



Gender Identity and Expression in the Workplace — A Pragmatic Guide for Lawyers and Human Resource Professionals

Christine Michelle Duffy

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The views expressed herein are those of Ms. Duffy and not necessarily those of any of her past or present employers or clients.

An abbreviated version of this article will be published in the July/August 2011 issue of the [ACC Docket](#), the journal of the [Association of the Corporate Counsel](#). The unabridged version of the article was updated 10 days after the abridged version was finalized, so the unabridged version contains a few additional developments. Web links in this unabridged article were last verified as functioning on June 21, 2011.

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The setting

It is 6:30 AM and Kevin, the chief compliance officer, is anxiously awaiting the arrival of Ralph, the general counsel. As Ralph walks by, Kevin shouts out, “Ralph, we need to talk, when you have a moment — I’ve got some important developments to tell you about.” Sensing something is wrong, Ralph says he will be back in a minute.

Ralph returns and sits down. “What’s up?” Ralph has never seen Kevin nervous before, and is not sure what to make of it. “Ralph, I need to discuss something personal with you, and I trust you will handle this appropriately.” Kevin did not need to say the last item to Ralph, but he remembered an earlier GC who could not keep juicy personnel issues a secret. What Kevin is about to tell Ralph is one genie that will never get back in the bottle: If Kevin’s personal info is handled appropriately from the start, then potential complications can be avoided.

“Ralph, I’m *gender dysphoric*.” Gasping for air, Kevin continues and explains. Ralph listens intently for 15 minutes or so. He recommends, and Kevin agrees, that they should bring in Helen, the astute senior vice president for Human Resources (HR). Ralph says he will reach out to Helen for a lunch meeting.

Ralph asks how Kevin’s family is handling the news. “It has been difficult for everyone,” Kevin responds, adding that his wife and daughter have been wonderfully supportive. “They have the more difficult road to travel. This is all new to them, whereas I’ve been struggling internally with my gender dysphoria for 50 years.”

Ralph returns to his office, trying to get his hands around what he just learned. His first thoughts might have ranged from:

1. Not on a Monday morning!
2. I had better go home tonight and watch the two funniest movies of all time — *Some Like It Hot* and *Tootsie*.¹

¹ See *The 100 Funniest American Movies Of All Time*, American Film Institute (June 14, 2000), available at www.afi.com/100Years/laughs.aspx.

3. Do I raise this in one hour, during our weekly executive team conference call? No, of course not!
4. Kevin as a woman? How will senior management and regulators Kevin interacts with react to this?
5. Kevin as a woman? Well, this accounts for some of Kevin's less-than-masculine gender expression.
6. What is that case ... PriceWaterhouse Hopkins?² I normally would ask Kevin for guidance, as he is the labor and employment expert. Well, thankfully Helen is top flight.
7. Okay, okay, no big issue. Some say Mona Lisa was actually a guy, Sonny and Cher's Chastity is now Chaz, and iconic Jane Fonda struggled with her gender identity for years.³
8. Wow, I was not expecting that. Good for Kevin. She is lucky she works for a company that takes its respect in the workplace policy seriously.

Introduction

This article will take you through many of the issues that Ralph and Helen likely had to address during the following weeks. First, I will discuss terminology and the power of words. Second, I will overview the medical aspects of gender dysphoria — a *physical condition with possible secondary psychiatric overlays*. Third, I will survey the relevant federal, state, and local laws that may apply in the workplace — *over two-thirds of the U.S. population is located in jurisdictions that bar discrimination on the basis of gender identity or expression*. Finally, I will review many of the HR issues that typically arise and offer strategies for addressing them — *at least 43 percent of Fortune 500 companies expressly bar discrimination on the basis of gender identity or expression*. I

² *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), available at www.law.cornell.edu/supct/html/historics/USSC_CR_0490_0228_ZS.html.

³ See Nick Squires, *Mona Lisa "was a boy,"* The Telegraph (February 2, 2011), available at www.telegraph.co.uk/culture/art/art-news/8299190/Mona-Lisa-was-a-boy.html; *From Chastity to Chaz: Bono Speaks Out*, CBS News (October 29, 2009), available at www.cbsnews.com/stories/2009/10/29/earlyshow/leisure/celebspot/main5449093.shtml; *Becoming Chaz*, Oprah Winfrey Network (May 10, 2011), available at www.oprah.com/own-doc-club/Sneak-Peek-Becoming-Chaz; Rebecca Traister, *Lady Jane*, Salon (April 5, 2005), available at www.salon.com/life/feature/2005/04/05/jane/print.html; Jane Fonda, *My Life So Far*, Random House, pp. 90-91, 95 (2005).

include reasons why Kevin's situation is nothing to worry about and should be embraced by the organization.

Before we start this journey, let me disclose that I am Kevin, well at least that was the name my parents gave me many years ago. I am well suited to be your tour guide. I've counseled *Fortune 500* companies for nearly 30 years; first as a lawyer for a preeminent regional law firm, then as the chief compliance officer and labor and employment counsel for a set of leading international environmental services companies, and currently as an unpaid advisor to legal and HR professionals who ask me for guidance on situations they confront.

I have written and lectured extensively on employment law, including a thorough analysis of the oldest and one of the broadest multipurpose anti-discrimination laws in the United States, the New Jersey Law Against Discrimination (NJLAD).⁴ I am on the Board of Visitors at Fenway Health in Boston, the leading medical center dedicated to the healthcare issues of gender and sexual minorities.

I have travelled a journey that is hard to understand, even for someone who has been through it.⁵ In these pages, I hope to make sense of it for you, and to offer employers and employees pragmatic solutions for dealing with gender identity and expression in the workplace. The good news is that employers do not have to do much if they already have effective respect in the workplace policies in place, a fact that helped me when I spoke with Ralph, Helen, and nearly every other person I came out to.

⁴ The New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 et seq., was enacted in 1945. Not surprisingly, New Jersey and New York squabble over which state was the first to have a comprehensive anti-discrimination law. Compare J. Frank Vespa-Papaleo, *Sixty Years Old and Going Strong: The NJ Law Against Discrimination*, New Jersey Division on Civil Rights Outreach Newsletter, at p. 3 (Spring 2005) (noting that the NJLAD is "the nation's oldest state civil rights statute"), available at www.nj.gov/oag/dcr/downloads/newsletter/dcr_outreach_spring_05.pdf, with *Basic Guide*, New York State Division of Human Rights, at p. 5 (2011) ("the New York State Legislature passed what was the first civil rights law in the country," referring to the New York Law Against Discrimination, which later was renamed as the New York Human Rights Law, codified in N.Y. State Executive Law, Article 15), available at www.dhr.state.ny.us/Basic_guide/basicguide.pdf. The debate over which law was first relates to the fact that the New York law, L.1945, c.118, was enacted on March 12, 1945, with an effective date of July 1, 1945, whereas the New Jersey law, L.1945, c.169, was enacted on April 16, 1945, with an effective date of April 16, 1945.

⁵ For recent studies concerning discrimination against people because of their gender identity or expression, see Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Gay and Lesbian Task Force and National Center for Transgender Equality (2011), available at www.thetaskforce.org/reports_and_research/ntds and www.transequality.org/PDFs/NTDS_Report.pdf; Jody L. Herman, *The Cost of Employment Discrimination Against Transgender Residents of Massachusetts*, The Williams Institute at UCLA School of Law (April 2011), available at www3.law.ucla.edu/williamsinstitute/pdf/MATransEmpDiscrimFINAL.pdf.

Terminology and the power of words

When I started my process of gender affirmation, I was literally clueless. With one exception, I had never read any books or searched the internet for information about my condition.⁶ It was when I was in a *Barnes & Noble* one evening that I had my breakthrough. A new book, *Dark Nights of the Soul*,⁷ had just been published and was on special display in the store. The title grabbed my attention, as it so aptly summarized the way I had felt most of my life.

As I scanned through the pages, I came across Thomas Moore's discussion of Jan Morris, a noted travel writer and a gender-affirmed woman who had written the autobiography *Conundrum*.⁸ I had heard of only three "trans" people before — Renée Richards, Carolyn Cossey, and Christine Jorgensen⁹ — but they never registered with me as real people, perhaps because of their celebrity status, the derogatory comments about them, and my deep denial of my inner feelings. But now I had just read a *Catholic theologian* talking positively about a person like me, a woman who had come out of her dark night.

My moment of truth had arrived; I finally accepted that I am normal.¹⁰ I had been living a split life emotionally, denying all aspects of my gender identity in my surface life, while being torn apart in silence in my inner life. For nearly 50 years, I never told another person that I had these deep, bizarre feelings about my gender.

⁶ The one book I did read, as a teenager, denigrated and mocked people such as me. See David R. Reuben, *Everything You Always Wanted to Know About Sex (But Were Afraid to Ask)*, Bantam Books, pp. 185-86 (1969). The book was clearly authoritative; after all, it was a nationwide bestseller and, more important, the younger of my older sisters had lent it to me. After reading this book, I knew I could never tell another person about the strange feelings I had.

⁷ Thomas Moore, *Dark Nights of the Soul: A Guide to Finding Your Way Through Life's Ordeals*, Gotham Books, pp. 182-84 (2004)

⁸ Jan Morris, *Conundrum: From James to Jan - An Extraordinary Personal Narrative of Transsexualism*, Harcourt Brace Jovanovich (1974).

⁹ See Renée Richards, *Second Serve: The Renée Richards Story*, Stein & Day Publishers (1983); Renée Richards, *No Way Renée: The Second Half of My Notorious Life*, Simon & Schuster (2007); Tula (Caroline Cossey), *I Am a Woman*, Sphere Books (1982); Caroline Cossey, *My Story*, Faber & Faber Limited (1991); Christine Jorgensen, *Christine Jorgensen: A Personal Autobiography*, Paul S. Eriksson Publishers (1967).

¹⁰ As Jane Pauley notes in her autobiography: "Truth arrives in microscopic increments, and when enough has accumulated, in a moment of recognition, you just know. You know because the truth fits." Jane Pauley, *Skywriting: A Life Out of the Blue*, Random House, p. 1 (2004).

When I finally started doing some homework after reading *Dark Nights*, the initial resources I read all pointed me to the same “must read” books. Each book, with supposed authority, used words that described who I am (i.e., “male-to-female transsexual”) and the medical condition I had (i.e., “transsexualism”). So I adopted those words, as part of my lexicon.

Within a year, as I read more, and spoke with others within the LGBT community and health professionals, I realized that the initial words that I had been provided simply did not fit who I am, or my medical reality. Those words made me seem like two distinct people, transitioning from one to the other. Words that described me first and foremost as a psychiatric problem, a person with a mental disorder.

What I quickly learned is that I am the same person I have always been. I did not have a psychiatric condition; I had a correctable physical condition. Looking back, after a period of time to reflect, these stark findings ring true even more so today.

When you read articles, books, and case law, or watch videos, about gender identity, keep in mind that many authors cling to terms they have simply inherited or that are out-of-date. Many authors do so because they have not thought about the words they are using or have not personally experienced a gender affirmation.

Some of the LGBT advocacy groups add to the problem. For example, one leading group has had no problem referring to people as “transsexuals,” yet does not refer to its core constituents as “homosexuals.” Ironic, actually, given that “sexual” has something to do with sexual orientation and nothing to do with gender identity. These groups should use neither term.

Some legislatures have added to the confusion. In amending their anti-discrimination laws to add gender identity or expression, they merely amended the definition of the term “sexual orientation” to include gender identity or expression, despite the fact that the two concepts are distinct.¹¹ Gender identity is not a subset of sexual orientation.

The New Jersey Legislature got it right in this respect. It added a new definition to the New Jersey Law Against Discrimination (NJLAD), which reads:

“Gender identity or expression” means having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person’s assigned sex at birth.¹²

¹¹ See *State by State Guide to Laws That Prohibit Discrimination Against Transgender People*, National Center for Lesbian Rights (2010), available at www.nclrights.org/site/DocServer/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf?docID=7821.

¹² N.J.S.A. 10:5-5(rr); L. 2006, c.100, §4, available at www.njleg.state.nj.us/2006/Bills/AL06/100_.PDF.

(footnote continues on next page)

The New Jersey Legislature rejected an attempt to include the words “transgender status” in the definition of “gender identity or expression,” recognizing, among other things, that (1) all people have gender identities and expressions, not just “transgender” people, and (2) the word “transgender” has no accepted or static definition.

