, a growing number of courts have begun to recognize that individuals who do not conform to traditional gender stereotypes or gender-normative behavior may be protected under Title VII's prohibitions against gender discrimination.[6]

In addition, at least one federal court in Ohio has determined that discrimination against males who dress in attire more typical of females was a form of gender discrimination under federal law.[7]

While federal case law continues to evolve in this area, what remains clear is that employees pursuing such claims of discrimination under Title VII must demonstrate that any allegedly discriminatory employment decisions were motivated, at least in part, based upon the individual's gender identity or expression.

Nevertheless, as the U.S. Supreme Court has reconfirmed, an employee may do so either by direct or circumstantial evidence and an employer's "incredible" explanation for the treatment toward the employee may be probative of intentional discrimination.[8]

On the other hand, the Americans with Disabilities Act (ADA) specifically excludes from its protections "transvestism, transsexualism...gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."

Most experts agree this language in the ADA precludes protection for individuals on account of gender identity, including those suffering from mental disabilities as a result of the severe distress caused by the conflict between their gender identity and their sex at birth.

The language of the statute does leave open the question of whether an argument can be made that gender identity disorders which are the result of physical impairments may be covered by the ADA.

The lack of explicit federal legislation has prompted the expected introduction of the Employment Non-Discrimination Act of 2007 (ENDA), which Congress likely will consider in the next legislative session. If passed in its current form, ENDA would prohibit employers throughout the U.S. from using an individual's gender identity or expression as the basis for adverse or disparate treatment in employment or employment opportunities.

*** Impact of the New Protections on the Workplace ***

*** Grooming & Dress Standards ***

Under the various state and local protections afforded to employees on account of gender identity or expression, employers generally are permitted to require all employees to adhere to reasonable workplace appearance, grooming and dress standards.

However, employers must permit employees to appear, groom and dress consistent with their gender identity or expression. In at least one municipality, employers actually may insist that employees have "a reasonably consistent gender presentation in the workplace."^[9]

Some employee advocates have expressed concern that employers may seek to use existing workplace appearance, grooming and dress standards to perpetuate policies and practices that no longer are permissible under existing state or local law.

In turn, some employer advocates have worried that employees will try to use existing or newly-enacted provisions to come to work dressed flamboyantly or to make a political statement regarding the irrelevancy of gender norms.

As a result, employers must take care to balance these concerns by scrutinizing existing policies to ensure compliance with both the letter and spirit of applicable nondiscrimination provisions, while requiring employees to comply with reasonable workplace-appropriate appearance, grooming and dress standards.

*** How Do Employers Resolve Facilities Usage Issues ***

Under federal law, and most states' laws, employers are required to provide all of their employees with reasonable access to restroom facilities.

However, restroom access for gender transitioning or gender affirmed employees can be an extremely sensitive issue. At the same time, employers must be concerned about the privacy rights of coworkers with respect to bathroom usage.

As a general matter, usage policies for restrooms and locker room facilities is within the discretion of the employer, so long as those policies do not contravene applicable law.

In many jurisdictions, the law permits some flexibility to employers when designing their policies pertaining to facilities usage. In Minnesota, for example, an employer may establish policies relating to restroom access based upon an individual's physical anatomy, as opposed to gender presentation, so long as the employer applies such policies consistently.^[10]

Policies designating bathroom and locker room access on the basis of genitals alone may raise other unintended problems for employers, including placing employers in the untenable position of having to verify the physical anatomy of all of its employees. To maintain "best practices" in this area, employers should work with their employees and legal counsel to devise practical solutions to ensure restroom access for all.

*** Employers Should Revise Their Policies and Procedures ***

Employers in the jurisdictions referenced above should review carefully and revise their antidiscrimination provisions and other policies to ensure compliance with the growing number of laws relating to gender identity and expression. Possible policies that may require modification include, but are not limited to:

Dress codes and other appearance standards;

Policies and procedures for changing identification cards, personnel records, name changes, and issuance of new email addresses;

Policies with respect to nondisclosure of medical information and/or relating to general employee privacy;

Pre-employment screening and background or security clearance policies and procedures;

Provision and usage of bathroom, locker room, and other gender-specific facilities;

Codes of conduct between employees as well as between employees and customers.

Employers also should incorporate discrimination and harassment issues relating to gender identity and expression into any employee and manager training.

In addition, employers in the jurisdictions mentioned may be required to modify benefits they offer to their employees in order to comport with state and/or local law.

Such policy changes may include removing exclusions from company-provided health care and short-term disability coverage for certain procedures that are medically necessary for employees in the process of gender affirmation/transitioning.

Changes also may include modifying health- or disability-related leave policies to allow transitioning employees to take leave associated with medically necessary procedures.

Gender-affirmed employees who are married or whose civil union or domestic partnership is recognized under state law may be entitled to employment benefits similar to those afforded to other employees' spouses and partners.

Therefore, employers must take care to ensure a transitioning employee's spouse or partner is treated equitably to the extent required by law.

Employers might consider having internal resources available to be ready to respond when an employee approaches human resources to begin their gender transition/affirmation. Such resources include Employee Assistance Program (EAP) contact information, as well as contact information for diversity resources and the company's leave and insurance administrators.

Employers also may wish to consider creating guidelines that specify the steps to be followed for gender transitions/affirmations by company employees.

Experience has shown that, once coworkers are educated about the real facts concerning gender identity, any apprehension by employees dissipates rapidly and the presence of "transgender" individuals in the workplace presents no serious issues.

Forward thinking managers and human resource personnel can ensure continued compliance with developing legal requirements through a combination of advance planning, revised policies and procedures, and employee and supervisory training.

--By Lee Schreter and Denise M. Visconti, **Littler Mendelson**

Lee Schreter is a shareholder in the Atlanta office of Littler Mendelson. Denise M. Visconti is an associate in the firm's San Diego office.

[1] For the most current list of jurisdictions, see www.thetaskforce.org/all_jurisdictions.

[2] For a complete copy of the Human Rights Campaign Foundation's State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans 2006-2007, see www.hrc.org.

[3] See Or. Rev. Stat. §§ 659A.030 et seq.

[4] See Iowa Stat. § 616.6 et seq. On the other hand the nondiscrimination provisions in Colorado, Maine, Minnesota,, New Jersey, Oregon and Vermont apply to all employers, regardless of size.

[5] See N.J. Rev. Stat. Ann. §§ 10:5-5, 5-12.

[6] See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding harassment directed at a person because they do not conform to traditional sex stereotypes covered by Title VII); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (ruling that gender stereotype-based sexual harassment against a gender-nonconforming employee may violate Title VII); *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257 (2nd Cir. 2002) (holding that a claim of sex discrimination may be sustained where the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender); *Barnes v. Cincinnati*, 401 F.3d 729, 735 (6th Cir. 2005), cert. denied, 126 S. Ct. 624 (2005) (finding potentially unlawful a police sergeant's demotion because he wore makeup at work and while off duty and failed to "act in masculine ways"). See also *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (reinstating an Equal Credit Opportunity Act sex discrimination claim on behalf of biologically male plaintiff who alleged he was denied an opportunity to apply for a loan because he was not dressed in "masculine attire").

[7] See *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004).

[8] See *Desert Palace v. Costa*, 539 U.S. 90 (2003) (holding that direct evidence is not required to prove discrimination where the employee presents multiple reasons for an adverse employment action, at least one of which is unlawful); *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000).

[9] See Denver Revised Muni. Code, Ch. 28, Art. IV, Sec. 28-93(8).

[10] See *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

All Content Copyright 2007, Portfolio Media, Inc.