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S.C. Municipal Human Resources Association – 2023 Spring Meeting  
Legal Issues with Transgender Employees and Applicants  
Kevin W. Sturm

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**OVERVIEW**

- LGBTQIA legal issues are in flux and will evolve
- Issues related to what books children should read, restrictions of transitioning minors/adults and transitioned individuals playing sports against those of the sex the individual was not born with are irrelevant to our discussion today.




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**DEFINITIONS**

- L: Lesbian
- G: Gay
- B: Bisexual
- T: Transgender
- Q: Queer/Questioning
- I: Intersex
- A: Asexual




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**DEFINITIONS**

- Gender Identity – sense of being either male or female, regardless of physical anatomy
- Sexual Orientation – the type of sexual or romantic attraction that one feels – whether to the same sex or the opposite sex
- Gender stereotypes – assuming that persons should act a certain way based upon their sex.



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**CURRENT STATE OF THE LAW**

- South Carolina Human Affairs Law does not currently identify sexual orientation or gender identity as protected classes.
- However, the Supreme Court has spoke on the issue.



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**Bostock v. Clayton County**  
June 15, 2020

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## Bostock

Held: The prohibition against sex discrimination in Title VII includes employment discrimination against an individual on the basis of sexual orientation or transgender status.

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## So Now Things are Different in South Carolina

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### EEOC's Examples of Discrimination

- Failing to hire an applicant because she is a transgender woman
- Firing an employee because he is planning or has made a gender transition
- Denying an employee equal access to a common restroom corresponding to the employee's gender identity
- Harassing an employee because of a gender transition, such as by intentionally and persistently failing to use the name and gender pronoun that corresponds to gender identity
- Denying an employee, a promotion because he is gay or straight
- Discrimination in terms and conditions of employment or denying spousal recognition of benefits
- Harassing or discriminating against an employee because of sexual orientation or gender identity
- Contending it is a disability.

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**ISSUES**

- Bathrooms
- Names
- Pronouns
- Records regarding gender identity
- Process of Transitioning
- Attitude of other employees, managers and Council Members

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**OSHA  
Guidance -  
Bathrooms**

- Core principle: "All employees, including transgender employees, should have access to restrooms that correspond to their gender identity."
- Sanitation Standard 1910.141(c)(1)(ii)
  - Total facilities for each sex
  - Can be accessed when employees need them
- Restroom access is a safety matter because "it is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives."
- 700,000 transgender – 22% denied access to gender appropriate restrooms
- [www.osha.gov/Publications/OSHA3795.pdf](http://www.osha.gov/Publications/OSHA3795.pdf)

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**What can an  
Employer do?**

- Single-occupancy gender-neutral (unisex) facilities
- Multiple-occupant, gender neutral restroom facilities with lockable single occupant stalls
- Multiple occupant but gender segregated restrooms add privacy features such as flaps to cover gaps in stall doors or stall walls and doors that extend from floor to ceiling.

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**Employers  
Should NOT**

- Ask an employee to provide any medical or legal documentation of the employee's gender identity.
- Ask an employee to use a segregated facility apart from other employees because of the employee's gender identity or transgender status
- Deny an employee access to a common restroom corresponding to the employee's gender identity.

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**Name**

**How to respond to a transgender employee's request for a name change?**

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**Required Documents**

- IRS requires the name on an employee's W-2 form to match the name on the social security card. These records can be changed when the employee has completed a legal name change.
- Benefit documents typically should reflect legal name to ensure proper claim handling.
- A note can be placed with internal records for preferred name.

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**Name Changes (continued)**

- Handle name change the same way you would handle a request from any other employee.
- Email addresses, business cards, nameplates, schedules, company ID cards, etc. should reflect name change the way other employees are permitted to use nicknames, etc.

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**PREFERRED PRONOUNS**

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- HE/HIM/HIS, SHE/HER/HERS
- THEY/THEM/THEIRS
- CASE LAW

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**DOCUMENTATION**  
What kind of documentation may an Employer require a transitioning employee to provide?

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- Employers cannot ask for any documentation they do not request from other employees under similar circumstances.
- FMLA
- Medical leave/doctors' notes

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**ADA and FMLA**

Does the ADA and its Accommodation Analysis Apply?

Is transitioning healthcare or surgery a "serious health condition" under the FMLA?

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DRESS CODE?

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WHAT ABOUT RELIGIOUS OBJECTIONS?

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Policies  
Are employers required to amend their anti-discrimination and anti-harassment policies?

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# Suggestions

- Harassment and Discrimination Policies
  - Periodic Training on harassment and discrimination
  - Train supervisors on how to treat employees
  - Enforce policy
  - Discipline violations
- Adopt gender neutral dress codes
- Address bathroom issue
- Recognize gender identity and use pronouns
- Consider assigning someone in the HR office to work with those employees who are transitioning if they request it.

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