Fenway Health, the leading medical center dedicated to LGBT healthcare issues, has a *Glossary of Gender and Transgender Terms* that reflects the wide diversity of terminology in use today and highlights terms that should be avoided.¹³ The *Glossary* starts with the following introduction:

The purpose of this Glossary is to help explain gender and transgender terms that may be unfamiliar or confusing to clinicians who care for transgender clients. We acknowledge that there is a wide divergence of opinion with respect to the best terms to use when discussing transgender issues.

* * *

On May 2, 2011, Hawaii amended its law to expressly bar employment discrimination on the basis of gender identity or expression. The new law defines “gender identity or expression” to mean “a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.” Hawaii Act 034, §3 (May 2, 2011), available at www.capitol.hawaii.gov/session2011/bills/HB546_SD1_.pdf.

On May 24, 2011, Nevada amended its law to expressly bar employment discrimination on the basis of gender identity or expression. The new law defines “gender identity or expression” to mean “a gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth.” Nevada Law 2011, Chapter 112, §5 (May 24, 2011), available at www.leg.state.nv.us/Session/76th2011/Bills/AB/AB211_EN.pdf.

On June 14, 2011, Connecticut amended its law to expressly bar employment discrimination on the basis of gender identity or expression. The new law defines “gender identity or expression” to mean “a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth” Connecticut Public Act 11-55, §1 (June 14, 2011), available at www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=6599&which_year=2011&SUBMIT1.x=9&SUBMIT1.y=9&SUBMIT1=Normal and www.cga.ct.gov/2011/ACT/PA/2011PA-00055-R00HB-06599-PA.htm.

¹³ *Glossary of Gender and Transgender Terms*, Fenway Health (rev. January 2010), available at www.fenwayhealth.org/site/DocServer/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms_.fi.pdf?docID=7081. I served as the editor-in-chief of the revised *Glossary*.

Be careful not to make assumptions. The best advice is to **listen to your clients – what terms do they use to describe themselves and their lives, what pronouns do they use, what words do they use to explain their medical needs?** If you are not sure what terms to use, be forthright and ask your clients what terms they prefer. Through asking questions and carefully listening to your clients, you will convey a welcoming attitude and thereby help your clients feel more accepted and comfortable.¹⁴

Some of the key terms from the *Glossary* are set forth in the attached *Appendix*. One of the major takeaways from all the definitions is that gender identity, gender expression, sexual orientation, and biological sex are very distinct concepts, but ultimately they are interrelated in a four-dimensional matrix, where each person finds a place on each of the four continua, creating a unique point that represents the special person that person is. And that point can, and does, change over time as we experience life. By recognizing our diversity, we see our similarity in our common humanity.

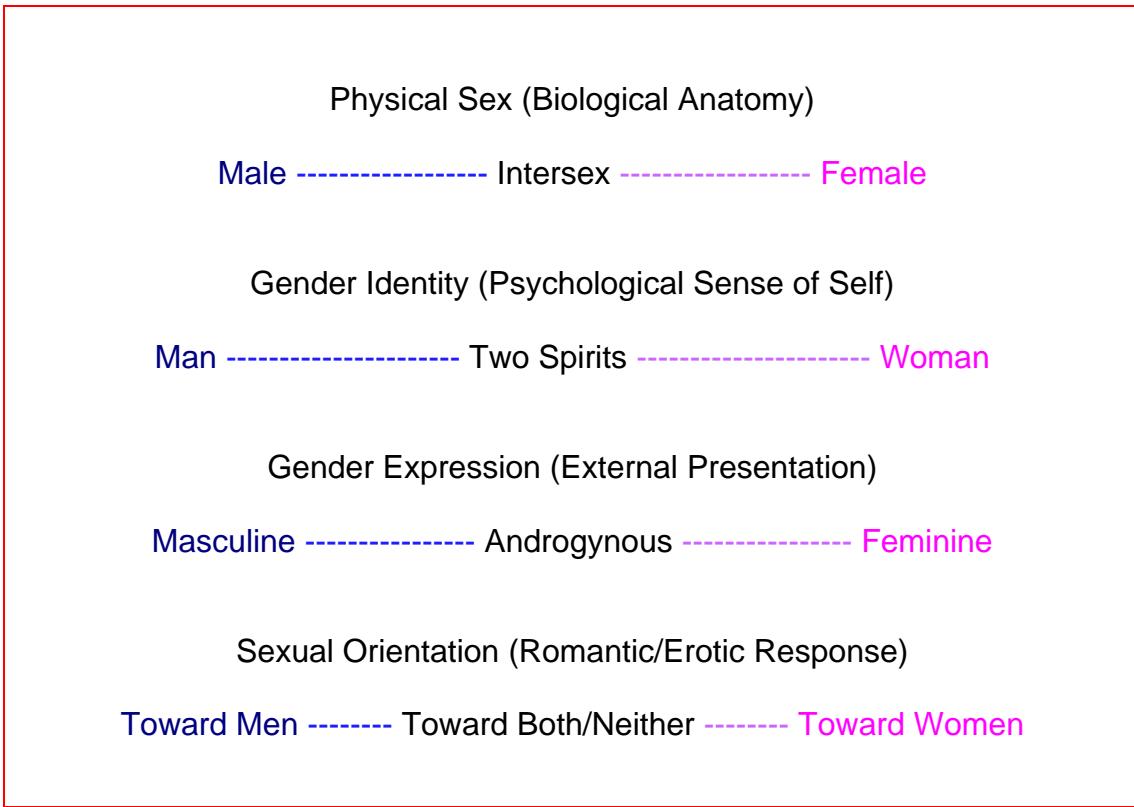
This can be graphically shown as follows:¹⁵

¹⁴ *Glossary of Gender and Transgender Terms*, Fenway Health, p. 2 (rev. January 2010), available at www.fenwayhealth.org/site/DocServer/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms_fi.pdf?docID=7081.

¹⁵ Adapted from Raytheon Company employee Amanda Simpson's presentation *Gender Identity and Expression and the Workplace*, slide 26, at the Out & Equal Workplace Summit 2004, previously, but no longer, available at www.outandequal.org/summit/2004/documents/Gender%20Identity%20and%20Expression%20in%20the%20Workplace.pdf. The landing page for the 2004 workshop presentations, which includes Ms. Simpson's PowerPoint, is archived at <http://replay.waybackmachine.org/20061006164612/http://www.outandequal.org/summit/2004/default.asp>.

Ms. Simpson is believed to be the first openly gender-affirmed person to be appointed to a governmental position by a United States President. See Russell Goldman, *First Transgender Presidential Appointee Fears Being Labeled “Token,”* ABC News (January 5, 2010), available at <http://abcnews.go.com/Politics/amanda-simpson-transgender-presidential-appointee-begins-work-commerce/story?id=9477161>.

There are numerous other continua, including ancestry, attractiveness, cognitive ability, color, culture, disability, education, inheritance, national origin, physical size, race, and religion, on which individual differences can be mapped.



Employers should avoid the words “tranny” and “queer.” Some people within the gender and sexual minority communities use these terms as words of empowerment, but criticize members of the majority if they use the same words. Others within these communities, however, find these terms highly offensive. Thus, the safest course is not to use these terms at all.¹⁶

When I introduce myself in circumstances where I disclose my past (for example, seeing a new medical doctor or doing educational outreach), no one has had any difficulty understanding what I am saying when I use words of affirmation as opposed to words that start with “trans.” And, more important, the conversation invariably is more positive because the conversation has not been instantaneously prejudiced with the baggage and stereotypes that words such as “transsexual” carry.

¹⁶ See *Words Can Hurt – Trans and Intersex Slurs* Video (2011), available at www.youtube.com/watch?v=1y9oQThUHRc&feature=youtu.be. See also the Special Olympics’ campaign to end the *R-word*, at www.r-word.org, and its 2011 public service announcement video, *Not Acceptable*, at www.r-word.org/r-word-not-acceptable-psa.aspx and www.youtube.com/watch?v=T549VoLca_Q.

Medical aspects of gender dysphoria

Until recently, many in the healthcare community treated gender dysphoria as a psychiatric condition. Over time, however, healthcare practitioners have begun to see gender dysphoria as a physical condition, which, as is the case with other physical conditions, may cause secondary psychiatric overlays.

The American Psychiatric Association (APA) publishes the *Diagnostic and Statistical Manual of Mental Disorders (DSM)*, now in its fourth edition (*DSM-IV-TR*). According to *DSM-IV-TR*, gender identity disorder (GID) is the diagnosis used when a person has a strong and persistent cross-gender identification and persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex, and the disturbance is not concurrent with physical intersex condition and causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.¹⁷

The APA is working on *DSM-5*, which, in its February 2010 draft form,¹⁸ renames GID “gender incongruence” (GI) because this new label “better reflects the core of the problem: an incongruence between, on the one hand, what identity one experiences and/or expresses and, on the other hand, how one is expected to live based on one’s assigned gender (usually at birth)....”¹⁹ The revision also shifts the discussion from sex

¹⁷ See *DSM-5 Development: 302.85 Gender Identity Disorder in Adolescents or Adults*, American Psychiatric Association (2010), available as modified at www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482 (look under the “DSM-IV” tab).

¹⁸ See *APA Announces Draft Diagnostic Criteria for DSM-5*, American Psychiatric Association (February 10, 2010), available at www.dsm5.org/Newsroom/Documents/Diag%20%20Criteria%20General%20FINAL%202.05.pdf.

¹⁹ *DSM-5 Development: 302.85 Gender Identity Disorder in Adolescents or Adults*, American Psychiatric Association (2010), available as modified at www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482 (look under the “Rationale” tab).

The February 2010 proposed new diagnostic standard reads:

Gender Incongruence (in Adolescents or Adults)

- A. A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by 2 or more of the following indicators:
 1. a marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics (or, in young adolescents, the anticipated secondary sex characteristics)

(footnote continues on next page)

to gender, eliminates the intersex disqualifier, reflects that gender dysphoria can be eliminated by transitioning and living in the gender that matches a person's gender identity, and notes the growing understanding that gender is not simply a question of being either male or female.²⁰

In May 2011, a second draft of *DSM-5* was released. Several changes were made. First, the term "gender incongruence" has been replaced with "gender dysphoria." Second, a "B" criterion has been inserted, to reflect that the diagnosis is reserved for

-
2. a strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or, in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics)
 3. a strong desire for the primary and/or secondary sex characteristics of the other gender
 4. a strong desire to be of the other gender (or some alternative gender different from one's assigned gender)
 5. a strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender)
 6. a strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender)

DSM-5 Development: 302.85 Gender Identity Disorder in Adolescents or Adults, American Psychiatric Association (2010), available as modified at www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482 (look under the "Proposed Revision" tab).

In May 2011, a second criterion was added:

- B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning, or with a significantly increased risk of suffering, such as distress or disability

DSM-5 Development: P 01 Gender Dysphoria in Adolescents or Adults, American Psychiatric Association (2011), available at www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482 (look under the "Proposed Revision" tab).

²⁰ *DSM-5 Development: 302.85 Gender Identity Disorder in Adolescents or Adults*, American Psychiatric Association (2010), available as modified at www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482 (look under the "Rationale" tab). In June 2011, the editors of the *Oxford English Dictionary* added "gender reassignment" to the highly-respected dictionary, reflecting the shift away from the term "sex change," as well as the shift in emphasis from sex to gender. See *Gender*, *Oxford English Dictionary*, Oxford University Press (June 2001), available at www.oed.com/view/Entry/77468; *New words June 2011*, *Oxford English Dictionary*, Oxford University Press (June 2001), available at www.oed.com/public/newwords0611.

“clinically significant distress or impairment in social, occupational, or other important areas of functioning, or … a significantly increased risk of suffering, such as distress or disability.” Third, a “specifier” has been added, to account for the fact that after transition, a gender-affirmed person generally does not have gender dysphoria, but still may have a continuing need for medical assistance (such as hormone treatment or intermittent psychotherapy because of negative “social consequences” of the transition). These changes are designed to eliminate “individuals with gender-atypical behaviors who had no gender-identity problem” and to ensure that the redefinition of this medical condition does not result in jeopardizing either insurance coverage or treatment access for patients.²¹

The May 2011 revision includes one very significant change. In *DSM-IV-TR*, GID is lumped in with sexual dysfunctions and paraphilic disorders. In *DSM-5*, the gender dysphoria diagnosis likely will be separately categorized and thus destigmatized.²² In addition, the drafters of the revised diagnosis note that they chose not to make any decision between categorizing gender dysphoria as either a psychiatric or a medical condition, which is a further reflection of the growing medical evidence that gender dysphoria is a psychiatric symptom arising from a physical impairment resulting from *in utero* hormonal and genetic causes, as will be discussed below.²³

²¹ *DSM-5 Development: P 01 Gender Dysphoria in Adolescents or Adults*, American Psychiatric Association (2011), available at www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482 (look under the “Proposed Revision” and “Rationale” tabs).

²² See *DSM-5 Development: Proposed DSM-5 Organizational Structure and Disorder Names* (2011), available at www.dsm5.org/proposedrevision/Pages/proposed-dsm5-organizational-structure-and-disorder-names.aspx.

²³ *DSM-5 Development: P 01 Gender Dysphoria in Adolescents or Adults*, American Psychiatric Association (2011), available at www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482 (look under the “Rationale” tab).

One of the drafters of the revised gender dysphoria diagnosis has written a lengthy article exploring the histories of the addition and removal of homosexuality and the addition of gender identity-related conditions to the *DSM*. In his article, Jack Drescher notes that gender identity-related conditions were added to *DSM-III* in 1980, when the medical community was just beginning to accept medical and surgical intervention (i.e., hormone treatment and genital surgery) as an appropriate treatment for people suffering with gender dysphoria. Dr. Drescher notes that the late Harry Benjamin, the physician who perhaps had the most positive impact on the proper treatment of gender-affirmed persons, believed that “the transsexual suffers from a biological disorder, that his brain was probably “feminized” *in utero*” and eschewed “any psychological explanation.” (The international standards of care that are used to treat the medical aspects of gender identity are named after Dr. Benjamin. See *Harry Benjamin Standards of Care for Gender Identity Disorders* (6th ed. 2001), available at www.wpath.org/Documents2/socv6.pdf.) Dr. Drescher notes that the addition of gender identity-related conditions to the *DSM* facilitated the availability of medical treatment and insurance coverage for patients. Their removal from the *DSM* might have the reverse consequence. Dr. Drescher

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Lawyers and HR professionals who have navigated the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and similar state laws already know that some medical conditions are not self-evident. We know when a person has certain physical medical conditions, such as a leg amputation or the impaired ability to use an arm because of cerebral palsy. Similarly, after witnessing a significant change in mood for an extended period, and despite warnings from employment lawyers, we might guess that an employee is seriously depressed.

However, there are some medical conditions that are beyond our ability to visually understand. For example, without the use of an evaluative tool, such as a reading test or medical examination, we do not necessarily know if a person has a visual impairment, or some other functional limitation, as opposed to a deficient education. This is our quandary when it comes to sex and gender identity.

One of the definitions set forth in the *Fenway Glossary* is “intersex,” which is a “spectrum of conditions involving anomalies of the sex chromosomes, gonads, reproductive ducts, and/or genitalia. The most traditional definition of intersex refers to individuals born with both male and female genitalia, or genitalia that are not clearly male or female. A person may have elements of both male and female anatomy, have different internal organs and external organs, or have anatomy that is inconsistent with chromosomal sex.”²⁴ Because the use of the word “intersex” is hotly debated, I will use the term “variation in sex development” (VSD) instead.

Consider María José Martínez-Patiño, one of Spain’s top female hurdlers. She has fully developed breasts and a vagina, feminine pelvic and shoulder structures, an XY chromosomal pair, no ovaries or uterus, and testes hidden in her labia. While she produces testosterone, it has no effect on her body because she has a medical condition called androgen insensitivity syndrome (AIS).

Because of her mixed characteristics, for an extended period of time, Ms. Martínez-Patiño was disqualified from international track and field competitions. Until the first time she was disqualified, as a result of a smear of her buccal mucosa²⁵ the day before one

therefore argues for continuing the inclusion of gender identity-related conditions in *DSM-5*, but the reformulation of their diagnoses so that they are no longer stigmatizing and better reflective of the underlying medical conditions. See Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, Archives of Sexual Behavior, 2010 Vol. 39, 427-60, available at <http://dx.doi.org/10.1007/s10508-009-9531-5>.

²⁴ Excerpts from the *Fenway Glossary* are set forth in the Appendix.

²⁵ “The buccal mucosa is the lining of the cheeks and the back of the lips, inside the mouth where they touch the teeth.” *Buccal Mucosa Cancer*, Cedars-Sinai (2011), available at www.cedars-sinai.edu/Patients/Health-Conditions/Buccal-Mucosa-Cancer-.aspx.

of her competitions, she never had a reason to not think she was female. As Ms. Martínez-Patiño explained it in the medical journal *The Lancet*, “When I was conceived, my tissues never heard the hormonal messages to become male.”²⁶

Consider Polish sprinter Ewa Klobukowska. She was one of the first international athletes disqualified from sports competition because testing revealed that she had a VSD condition and, thus, she was deemed a male. As noted in an article on *SI.com*, Ms. Klobukowska “was ruled ineligible after sex testing determined she had ‘ambiguous genitalia’ — although not ambiguous enough to prevent her from giving birth to a child some time later.”²⁷

More recently, in August 2009, Caster Semenya won the women’s 800 meters at the world track and field championships in Berlin. Her victory was put on hold for 11 months while the International Association of Athletics Federations (IAAF) debated whether Ms. Semenya is a man or a woman. At the time, Alice Domurat Dreger, a professor of medical humanities and bioethics at Northwestern University,²⁸ said the doctors would examine Ms. Semenya genes, gonads, genitalia, hormone levels, and medical history. Dr. Dreger added:

But at the end of the day, they are going to have to make a social decision on what counts as male and female, and they will wrap it up as if it is simply a scientific decision. And the science actually tells us sex is messy. Or as I like to say, “Humans like categories neat, but nature is a slob.”²⁹

²⁶ María José Martínez-Patiño, *Personal Account A woman tried and tested*, *The Lancet* 2005 Vol. 366, p. S38, available at [www.thelancet.com/journals/lancet/article/PIIS0140-6736\(05\)67841-5/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(05)67841-5/fulltext) and www.aissg.org/PDFs/Patino-Tried-Tested-Lancet-2005.pdf. See Anne Fausto-Sterling, *Sexing the Body*, Basic Books, pp. 1-2 (2000); María José Martínez-Patiño, Covadonga Mateos-Padorno, Aurora Martínez-Vidal, Ana María Sánchez Mosquera, José Luis García Soidán, María Del Pino Díaz Pereira, and Carlos Francisco Touriño González, *An approach to the biological, historical and psychological repercussions of gender verification in top level competitions*, *Journal of Human Sport & Exercise* 2010 Vol. 5, pp. 307-21, available at www.jhse.ua.es/index.php/jhse/article/view/151/245.

²⁷ Mike Fish, *A level playing field?: Transgender athletes pose new questions about competition*, *SI.com* (June 24, 2003), available at http://sportsillustrated.cnn.com/inside_game/mike_fish/news/2003/06/24/fish_dumaresq/. See *Genetics: Mosaic in X & Y*, *Time* (September 29, 1967), available at www.time.com/time/magazine/article/0,9171,899860,00.html.

²⁸ See Alice Domurat Dreger’s website at <http://alicedreger.com>.

²⁹ Christopher Clarey, *Gender Test After a Gold-Medal Finish*, *The New York Times* (August 19, 2009), available at www.nytimes.com/2009/08/20/sports/20runner.html?scp=1&sq=Gender%20Test%20After%20a%20Gold-Medal%20Finish%20&st=cse. It took the International Association of Athletics Federations (IAAF) 11 months to finally decide that Ms. Semenya met IAAF’s definition of who qualifies as a woman. According the IAAF, which admitted that Ms. Semenya’s medical confidentiality had been violated, she would undergo “very, very comprehensive” testing — visual evaluation; chromosome

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These are just three of the many people whose lives have been ruined by testing and stereotypes. They are not alone. It is estimated that various categories of VSD births occur in 1.7 percent of all births.³⁰ Over time, the healthcare community has come to repudiate a number of medical and psychological interventions that were used to “fix” VSD babies, in recognition of the enormous damage such interventions have caused.³¹

As the preceding discussion demonstrates, people are born with variations from the norm, sometimes unfortunately referred to as “birth defects.” For women such as Ms. Martínez-Patiño, Ms. Klobukowska, and Ms. Semenya, they themselves, their families, and their doctors had always assumed they were female. It was only as the result of intrusive, humiliating testing, in connection with sports, that their gender was questioned.

I suspect you can get your hands around the idea that some people are born with chromosomal pairs that are not the norm of XX for female and XY for male, or some people may have “ambiguous” genitalia. You can appreciate this because there is objective evidence that clearly shows the variation from the normative female or male.

But when it comes to gender identity, currently there is no objective evidence that gender dysphoric people can give you to support the deep, innate feelings they have that their physical bodies and their brains have different genders. That is, it is not

testing; gynecological investigation; “all manner of things, organs, X-rays, scans.” Id. See Lindsay Rovegno and Julie Foudy, *Professor: Sports need gender policies*, ESPN Outside the Lines (November 8, 2010), available at <http://sports.espn.go.com/espn/otl/news/story?id=5649091>.

Many unusual things happen in nature, none of which should result in the affected persons being deemed or treated as abnormal. See, e.g., *British twins have different skin color: In a rare occurrence, boys inherited different genetic codes from mother*, The Associated Press (October 27, 2006), available at www.msnbc.msn.com/id/15447465/wid/11915773?GT1=8618. Indeed, some variations from the norm are cherished. See *Michael Phelps Bio*, NBC 2008 Beijing Olympics (2008) (“Physical advantage. At first glance, Phelps might look like a typical swimmer. But several of his physical characteristics seem genetically tailored for swimming. His 6-foot-7-inch wingspan is three inches longer than his height, providing him with unusual reach. His torso is long compared to his legs, enabling him to ride high on the water. And his flexible ankles, combined with size-14 feet, allow for a powerful kick.”), available at www.2008.nbcolympics.com/athletes/athlete=2/bio/index.html.

³⁰ Anne Fausto-Sterling, *Sexing the Body*, Basic Books, pp. 51-53 (2000).

³¹ For a very disturbing examination of surgical intervention to “fix” the sex of an infant, read about David Reimer and his eventual suicide. John Colapinto, *The True Story of John/Joan*, Rolling Stone, pp. 54-97 (December 11, 1997), available at www-psych.stanford.edu/~gender/RollingStone_Colapinto.pdf and <http://members.cox.net/nniland/AP%20Psych%20Documents/Ch%202%20-%20Joan%20John%20Case%202006.pdf>; John Colapinto, *Gender Gap: What were the real reasons behind David Reimer’s suicide?*, Slate (June 3, 2004), available at www.slate.com/id/2101678.

possible for them to definitively prove to you that they were born with a man's plumbing and a woman's wiring, or vice versa.

According to *The Fenway Guide to Lesbian, Gay, Bisexual and Transgender Health*,

The predominating biological theory suggests that a neurohormonal disturbance takes place in the brain during embryological development. While the genitalia of the human embryo become differentiated as male or female during the 12th week of fetal development, the gender identity portion of the brain differentiates around the 16th week. If there is a hormonal imbalance during this four-week period, gender identity may not develop along the same lines as the genitalia. It is hypothesized that the state of the mother's overall physical and mental health during pregnancy could cause such an imbalance. Severe emotional trauma or other stress or the ingestion of certain prescription or illegal drugs during pregnancy could interfere with fetal brain chemistry.³²

More recent medical studies continue to point in the direction of hormonal and genetic causes for the *in utero* development of gender dysphoria.³³ When there is a hormonal

³² Randi Kaufman, *Introduction to Transgender Identity and Health*, The Fenway Guide to Lesbian, Gay, Bisexual and Transgender Health, American College of Physicians, Ch. 12, pp. 337-38 (2008) (footnote omitted), available at www.acponline.org/atpro/timssnet/images/books/sample%20chapters/Fenway%20Sample%20Chapter%2012.pdf. Please note that the glossary in Chapter 12 has been replaced by the Fenway Health Glossary of Gender and Transgender Terms (rev. January 2010), which is available at www.fenwayhealth.org/site/DocServer/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms_fi.pdf?docID=7081.

³³ See Alicia Garcia-Falgueras and Dick F. Swaab, *Sexual Hormones and the Brain: An Essential Alliance for Sexual Identity and Sexual Orientation*, Pediatric Neuroendocrinology 2010 Vol. 17, pp. 22-35 (Abstract: "The fetal brain develops during the intrauterine period in the male direction through a direct action of testosterone on the developing nerve cells, or in the female direction through the absence of this hormone surge. In this way, our gender identity (the conviction of belonging to the male or female gender) and sexual orientation are programmed or organized into our brain structures when we are still in the womb. However, since sexual differentiation of the genitals takes place in the first two months of pregnancy and sexual differentiation of the brain starts in the second half of pregnancy, these two processes can be influenced independently, which may result in extreme cases in transsexuality. This also means that in the event of ambiguous sex at birth, the degree of masculinization of the genitals may not reflect the degree of masculinization of the brain. There is no indication that social environment after birth has an effect on gender identity or sexual orientation."), available at <http://content.karger.com/produkteb/produkte.asp?doi=10.1159/000262525&typ=pdf>; Ivanka Savic, Alicia Garcia-Falgueras, and Dick F. Swaab, *Sex Differences in the Human Brain, their Underpinnings and Implications, Chapter 4 – Sexual differentiation of the human brain in relation to gender identity and sexual orientation*, Progress in Brain Research 2010 Vol. 186, pp. 41-62 (same), available at <http://dx.doi.org/10.1016/B978-0-444-53630-3.00004-X>; Lauren Hare, Pascal Bernard, Francisco J. Sánchez, Paul N. Baird, Eric Vilain, Trudy Kennedy, and Vincent R. Harley, *Androgen Receptor Repeat Length Polymorphism Associated with Male-to-Female Transsexualism*, Biological Psychiatry 2009 Vol. 65, pp. 93-96 ("There is a likely genetic component to transsexualism, and genes involved in sex steroidogenesis are good candidates. *** [A] decrease in testosterone levels in

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the brain during development might result in incomplete masculinization of the brain ..., resulting in a more feminized brain and a female gender identity."), available at [www.biologicalpsychiatryjournal.com/article/S0006-3223\(08\)01087-1](http://www.biologicalpsychiatryjournal.com/article/S0006-3223(08)01087-1) and <http://tsi.org/files/doi101016jbiopsych200808033.pdf>; Louann Brizendine, *The Female Brain*, Broadway Books, inside front book jacket (2006) ("Every brain begins as a female brain. It only becomes male eight weeks after conception, when excess testosterone shrinks the communication center, reduces the hearing cortex, and makes the part of the brain that processes sex twice as large."); Paul-Martin Holterhus, Jan-Hendrik Bebermeier, Ralf Werner, Janos Demeter, Annette Richter-Unruh, Gunnar Cario, Mahesh Appari, Reiner Siebert, Felix Riepe, James D Brooks, and Olaf Hiort, *Disorders of sex development expose transcriptional autonomy of genetic sex and androgen-programmed hormonal sex in human blood leukocytes*, BMC Genomics 2009 Vol. 10, p. 292 ("Conclusion: A significant fraction of gene expression differences between males and females in the human appears to have its roots in early embryogenesis and is not only caused by sex chromosomes but also by long-term sex-specific hormonal programming due to presence or absence of androgen during the time of external genital masculinization. Genetic sex and the androgen milieu during embryonic development might therefore independently modulate functional traits, phenotype and diseases associated with male or female gender as well as with DSD conditions."), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC2713997/pdf/1471-2164-10-292.pdf; Giuseppina Rametti, Beatriz Carrillo, Esther Gómez-Gil, Carme Junque, Santiago Segovia, Ángel Gomez, and Antonio Guillamon, *White matter microstructure in female to male transsexuals before cross-sex hormonal treatment. A diffusion tensor imaging study*, Journal of Psychiatric Research 2010 Vol. 45, pp. 199-204 (Abstract: "Some gray and white matter regions of the brain are sexually dimorphic. *** Our results show that the white matter microstructure pattern in untreated [female to male] transsexuals is closer to the pattern of subjects who share their gender identity (males) than those who share their biological sex (females). Our results provide evidence for an inherent difference in the brain structure of [female to male] transsexuals."), available at <http://dx.doi.org/10.1016/j.jpsychires.2010.05.006>; Giuseppina Rametti, Beatriz Carrillo, Esther Gómez-Gil, Carme Junque, Leire Zubiarre-Elorza, Santiago Segovia, Ángel Gomez, and Antonio Guillamon, *The microstructure of white matter in male to female transsexuals before cross-sex hormonal treatment: A DTI study*, Journal of Psychiatric Research 2011 Vol. 45, pp. 949-54 (Abstract: "Our results show that the white matter microstructure pattern in untreated [male to female] transsexuals falls halfway between the pattern of male and female controls. The nature of these differences suggests that some fasciculi do not complete the masculinization process in [male to female] transsexuals during brain development."), available at <http://dx.doi.org/10.1016/j.jpsychires.2010.11.007>; Edwina Sutton, James Hughes, Stefan White, Ryohei Sekido, Jacqueline Tan, Valerie Arboleda, Nicholas Rogers, Kevin Knower, Lynn Rowley, Helen Eyre, Karine Rizzoti, Dale McAninch, Joao Goncalves, Jennie Slee, Erin Turbitt, Damien Bruno, Henrik Bengtsson, Vincent Harley, Eric Vilain, Andrew Sinclair, Robin Lovell-Badge, and Paul Thomas, *Identification of SOX3 as an XX male sex reversal gene in mice and humans*, Journal of Clinical Investigation 2011 Vol. 121, pp. 328-41 ("Sex in mammals is genetically determined and is defined at the cellular level by sex chromosome complement (XY males and XX females) and at the phenotypic level by the development of gender-specific anatomy, physiology, and behavior. *** Although female development has traditionally been considered by some to be a "default" pathway, it is now clear that sexual fate is determined by a balance of opposing signals within the gonad, in which [the Y-linked testis-determining gene] Sry exerts a dominant masculinizing influence *** Through characterization of a unique transgenic mouse line, we show that ectopic expression of [gene] Sox3 in uncommitted XX gonads is sufficient to divert the program of ovarian development toward testis formation, leading to XX males. Our data indicate that Sox3 functions as a molecular switch, activating the testis differentiation pathway via a mechanism that is functionally analogous to Sry. Furthermore, we provide the first evidence to our knowledge that SOX3 gain of function in humans can also lead to complete XX male sex reversal."), available at www.jci.org/articles/view/42580/pdf; Lindsay R. Chura, Michael V. Lombardo, Emma Ashwin, Bonnie

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imbalance *in utero*, it is possible that a person's physical anatomy may develop as if a male, while the brain develops as if a female, or vice versa.

In sum, gender identity disorder (GID) is just one of a number of physical (not psychiatric) medical conditions for which the medical community is still struggling to understand. Other conditions whose causes are not yet fully understood include polycystic ovary syndrome,³⁴ cerebral palsy,³⁵ strabismus,³⁶ and dyslexia.³⁷ GID is no different from other medical conditions, such as microvascular angina, for which a

Auyeung, Bhismadev Chakrabarti, Edward T. Bullmore, and Simon Baron-Cohen, *Organizational Effects of Fetal Testosterone on Human Corpus Callosum Size and Asymmetry*, Psychoneuroendocrinology 2010 Vol. 35, pp. 122-32 (Abstract: "Previous theory and research in animals has identified the critical role that fetal testosterone (FT) plays in organizing sexually dimorphic brain development. *** We suggest that this possible organizational effect of FT on callosal asymmetry may also play a role in shaping sexual dimorphism in functional and structural brain development, cognition, and behavior."), available at <http://dx.doi.org/10.1016/j.psyneuen.2009.09.009> and www.autismresearchcentre.com/docs/papers/2010_Chura_etal_OrgEffectsOfFT_Psychoneuroendocrinology.pdf; Evanthia Diamanti-Kandarakis, Jean-Pierre Bourguignon, Linda C. Giudice, Russ Hauser, Gail S. Prins, Ana M. Soto, R. Thomas Zoeller, and Andrea C. Gore, *Endocrine-Disrupting Chemicals: An Endocrine Society Scientific Statement*, Endocrine Review 2009 Vol. 30, pp. 293-42 (discussing the growing number of medical conditions associated with exposure to endocrine-disrupting chemicals *in utero*), available at <http://edrv.endojournals.org/cgi/reprint/30/4/293> and www.endo-society.org/journals/ScientificStatements/upload/EDC_Scientific_Statement.pdf.

³⁴ "Polycystic ovary syndrome (PCOS) is the most common hormonal disorder among women of reproductive age. *** Infrequent or prolonged menstrual periods, excess hair growth, acne and obesity can all occur in women with [PCOS]. *** The exact cause of [PCOS] is unknown." *Polycystic ovary syndrome*, Mayo Clinic (December 8, 2009), available at www.mayoclinic.com/health/polycystic-ovary-syndrome/DS00423.

³⁵ "Cerebral palsy (CP) is a broad term used to describe a group of chronic "palsies" – disorders that impair control of movement – due to damage to the developing brain. *** Much remains unknown about the disorder's causes" *Understanding Cerebral Palsy -- the Basics*, WebMD (November 1, 2010), available at www.webmd.com/brain/understanding-cerebral-palsy-basic-information.

³⁶ "Strabismus [is] a misalignment of the eyes The eyes (one or both) may turn inward (crossed-eyes), outward (wall eyes), turn up, or turn down. *** Experts do not completely understand the cause of strabismus." *Strabismus and Amblyopia*, Children's Hospital Boston (2011), available at www.childrenshospital.org/az/Site1644/mainpageS1644P0.html. "Strabismus ...is a vision problem in which both eyes do not look at the same point at the same time. *** Childhood strabismus often has no known cause" *Strabismus - Topic Overview*, WebMD (May 7, 2010), available at <http://children.webmd.com/tc/strabismus-topic-overview>.

³⁷ "Dyslexia is a learning problem that makes it hard to read, write, and spell. It occurs because the brain jumbles or mixes up letters and words. *** Experts don't know for sure what causes dyslexia." *Dyslexia – Overview*, WebMD (June 4, 2010), available at <http://children.webmd.com/tc/dyslexia-overview>.

patient may have symptoms, but medical tests do not reveal an underlying cause, yet accepted non-psychiatric treatment resolves the pain.³⁸

Consider my situation. I am a hodgepodge of variations from the norm. Among other things, I was born with several extra teeth, an extra ureter, and limited hearing. These are all conditions that can be (and were) verified visually and/or with tests. If all these things can go “wrong” with me, why then is it difficult to accept that my external physical body developed in a masculine direction while my brain developed in a feminine direction? In reality, we are all born with variations from what might be considered a normative male or normative female.

I was also born with limited eyesight, due in part to strabismus (cross vision) and amblyopia (lazy eye). I underwent a number of medical procedures in an attempt to ameliorate some of my eye problems. Surgery rectified my wandering eyes and eliminated the cross vision. After the surgery, my doctors and others did not refer to be as a *transvisualist*. Why then, if I have corrective genital surgery, should I be called a *transsexual*? In each case, I simply had a physical impairment corrected with surgery.

The law — federal

Title VII of the Civil Rights Act of 1964

Ralph, the mythical general counsel in the hypothetical at the beginning of this article, was spot-on when he ruminated about *Price Waterhouse v. Hopkins*,³⁹ the 1989 United States Supreme Court case, where the Court was confronted with the concept of sex stereotyping under Title VII of the Civil Rights Act of 1964. Ann Hopkins sued Price Waterhouse after her admission to partnership was put on hold. Despite some partners seeing her “as ‘an outstanding professional’ who had a ‘deft touch,’ a ‘strong character, [with] independence and integrity,’” other partners described her as “macho,” suggested that she “take ‘a course at charm school,’” and, in communicating to her that the partnership decision was being put on hold, advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁴⁰ Hopkins won at trial and before the Court of Appeals for the District of

³⁸ Rebecca Allison, *Aligning Bodies with Minds: The Case for Medical and Surgical Treatment of Gender Dysphoria*, Journal of Gay & Lesbian Mental Health 2010 Vol. 14, pp. 139-44, available at <http://dx.doi.org/10.1080/19359701003609872>; Rebecca Allison, *Aligning Bodies With Minds*, American Psychiatric Association Presentation (May 2009), available at <http://beckyallison.wordpress.com/about/aligning-bodies-with-minds-apa-presentation-may-2009>.

³⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), available at www.law.cornell.edu/supct/html/historics/USSC_CR_0490_0228_ZS.html.

⁴⁰ *Price Waterhouse v. Hopkins*, 490 U.S. at 234-35.

Columbia, but a divided Supreme Court remanded because the lower courts imposed the wrong standard of proof on the defendant in a mixed-motive case (requiring clear and convincing evidence instead of the correct preponderance of the evidence).

Price Waterhouse has been cited numerous times as a basis for holding that Title VII bars discrimination on the basis of gender identity or expression. Perhaps the most interesting case involved Diane Schroer, a highly decorated veteran who applied for a position with the Library of Congress. When she applied, she was in the midst of a medically supervised gender transition. At the job interview, Colonel Schroer presented as David. She was offered the position; she received the highest interview score of all 18 candidates.

Colonel Schroer then advised her future supervisor that she was in the process of coming out and would start work at the Library of Congress as Diane, presenting as a woman. Shortly thereafter, the offer of employment was withdrawn because she was no longer deemed a “good fit.” Rarely does a plaintiff have such a solid case of proximate cause!

To hear Colonel Schroer’s story in her own words, go to www.youtube.com/watch?v=UEPsK_axRqo or <http://gbge.aclu.org/transgender>. To hear her June 2008 testimony before Congress in support of the Employment Non-Discrimination Act (ENDA), go to www.youtube.com/watch?v=ovvt4hl-iNM.

The trial court twice denied motions by the Librarian of Congress to dismiss Colonel Schroer’s Title VII claim, finding that she had a cognizable claim for sex stereotyping discrimination under Title VII. The court held for another day “whether discrimination against transsexuals because they are transsexuals is ‘literally’ discrimination ‘because of … sex.’”⁴¹ After a bench trial, the district court found that the Librarian had discriminated against Colonel Schroer, in violation of Title VII. The court also answered the question it left open in its earlier opinion:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of

⁴¹ *Schroer v. Billington, Librarian of Congress*, 525 F.Supp.2d 58, 63 (D.D.C 2007) (denying in part second and third motions to dismiss), available at www.aclu.org/lgbt-rights_hiv-aids/schroer-v-library-congress-order-denying-governments-3rd-motion-dismiss. See also *Schroer v. Billington, Librarian of Congress*, 424 F.Supp.2d 203 (D.D.C. 2006) (denying first motion to dismiss), available at www.aclu.org/lgbt-rights_hiv-aids/schroer-v-library-congress-order-denying-governments-1st-motion-dismiss.

discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a *change* of religion.

For Diane Schroer to prevail on the facts of her case, however, it is not necessary to draw sweeping conclusions about the reach of Title VII. Even if the [old, pre-*Price Waterhouse*] decisions that define the word “sex” in Title VII as referring only to anatomical or chromosomal sex are still good law — after that approach “has been eviscerated by *Price Waterhouse*,” *** the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination “because of . . . sex.”⁴²

Just a few federal appellate courts have addressed whether a gender-affirmed employee is protected under the *Price Waterhouse* sex stereotyping theory. The Sixth Circuit has ruled that employees going through gender affirmations are protected, and the Tenth Circuit has sidestepped the issue.⁴³ The Ninth Circuit, in the context of the federal Gender Motivated Violence Act, and the First Circuit, in the context of the federal Equal Credit Opportunity Act, followed Title VII standards and applied *Price Waterhouse* in cases involving a gender dysphoric person and a cross-dresser, respectively.⁴⁴

⁴² *Schroer v. Billington, Librarian of Congress*, 577 F.Supp.2d 293, 306-08 (D.D.C. 2008), available at www.aclu.org/lgbt-rights_hiv-aids/schroer-v-library-congress-decision. The U.S. Department of Justice declined to appeal the trial court’s well-reasoned decision.

For additional resources about this case, including court documents, see the American Civil Liberties Union’s (ACLU) website, at www.aclu.org/lgbt-rights_hiv-aids/schroer-v-library-congress-case-profile. The ACLU represented Ms. Schroer. The trial court’s opinion regarding damages is *Schroer v. Billington, Librarian of Congress*, 106 FEP Cases (BNA) 594, 2009 WL 1543686 (D.D.C. 2009), available at www.aclu.org/lgbt-rights_hiv-aids/schroer-v-library-congress-damages-order.

⁴³ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (the Sixth Circuit covers KY, MI, OH, and TN), available at www.ca6.uscourts.gov/opinions.pdf/04a0262a-06.pdf; *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir.), cert. den., 546 U.S. 1003 (2005), available at www.ca6.uscourts.gov/opinions.pdf/05a0142p-06.pdf; *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007) (the Tenth Circuit covers CO, KS, NM, OK, UT, WY, and those portions of the Yellowstone National Park extending into ID and MT), available at www.ca10.uscourts.gov/opinions/05/05-4193.pdf.

⁴⁴ *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (the Ninth Circuit covers AK, AZ, CA, HI, ID, MT, NV, OR, WA, Guam, and Northern Mariana Islands), available at <http://archive.ca9.uscourts.gov/ca9/newopinions.nsf/04485f8dcbd4e1ea882569520074e698/aa80d356bd92e6e088256e5a007076b5?OpenDocument>; *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (the First Circuit covers MA, ME, NH, RI, and PR), available at www.glad.org/30years/pdfs/rosa-summary.pdf. See *Federal Cases Addressing Whether Discrimination on the Basis of Gender Non-Conformity and/or Transgender Status Is a Form of*

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On at least two occasions, the United States Supreme Court has declined to address the issue.⁴⁵

On May 27, 2011, while this article was in press, the United States Office of Personnel Management (OPM) issued a new, detailed guidance document pertaining to transgender employees in the federal workplace. To the extent the *OPM Guidance Memo* refers to topics discussed in this article, it is noted in the footnotes.⁴⁶ As a result

Discrimination on the Basis of Sex, National Center for Lesbian Rights (September 2009), available at www.nclrights.org/site/DocServer/Federal_Cases_Addressinig_Whether_Discriminatioon_on_the_B.pdf?docID=3661.

⁴⁵ *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir.), cert. den., 546 U.S. 1003 (2005); *Myers v. Cuyahoga County*, 182 Fed.Appx. 510, 98 FEP Cases (BNA) 959, 18 ADA Cases (BNA) 354 (6th Cir.), cert. den., 549 U.S. 965 (2006).

⁴⁶ See *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (May 27, 2011), available at www.opm.gov/diversity/Transgender/Guidance.asp; *Federal Employees Health Benefits Program Carrier Letter re Gender Reassignment*, U.S. Office of Personnel Management (May 27, 2011), available at www.opm.gov/carrier/carrier_letters/2011/2011-12.pdf, and *Operating Manual: The Guide To Personnel Recordkeeping*, Chapter 4, U.S. Office of Personnel Management (September 2008), available at www.opm.gov/feddata/recguide.pdf, as amended by *How to Reconstruct a Personnel Folder due to a Change in Gender Identity*, U.S. Office of Personnel Management (June 1, 2011), available at www.opm.gov/feddata/Ch4_ReconstructPersonnelFolder.pdf.

In particular, the *OPM Guidance Memo* provides:

It is the policy of the Federal Government to treat all of its employees with dignity and respect and to provide a workplace that is free from discrimination whether that discrimination is based on race, color, religion, sex (including gender identity or pregnancy), national origin, disability, political affiliation, marital status, membership in an employee organization, age, sexual orientation, or other non-merit factors. Agencies should review their anti-discrimination policies to ensure that they afford a non-discriminatory working environment to employees irrespective of their gender identity or perceived gender non-conformity.

Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, U.S. Office of Personnel Management (May 27, 2011) (Policy and Purposes), available at www.opm.gov/diversity/Transgender/Guidance.asp.

In April 2011, the United States Department of Labor amended its Equal Employment Opportunity Policy to add gender identity, by including it as part of the protected category "sex." The *OPM Guidance Memo* follows the same approach. See Hilda L. Solis, *U.S. Department of Labor Policy on Equal Employment Opportunity*, U.S. Department of Labor (April 2011), available at www.dol.gov/oasam/programs/crc/crc-internal/eeo.htm; News Release, *US Department of Labor announces renewed commitment to fair treatment and equal opportunity for all of its employees: New policy statements prohibit discrimination based on gender identity and pregnancy*, U.S. Department of Labor (April 28, 2011), available at www.dol.gov/opa/media/press/oasam/OASAM20110618.htm.

of the *OPM Guidance Memo*, all federal employees are now clearly protected from discrimination on the basis of gender identity or expression.

American with Disabilities Act of 1990

I know what you are already saying to yourself: “The ADA does not apply here.” I once thought that way as well. Sections 508 and 511 of the ADA exclude “transvestites,” and Section 511 additionally excludes “homosexuality,” “bisexuality,” and “transsexualism.”⁴⁷ That was all we needed to know back in 1991, when we all read the newsletters that summarized the ADA for us. We focused our attention on understanding the applicability to the new law to our clients varied operations, and did not waste time worrying about the exclusions that also include pedophilia, exhibitionism, voyeurism, and other sexual behavior disorders.

What we overlooked, however, was the one exception to the exclusions. In particular, we glossed over Section 511(b)(1), which reads:

⁴⁷ Sections 508 and 511 of the Americans with Disabilities Act (ADA), which are available at www.eeoc.gov/laws/statutes/ada.cfm, read as follows:

42 U.S.C.A. §12208. Transvestites [ADA Section 508]

For the purposes of this chapter, the term “disabled” or “disability” shall not apply to an individual solely because that individual is a transvestite.

42 U.S.C.A. §12211. Definitions [ADA Section 511]

(a) Homosexuality and bisexuality

For purposes of the definition of “disability” in section 12102(2) of this title [ADA Section 3(2)], homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term “disability” shall not include –

- (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- (2) compulsive gambling, kleptomania, or pyromania; or
- (3) psychoactive substance use disorders resulting from current illegal use of drugs.

Under this chapter, the term “disability” shall **not include** –

- (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, **gender identity disorders [GID] not resulting from physical impairments**, or other sexual behavior disorders[.]⁴⁸

As explained above in the medical discussion, the healthcare community is now beginning to treat GID as a condition resulting from a physical impairment (i.e., arising from genetics and/or hormonal imbalance *in utero*), not as a sexual behavior disorder. People are born with a variety of variations from the norm, some of which may be self-evident upon medical examination (e.g., some intersex conditions) and others that are not (e.g., gender dysphoria). These conditions have medical bases in fetal development and genetics.

The ADA may become a new battle ground in litigation, especially in view of the ADA Amendments Act of 2008 (ADAAA), which, among other things, expanded (1) the scope of what constitutes a “major life activity” and (2) the definition of when a person is “regarded as” disabled to include an actual and/or perceived impairment, regardless of whether the impairment limits a major life activity.⁴⁹ Thus, no longer does the employee have to be perceived as *disabled*. Merely being perceived as *impaired* is enough to potentially trigger ADA liability.⁵⁰ Given the lack of understanding generally in society

⁴⁸ ADA §511(b), 42 U.S.C.A. §12211(b) (emphasis added), available at www.eeoc.gov/laws/statutes/ada.cfm.

⁴⁹ The ADA Amendments Act of 2008 (ADAAA) is available at www.eeoc.gov/laws/statutes/adaaa.cfm. On March 25, 2011, the Equal Employment Opportunity Commission issued its final revised ADA regulations and interpretive guidance. These new guidance materials reflect the breadth of the ADA as amended by the ADAAA. See *The Americans with Disabilities Act Amendments Act of 2008*, U.S. Equal Employment Opportunity Commission (2011), available at www.eeoc.gov/laws/statutes/adaaa_info.cfm, for the new regulations and two sets of questions and answers related thereto.

⁵⁰ In its 2011 revised *Interpretive Guidance on Title I of the Americans with Disabilities Act*, the EEOC notes: “Coverage under the ‘regarded as’ prong of the definition of disability should not be difficult to establish.” *Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended*, U.S. Equal Employment Opportunity Commission, 76 Federal Register 16978, 17014 (March 25, 2011), available at www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf. In the preamble to the 2011 revised ADA regulations, the EEOC adds: “The final regulations *** make clear that the concepts of ‘major life activities’ and ‘substantially limits’ *** are not relevant in evaluating coverage under the ‘regarded as’ prong. Thus, in order to have regarded an individual as having a disability, a covered entity need not have considered whether a major life activity was substantially limited, and an individual claiming to have been regarded as disabled need not demonstrate that he or she is substantially limited in a major life activity.” *Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended*, U.S. Equal Employment Opportunity Commission, 76 Federal Register 16978, 16985 (March 25, 2011), available at www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf.

about gender dysphoria and the rampant stereotypes associated with gender dysphoria, the revised, less burdensome “regarded as” standard will open the door to many more ADA claims.

At least seven states have applied their laws barring disability discrimination to protect gender dysphoric people.⁵¹

Employment Non-Discrimination Act

Federal legislation that would expressly bar employment discrimination on the basis of sexual orientation and gender identity — the Employment Non-Discrimination Act (ENDA) — is stalled in Congress, with little prospects of moving forward in the near term.⁵²

The law — state and local

Fifteen states and the District of Columbia by statute expressly outlaw discrimination on the basis of gender identity or expression: California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.⁵³

⁵¹ See *Cases Recognizing Protection for Transgender People Under State Sex and Disability Discrimination Laws*, National Center for Lesbian Rights (August 2008) (citing FL, IL, MA, NH, NJ, NY, and WA), available at www.nclrights.org/site/DocServer/state_cases091004.pdf?docID=1203.

⁵² The latest version of the Employment Non-Discrimination Act (ENDA) was introduced in the House of Representatives on April 6, 2011, as H.R. 1397, available at www.gpo.gov/fdsys/pkg/BILLS-112hr1397ih/pdf/BILLS-112hr1397ih.pdf, and in the Senate on April 13, 2011, as S. 811, available at www.gpo.gov/fdsys/pkg/BILLS-112s811is/pdf/BILLS-112s811is.pdf.

For more information on ENDA, see the websites for United ENDA (<http://unitedenda.org>); National Gay and Lesbian Task Force (www.thetaskforce.org/issues/nondiscrimination/ENDA_main_page); Human Rights Campaign (www.hrc.org/issues/workplace/enda.asp); and National Center for Transgender Equality (<http://transequality.org/Resources/index.html>).

⁵³ The statutes in these jurisdictions generally bar discrimination on the basis of gender identity or expression in employment, housing, and public accommodations. In May 2011, the Hawaii and Nevada employment anti-discrimination laws were amended to expressly include gender identity or expression. On June 14, 2011, Connecticut enacted a similar law. For the statutory citation for each of these jurisdictions, see *State by State Guide to Laws That Prohibit Discrimination Against Transgender People*, National Center for Lesbian Rights (2010), available at www.nclrights.org/site/DocServer/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf?docID=7821; Griffin & Carroll, *On the Team: Equal Opportunity For Transgender Student Athletes*, National Center for Lesbian Rights and Women’s Sports Foundation, Appendix B (Legal Status of Transgender People) (October 4, 2010), available at www.nclrights.org/site/DocServer/TransgenderStudentAthleteReport.pdf?docID=7901; Press Release, *Governor Signs Bill to End Discrimination*, Office of Hawaii Governor Neil Abercrombie (May 2, 2011), available at <http://hawaii.gov/gov/newsroom/press-releases/governor-signs-bill-to-end->

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At least 139 cities and counties have adopted ordinances barring discrimination on the basis of gender identity or expression. With these added jurisdictions, 43 percent of the United States population is covered by statutory laws banning such discrimination.⁵⁴

[discriminationhonolulu-2013governor-neil-abercrombie-signed-into-law-house-bill-546-which-prohibits-discrimination-on-the-basis-of-gender-identity-or-expression-as-a-public-policy-matter-and-specifically-with-regard-to](#); Hawaii Act 034 (May 2, 2011), available at www.capitol.hawaii.gov/session2011/lists/measure_indiv.aspx?billtype=HB&billnumber=546 and www.capitol.hawaii.gov/session2011/bills/HB546_SD1.pdf, Nevada Law 2011, Chapter 112 (May 24, 2011), available at www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=480 and www.leg.state.nv.us/Session/76th2011/Bills/AB/AB211_EN.pdf, Nevada Law 2011, Chapter 191 (June 1, 2011), available at www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=879 and www.leg.state.nv.us/Session/76th2011/Bills/SB/SB368_EN.pdf, Nevada Law 2011, Chapter 192 (June 1, 2011), available at www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=797 and www.leg.state.nv.us/Session/76th2011/Bills/SB/SB331_EN.pdf; Connecticut Public Act 11-55, §1 (June 14, 2011), available at www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=6599&which_year=2011&SUBMIT1.x=9&SUBMIT1.y=9&SUBMIT1=Normal and www.cga.ct.gov/2011/ACT/PA/2011PA-00055-R00HB-06599-PA.htm.

The National Gay and Lesbian Task Force, the Human Rights Campaign, and the American Civil Liberties Union have maps of the states with statutes that expressly bar discrimination on the basis of gender identify or expression and sexual orientation, available at www.thetaskforce.org/reports_and_research/nondiscrimination_laws (*State Nondiscrimination Laws in the U.S.*), www.hrc.org/documents/Employment_Laws_and_Policies.pdf (*Statewide Employment Laws & Policies*), and www.aclu.org/non-discrimination-laws-state-state-information-map (*Non-Discrimination Laws: State by State Information - Map*).

Legislation to bar discrimination on the basis of gender identity or expression has been pending in several other states, including in Maryland, Massachusetts, and New York, for a number of years. The Maryland legislation, Assembly Bill 235, was sent back to committee on April 11, 2011. Yusef Najafi, *Delayed, Not Defeated: After Maryland Senate kills gender identity bill for 2011, advocates start making plans for 2012*, Metro Weekly (April 14, 2011), available at www.metroweekly.com/news/?ak=6161. The Massachusetts legislation, House Bill 502 and Senate Bill 764, is pending in the legislature, with a hearing held on June 8, 2011. See Massachusetts' legislative service, at www.malegislature.gov/Bills/187/House/H00502 and www.malegislature.gov/Bills/187/Senate/S00764. The New York legislation, Assembly Bill 5039 and Senate Bill 2873, passed the Assembly on June 14, 2011 and, as of June 22, 2011, is pending in the Senate. See New York Senate's Open Legislation service, at <http://open.nysenate.gov/legislation/bill/A5039-2011> and <http://open.nysenate.gov/legislation/bill/S2873-2011>; GENDA Reintroduced in NY, Transgender Legal Defense & Education Fund (2011), available at www.transgenderlegal.org/headline_show.php?id=322.

⁵⁴ See *Jurisdictions with Explicitly Transgender-Inclusive Nondiscrimination Laws*, National Gay and Lesbian Task Force (May 9, 2011) (134 cities and counties; does not include CT and NV; 41 percent), available at www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_5_11.pdf. See also the landing page at www.thetaskforce.org/reports_and_research/all_jurisdictions in case a later version of this summary becomes available. See *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, Human Rights Campaign (June 21, 2011) (139 cities and

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At least 13 states and the District of Columbia have court and administrative case law extending their laws prohibiting discrimination against sex and disability discrimination to cover gender identity and expression: California, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Vermont, and Washington.⁵⁵

Finally, at least nine states have an executive order, administrative order, or personnel regulation prohibiting discrimination against state *public employees* based on their gender identity: Delaware, Indiana, Kansas, Kentucky, Michigan, Maryland, Massachusetts, New York, and Pennsylvania.⁵⁶

counties), available www.hrc.org/issues/workplace/equal_opportunity/gender-identity-city-county-laws.htm; at Lindemann, Grossman & Weirich, *Employment Discrimination Law*, BNA Books, p. 569 (4th ed. 2007). Additional jurisdictions have adopted similar ordinances since the National Gay and Lesbian Task Force's 41 percent figure was published on May 9, 2011. See, e.g., *Dallas County Adds Trans Protections*, DallasVoice.com (April 26, 2011), available at www.dallasvoice.com/dallas-county-adds-trans-protections-32-vote-1074055.html. With these new jurisdictions, including Connecticut and Nevada, added in, the percentage is now forty-three. If the legislation that is pending in Massachusetts in early June 2011 becomes law, the percentage would increase to forty-five. If the legislation that is pending in New York in early June 2011 becomes law, the percentage would increase to forty-six. If the legislation pending in both jurisdictions becomes law, the percentage would increase to forty-eight.

The Transgender Law & Policy Institute and the National Gay and Lesbian Task Force have another very useful publication, *Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws*, available at www.thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_08.pdf (July 2008) and www.transgenderlaw.org/nllaws/ngltlpcchart.pdf (April 2006). See also the landing page at www.thetaskforce.org/reports_and_research/transgender_inclusive_laws in case a later version of this summary becomes available.

⁵⁵ See Lindemann, Grossman & Weirich, *Employment Discrimination Law*, BNA Books, pp. 563-65 (4th ed. 2007) (citing CT, FL, IL, MA, NH, NJ, NY, and WA); *Cases Recognizing Protection for Transgender People Under State Sex and Disability Discrimination Laws*, National Center for Lesbian Rights (August 2008) (citing CA, CT, FL, IL, MA, NH, NJ, NY, PA, and WA), available at www.nclrights.org/site/DocServer/state_cases091004.pdf?docID=1203; *Jurisdictions with Good Case Law*, Transgender Law and Policy Institute (April 2, 2010) (citing CA, CT, DC, FL, HI, MA, NH, NJ, NY, OR, PA, and VT), available at www.transgenderlaw.org/cases/index.htm#goodcaselaw; *Transgender Legal Issues: New England*, Gay & Lesbian Advocates & Defenders, pp. 12, 15, (June 2011) (citing MA and NH), available at www.glad.org/uploads/docs/publications/trans-legal-issues.pdf; *Statewide Employment Laws & Policies*, Human Right Campaign (May 27, 2011) (citing CT, FL, MA, and NY), available at www.hrc.org/documents/Employment_Laws_and_Policies.pdf; *State Laws*, Human Right Campaign (2011), available at www.hrc.org/laws_and_elections/state.asp.

⁵⁶ See *Statewide Employment Laws & Policies*, Human Rights Campaign (May 27, 2011) (citing DE, IN, KS, KY, MA, MI, NY, OH, and PA), available at www.hrc.org/documents/Employment_Laws_and_Policies.pdf; Lindemann, Grossman & Weirich, *Employment Discrimination Law*, BNA Books, p. 569 (4th ed. 2007) (citing KY and PA); *Maryland Executive Order 01.01.2007.16* (August 22, 2007), available at

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The law — federal, state, and local combined

Thus, as a result of federal Title VII case law and the foregoing state authorities, employees in the following 31 states and four non-state jurisdictions are protected from discrimination on the basis of gender identity or expression: Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Guam, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Northern Mariana Islands, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Tennessee, Vermont, and Washington, plus state employees in Delaware, Indiana, and Kansas.

If you count just the population in the 28 states that have case law or state statutes covering *both* private and public employers, and the District of Columbia, 65 percent of the United States population is protected by laws that bar discrimination on the basis of gender identity or expression.⁵⁷ If you add in the additional 8.7 million people who reside in city and counties in 10 other states that have ordinances barring discrimination by private employers on the basis of gender identity or expression, the percentage increases to 68 percent.⁵⁸ Not counted in the numbers discussed above are the federal employees who are now protected as a result of the May 2011 *OPM Guidance Memo* discussed above,⁵⁹ the state employees protected in Delaware, Indiana, and Kansas,

www.gov.state.md.us/executiveorders/01.01.07.16FairHiring2.pdf. See also *State Laws*, Human Right Campaign (2011), available at www.hrc.org/laws_and_elections/state.asp. On January 21, 2011, Ohio Governor John Kasich issued a new Executive Order that removed gender identity as a protected class. See *Ohio Executive Order 2011-05K* (January 21, 2011), available at <http://governor.ohio.gov/LinkClick.aspx?fileticket=hxw7g71LELs%3d&tabid=69>.

⁵⁷ The percentage is based on the 2000 Census data of 181,907,528 divided by 281,421,906, which is 64.64%. If 2009 Census data is used, the outcome is 63.83% (195,967,762 divided by 307,006,550). Census data was downloaded on April 1, 2011, from http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=&-ds_name=PEP_2009_EST&-lang=en&-mt_name=PEP_2009_EST_GCTT1_US40&-format=US-40|U-40Sa|U-40Sb|U-40Sc|U-40Sd|U-40Se|U-40Sf|U-40Sq|U-40Sh|US-40S&-CONTEXT=gct.

⁵⁸ The cities and counties, with a total population of 8,746,224, are located in Georgia, Indiana, Louisiana, Maryland, Missouri, South Carolina, Texas, Utah, West Virginia, and Wisconsin. See *Jurisdictions with Explicitly Transgender-Inclusive Nondiscrimination Laws*, National Gay and Lesbian Task Force (May 9, 2011), available at www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_5_11.pdf. See also the landing page at www.thetaskforce.org/reports_and_research/all_jurisdictions in case a later version of this summary becomes available.

⁵⁹ In 2010, there were approximately 2.8 million civilian employees in the federal workforce. See *Improving the Federal Workforce*, U.S. Office of Personnel Management, Table 11-3, p. 111 (2010), available at www.whitehouse.gov/sites/default/files/omb/performance/chapter11-2012.pdf.

and the city and county employees in local jurisdictions that protect just public employees.

Finally, the American Bar Association has urged federal, state, and local governments to enact legislation prohibiting discrimination on the basis of actual or perceived gender identity or expression, in employment, housing, and public accommodations.⁶⁰

The workplace — pragmatic solutions

Take a deep breath and relax

If your company has a robust respect in the workplace policy, and takes its commitment to a discrimination-free workplace seriously, then there is very little you need to do to address gender identity and expression in the workplace. The same tools that HR generally uses to address discrimination and harassment are equally applicable here. Any lawyer or HR professional who understands the reasonable accommodation principles applicable to disabilities and religious beliefs will have no difficulty in accommodating differences arising out of an employee's gender identity or expression.

As you navigate these issues, keep in mind the difficulties that a gender-nonconforming person faces in a binary gender world. Kate Bornstein aptly summarized it this way: "It's a difficult place to live, being neither/nor in an either/or world."⁶¹

Tone at the top

When I was in-house as the chief compliance officer and labor and employment counsel, we developed excellent compliance programs. When I departed the company, the CEO commented to me that he was impressed that a compliance program did not have to be bureaucratic or overbearing in administration in order to be effective. In great part, this was because the executive management team was fully committed to compliance and walked the talk.

Too often, companies think that effective compliance requires volumes of policies and a bureaucracy to implement those policies. They do not appreciate that the tone at the top

⁶⁰ House of Delegates Resolution 122B, American Bar Association (August 2006), available at www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentytwo.doc.

⁶¹ Kate Bornstein, *Gender As Neither/Nor*, The Huffington Post (July 30, 2007), available at www.huffingtonpost.com/kate-bornstein/gender-as-neithernor_b_58397.html. See Jayme Poisson, *Parents keep child's gender secret*, Toronto Star (May 21, 2011)(parents of a newborn have decided that they will not disclose publicly the gender of their child), available at www.parentcentral.ca/parent/babiespregnancy/babies/article/995112--parents-keep-child-s-gender-secret.

is the most critical tool in the compliance arsenal. Rank-and-file employees carefully watch senior management's actions to see what management truly deems important and rewards. Everything else flows from that, including whether a compliance program succeeds or fails.

When it comes to gender identity and expression in the workplace, step one for HR and Legal is to educate senior management about what gender dysphoria is and how allowing gender-affirmed and gender-nonconforming employees to live openly as their true selves should have a net positive impact on the organization. Once management is onboard and committed to enforcing a discrimination-free work environment for *all* employees, regardless of their gender identities and expressions, the rest is quite easy.

As an ethics officer, when speaking with a new group of employees, I would often discuss the difference between the legal right to take a certain action and doing the right thing. While discriminating against people because of their gender identities or expressions may be legal in a minority of United States jurisdictions, it is not the right thing to do. Senior management should take to heart Martin Luther King, Jr.'s observation: "[H]istory will have to record that the greatest tragedy of this period of social transition was not the strident clamor of the bad people, but the appalling silence of the good people."⁶²

EEO policy

Step two is simple: Amend the organization's EEO and anti-discrimination policies to add "gender identity or expression" to the list of enumerated protected classes.⁶³ Some employers have replaced the word "sex" with "gender," with "gender" intended to include sex, gender identity, and gender expression. That should be okay, as long as the employer communicates to employees the purpose behind the one-word change. However, this shortcut may diminish the effectiveness of the employer's diversity outreach efforts because its openness to gender-affirmed and gender-nonconforming employees will not be self evident to prospective employees who read the organization's EEO and anti-discrimination policies.

⁶² Martin Luther King, *Stride Toward Freedom*, Harper & Brothers (1958), reissued as *Stride Toward Freedom: The Montgomery Story*, Beacon Press, p. 196 (2010).

⁶³ See, e.g., *Nevada's Ban on Discrimination Based on Gender Identity to Take Effect October 1*, Jackson Lewis LLP (June 1, 2011) ("Employers in Nevada should revise their employee handbooks and non-discrimination and non-harassment policies to ensure that gender identity and expression are listed as a protected class."), available at www.jacksonlewis.com/resources.php?NewsID=3805.

Communications and special transition policies

A number of groups have recommended that specialized programs and policies are needed in order to address the unique issues related to gender identity and expression. You can find lots of different policies — some good, some not so good — on the internet on how to handle a transition in the workplace.⁶⁴

Stop! You do not need a new set of formal, written policies. Once the HR team has been educated about the issues relating to gender identity and expression, and once they have trained senior management (e.g., at an annual retreat), the key elements are in place.⁶⁵ In other words, dealing with a gender-affirmed or gender-nonconforming employee is no different than dealing with any other employee with an HR issue — you manage it as a professional would, using the usual tools of the trade.

Hopefully your company is doing periodic harassment prevention training and the CEO issues a periodic message to employees regarding respect in the workplace (which can be part of a broader communiqué). These are the types of vehicles that can be used to communicate to all employees the organization's expansion of its EEO policy and to educate employees about what gender dysphoria is — to demystify a medical condition that many employees may be unfamiliar with.

HR professionals already have learned how to appropriately respond to coworkers who object to company policies that bar discrimination on the basis of numerous protected statuses and to diversity training. The same toolkit works with respect to workers who dislike gender-affirmed and gender-nonconforming employees.

I was very fortunate to work with an extraordinarily talented corporate communications team. We had a monthly company newsletter that had articles on a wide range of topics, such as stories about new product lines, new projects we were awarded, health and safety insights, the annual enrollment period for health benefits, and a CEO corner. Each article was tagged with one of our seven core values. Your organization's newsletter can be used to deliver the message regarding diversity and inclusion, be it in a column authored by the CEO or HR SVP, or an article about a major contract the company was awarded as a result of teamwork (with an accompanying photo of the diverse team members).

⁶⁴ The May 27, 2011 *OPM Guidance Memo* is one of the better policies. See *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (May 27, 2011), available at www.opm.gov/diversity/Transgender/Guidance.asp.

⁶⁵ See *Nevada's Ban on Discrimination Based on Gender Identity to Take Effect October 1*, Jackson Lewis LLP (June 1, 2011) ("Employers are urged to make certain that their Human Resource professionals are aware of this change in the law so that they may help disseminate information and provide appropriate training."), available at www.jacksonlewis.com/resources.php?NewsID=3805.

Medical confidentiality and documentation

Care must be exercised in discussing the medical aspects of a specific employee's gender identity or expressions with coworkers, so as not to violate medical confidentiality obligations. HR needs to discuss this in advance with the employee in question and obtain the employee's approval. In my experience, gender-affirmed employees who come out in the workplace appreciate that in order to help coworkers understand the issues, some carefully thought out discussion of general medical issues may be useful. This normally can be done in a generic manner, without discussing specifics related to a particular employee. I cannot envision a single instance where it would be relevant for an employer to disclose to coworkers whether a gender-affirmed employee has or has not had any corrective surgery.⁶⁶

If HR does have a discussion with an employee regarding surgery, for example, when the employee requests to use accrued sick time for a gender-related medical reason, HR professionals should avoid terms such as "sex change" and "sex change surgery." "Surgery" is more than sufficient. Follow the employee's lead and, if appropriate, mirror the terms that the employee uses.⁶⁷

In the case of a new employee, there would be no need for HR and management to mention the employee's past gender affirmation to any coworkers. Making such a disclosure would likely violate laws that protect gender affirmed people from discrimination.

⁶⁶ The May 27, 2011 *OPM Guidance Memo* makes note of this: "An employee's transition should be treated with as much sensitivity and confidentiality as any other employee's significant life experiences, such as hospitalization or marital difficulties. Employees in transition often want as little publicity about their transition as possible. *** Employing agencies, managers, and supervisors should be sensitive to these special concerns and advise employees not to spread information concerning the employee who is in transition: gossip and rumor-spreading in the workplace about gender identity are inappropriate. Other employees may be given only general information about the employee's transition; personal information about the employee should be considered confidential and should not be released without the employee's prior agreement. Questions regarding the employee should be referred to the employee himself or herself. If it would be helpful and appropriate, employing agencies may have a trainer or presenter meet with employees to answer general questions regarding gender identity. Issues that may arise should be discussed as soon as possible confidentially between the employee and his or her managers and supervisors." *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (May 27, 2011) (Transition While Employed – Confidentiality and Privacy), available at www.opm.gov/diversity/Transgender/Guidance.asp.

⁶⁷ See *Fenway Glossary* (excerpts in Appendix A). In June 2011, the editors of the *Oxford English Dictionary* added "gender reassignment" to the highly-respected dictionary, reflecting the shift away from the term "sex change," as well as the shift in emphasis from sex to gender. See *Gender*, *Oxford English Dictionary*, Oxford University Press (June 2001), available at www.oed.com/view/Entry/77468; *New words June 2011*, *Oxford English Dictionary*, Oxford University Press (June 2001), available at www.oed.com/public/newwords0611.

In the case of a new or current employee, there is no need for the employer to ask for medical or non-medical documentation to “prove” that the employee is gender affirmed. If an employee is presenting or will be presenting in the employee’s expressed gender identity consistently, an employer’s request for proof might itself be a discriminatory act. The employer should take the employee’s word for it, just as employers accept without proof employees’ statements for other purposes, such as that they are married and thus their spouses are eligible for health insurance benefits.⁶⁸

Confidentiality

If the company has not done any pre-planning, it may take a few weeks to come up to speed with respect to the issues surrounding an employee coming out on the job.

⁶⁸ The new June 2011 Connecticut law outlawing discrimination on the basis of gender identity or expression — which covers employment, housing, public accommodations, credit, and other areas — contains an interesting provision that was adopted during a floor debate. The added language provides an illustrative list of ways an employee can prove, *during employment discrimination litigation*, the employee’s gender identity: “evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person’s core identity or not being asserted for an improper purpose.” Connecticut Public Act 11-55, §1 (June 14, 2011), available at www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=6599&which_year=2011&SUBMIT1.x=9&SUBMIT1.y=9&SUBMIT1=Normal and www.cga.ct.gov/2011/ACT/PA/2011PA-00055-R00HB-06599-PA.htm. The extensive colloquy during the debate clearly establishes that the purpose of the added language is to provide the Connecticut Commission on Human Rights and Opportunities (CHRO) and the courts guidance with respect to how an employee can prove the employee’s gender identity or expression in the event the employee files a formal discrimination complaint with the CHRO and, after exhaustion of administrative remedies, in court. It was added to the law in order to eliminate the possibility that a “flip-flopper” — someone who on a whim changes gender identity or expression back and forth day after day or week after week — would be covered by the new law. In contrast, an employee who advises an employer that the employee will henceforth present in the gender matching the employee’s gender identity is protected by the law and can, for example, immediately begin using the bathroom corresponding to the employee’s expressed gender identity. See *Proceedings of The Connecticut General Assembly: The House of Representatives* (May 19, 2011), available at <http://www.cga.ct.gov/2011/trn/H/2011HTR00519-R00-TRN.htm>.

The added language is *not* an authorization for employers to request such evidence from an employee who has come out and begun the process of gender affirmation. Nonetheless, the added language is instructive for employers: an employee going through a gender affirmation normally will be able to easily meet the low threshold set by the added language. Similar to the way Congress told employers, when it passed the ADA Amendments Act of 2008 (ADAAA), to get past the question of whether an employee has a disability and to focus instead on reasonable accommodations, the Connecticut legislature has instructed employers to not question an employee’s good faith coming out in the workplace and to accept the employee in accordance with the employee’s expressed gender identity. See *Proceedings of The Connecticut General Assembly: The House of Representatives* (May 19, 2011), available at <http://www.cga.ct.gov/2011/trn/H/2011HTR00519-R00-TRN.htm>.

Confidentiality during this time is critical, so that a game plan can be carefully thought out and appropriate discussions can take place among the employee, the employee's manager, and HR. If an employee's pending coming out leaks out into the workplace, needless rumors and coworker upset may result.

In one recent situation, word was leaked to a local newspaper about a city manager's planned gender affirmation. Within three weeks after the leak, there were over 200,000 Google hits about the story, and it played out with intense media attention for several months.⁶⁹

One area HR needs to pay attention to are those pesky no-match letters that employers receive from the government when payroll information reported by the company does not match the data the government has on the employee.⁷⁰ The Social Security Administration will not change a person's gender marker in its records without proof of "sexual reassignment surgery."⁷¹ It is thus possible that on a company form a new hire may check off the sex that matches the employee's gender identity, which might not match what the government has recorded in its database. The payroll staff needs to treat no-match letters that report a gender disconnect with care so that an employee is not "outed" to coworkers.

⁶⁹ The newspaper that broke the story, the St. Petersburg Times, has run numerous articles about Susan Stanton. Search "Susan Stanton" at www.sptimes.com.

⁷⁰ See *What to do when a no-match letter is received*, U.S. Social Security Administration (April 21, 2011), available at http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1127. On April 6, 2011, the U.S. Social Security Administration issued revised guidelines on how employers are expected to respond to no-match letters. See *Program Operations Manual System*, Part 01 - Records Maintenance, Chapter 011 - Tax Procedures and Employer Reports, Subchapter 05 - Employer Reports - Wage Reports, Transmittal No. 06, U.S. Social Security Administration (April 6, 2011), available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0101105027>. The U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) has its own set of web pages dedicated to the issue of no-match letters, as it is concerned that employers may use no-match letters in a discriminatory manner. See *SSA No-Match Guidance Page*, U.S. Department of Justice, available at www.justice.gov/crt/about/osc/htm/SSA.php. See generally *SSA Resumes Sending "No-Match" Letters to Employers*, Littler Washington D.C. Employment Law Update (April 14, 2011), available at www.dcemploymentlawupdate.com/2011/04/articles/immigration/ssa-resumes-sending-nomatch-letters-to-employers; *Social Security Gender No-Match Letters and Transgender Employees*, National Center for Transgender Equality (February 2011), available at http://transequality.org/Resources/NCTE_SSA_2011.pdf.

⁷¹ See *Correct or change gender on your Social Security record*, U.S. Social Security Administration (May 16, 2011), available at http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1667.

I am not sure how frequently no-match letters are issued for gender mismatches.⁷² After I was born, my mom applied for my social security number. As I learned later in life, on the application, she marked off my gender as female. Moms always know! None of my employers ever came to me with a no-match letter, looking for an explanation.

If an employer has a good EEO record, hopefully job applicants, once hired, will discuss with HR any potential issues relating to gender markers. Then the employer can report the anatomic sex to the government for payroll purposes and use the gender the employee is presenting in for other company purposes, such as healthcare cards.

EEO statistics

An employer should appreciate that gender affirmations can improve a company's EEO stats. For example, if an employer has five senior managers, three of whom are male, if one of those males comes out as female, then the female gender profile of the employer's managerial workforce increases from 40 to 60 percent — a 50 percent increase: Yet another reason why employers should be welcoming of gender affirmations.

Conflicting rights and restrooms

Amending an EEO policy to add gender identity or expression as a protected class initially may create some friction relating to the personal privacy and other rights of coworkers. Whenever you legislate to protect civil rights, you effectively diminish the rights of others to discriminate and, thus, potentially create friction. Similar concerns were raised with respect to laws relating to racial integration, laws extending equal protection to women and the disabled, and probably every other class that has been afforded statutory protection from discrimination.

Potential conflicts can be minimized by the simple expedient of educating the workforce and using the accommodation mindset that lawyers and HR professionals have long been accustomed to applying in the areas of religious beliefs and disabilities. You do not need a detailed policy setting forth how to handle each workplace interaction; simply use your existing HR toolkit. Each and every employee is entitled to full enjoyment of the workplace.

Experience has shown that once coworkers understand what gender dysphoria is and interact with the person who has come out as gender affirmed, they begin to appreciate

⁷² According to the Social Security Administration, gender is an optional field in its Social Security Number Verification System. Aviva Sufian, Associate Commissioner of External Affairs, U.S. Social Security Administration, *Letter to Mara Keisling, Executive Director, National Center for Transgender Equality* (November 16, 2010), available at http://transequality.org/PDFs/SSA_Letter_SSNVS_11_16_10.pdf.

the human struggle the person has gone through and see a friendlier person once no longer hiding the employee's true self.

In some workplaces, inevitably, there will be one or two employees who will complain — you know who they are. Not much has to be said in response to their gripes. Reiterate the organization's position that all employees are to be treated with respect, advise that other companies have had no problems with employees who have transitioned, and, if you must, stress that the company has a legal obligation to ensure that employees are not harassed.

Restroom usage is the *hot* issue for some coworkers. The reality is that a coworker's concerns can be harmonized with the rights of a transgender employee. If necessary, when an employee starts a public gender affirmation, there are a number of interim measures that can be taken to help alleviate a coworker's concerns. In time, these concerns normally fade away.

The usual red herring that is tossed out by those who oppose laws protecting gender-affirmed people is that allowing gender-affirmed women to use the women's bathroom will allow rapists more ready access to their victims.⁷³ There is no support for this proposition.⁷⁴ There have been no outbreaks of such workplace rapes in the

⁷³ In June 2011, after extensive discussion, the Connecticut legislature joined the growing list of legislatures nationwide who have rejected such a rationale for denying equal rights. See Susan Haigh, *Conn. Senate passes gender identity bill*, The Associated Press (June 4, 2011), available at www.ctpost.com/news/article/Conn-Senate-passes-gender-identity-bill-1409272.php. See also Editorial, *A matter of simple justice*, The Boston Globe (June 8, 2011) ("Opponents [of the pending bill] that would outlaw discrimination on the basis of gender identity or expression] would rather not contend with the hardships that transgender people face. It's easier to call the measure a 'Bathroom Bill,' on the ludicrous theory that a heterosexual male predator could sneak into the ladies' room by pretending to be transgender — as if there were someone checking IDs at the restroom door. The 'Bathroom Bill' talk is nothing but a cheap way to play on some legislators' unease about the subject."), available at www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2011/06/08/a_matter_of_simple_jus_tice.

⁷⁴ Indeed, groups with a mission to protect children and women from abuse have supported the recent antidiscrimination laws that have guaranteed gender affirmed people the right to use the bathrooms that match their gender identities. See, e.g., *Proceedings of The Connecticut General Assembly: The House of Representatives* (May 19, 2011) (Connecticut's June 2011 law was supported by the Connecticut Office of the Child Advocate, the Connecticut Education Association, and the Connecticut Sexual Assault Crisis Services), available at <http://www.cga.ct.gov/2011/trn/H/2011HTR00519-R00-TRN.htm>; Connecticut Public Act 11-55 (June 14, 2011), available at www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=6599&which_year=2011&SUBMIT1.x=9&SUBMIT1.y=9&SUBMIT1=Normal and www.cga.ct.gov/2011/ACT/PA/2011PA-00055-R00HB-06599-PA.htm; Connecticut Education Association Letter to Members of the Connecticut Judiciary Committee (March 30, 2011) (supporting the then pending Connecticut bill), available at www.cea.org/v2/assets/includes/shared/getFile.cfm?type=pdf&getFile=HB-6599-Ron-

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jurisdictions that have laws barring discrimination on the basis of gender identity or expression.⁷⁵ Think about it — the typical male heterosexual rapist is not going to dress

[*Cordillico&loc=/politics/Testimony/2011/*](#); 2011 Legislative Session – Priority Issues, Connecticut Sexual Assault Crisis Services (2011) (listing the then pending Connecticut bill as a legislative priority), available at www.connsacs.org/aboutus/policy.htm. See also *Transgender Equal Rights Coalition Partners*, Massachusetts Transgender Political Coalition (2011) (listing, among many others, the following organizations as supporting the pending Massachusetts bill that would bar discrimination on the basis of gender identity or expression: Jane Doe Inc. – The Massachusetts Coalition Against Sexual Assault and Domestic Violence; the Massachusetts Society for the Prevention of Cruelty to Children; and the Boston, LGBTQ, Massachusetts, and Women's Bar Associations), available at www.masstpc.org/legislation/coalition.shtml.

⁷⁵ In June 2011, the Maine legislature rejected a bill that would have barred transgender people from using public accommodation restrooms or shower facilities that match their gender identity but not their biological sex. Representative Megan Rochello observed: “None of these cities and states [with gender identity protection laws, including Maine,] have experienced any of the terrible things that some of the supporters of this bill have said would occur.” Susan Sharon, *Maine Lawmakers Reject Transgender Bill*, The Maine Public Broadcasting Network (June 8, 2011), available at www.mpbn.net/Home/tabid/36/ctl/ViewItem/mid/3478/ItemId/16700/Default.aspx.

In contrast, there have been reports of transgender people being assaulted for using bathrooms that match their gender identity. See, e.g., Richard Connelly, *Lance Reyna: Assaulted In An HCC Bathroom Because He's Transgendered*, Houston Press (June 24, 2010), available at http://blogs.houstonpress.com/hairballs/2010/06/lance_reyna_assaulted_in_an_hc.php.

In April 2011, there was a violent assault of a transgender woman outside a bathroom at a Baltimore fast food restaurant. In May 2011, the adult assailant was charged with a gender identity-based hate crime. See The Associated Press, *2 Teens Charged in Videotaped Maryland McDonald's Restaurant Beating*, WTTG-Fox5 (April 22, 2011) (includes graphic video), available at www.myfoxdc.com/dpp/news/maryland/2-teens-charged-in-videotaped-maryland-restaurant-beating-042211; Editorial, *Attack at McDonald's: Regardless of Whether It Is Classified a Hate Crime, The Vicious Beating of a Transgender Woman Demands Condemnation From the Community*, The Baltimore Sun (April 25, 2011), available at http://articles.baltimoresun.com/2011-04-25/news/bs-ed-mcdonalds-beating-20110425_1_transgender-woman-gender-identity-crime-law; John Wagner, [Governor] O’Malley calls for actions to protect transgender people, The Washington Post (May 17, 2011), available at www.washingtonpost.com/blogs/maryland-politics/post/omalley-calls-for-actions-to-protect-transgender-people/2011/05/17/AFrHau5G_blog.html. See Jamilah King, *Weighing Solutions to Hate Crime After Brutal Baltimore Attack*, Colorlines (April 27, 2011) (according to Reina Gossett, from the Sylvia Rivera Law Project, a New York-based legal services organization for low-income gender minorities, “There’s a level of violence that trans folks have to navigate everyday, and bathrooms are one site where that violence happens. Whether it’s at the welfare office, the Social Security administration, the shelter system or McDonald’s, bathrooms are a place of violence for trans folks. *** It’s not just bathrooms. Anytime that trans people are accessing our basic survival needs in New York City, we’re constantly navigating different sites of violence.”), available at http://colorlines.com/archives/2011/04/baltimore_mcdonalds_transgender_hate_crime.html; Maya Rupert, *The Assault on Chrissy Lee Polis: The Not So Innocent Bystanders*, The Huffington Post (April 27, 2011) (“In 2009, the most recent year for which statistics are available, the National Coalition of Anti-Violence Programs *reported* that transgender women and girls account for 50 percent of the victims of fatal hate crimes against the LGBT community.”), available at www.huffingtonpost.com/maya-rupert/the-assault-on-chrissy-le_b_854510.html.

up as a woman in order to rape women; nor is he going to carry out his criminal acts in workplace bathrooms, where other employees will be around. Moreover, a rapist is going to commit rapes regardless of whether there is a law barring discrimination on the basis of gender identity or expression.⁷⁶

Some employees are uncomfortable with gay and lesbian coworkers. I am not aware of a single workplace where gay men are barred from using the same bathroom as non-gay men or where lesbian women are barred from using the same bathroom as non-lesbian women. And this is despite the fact that non-workplace same-sex rapes occur.⁷⁷

At one time, racially segregated bathrooms were common in the United States. Thankfully, this is no longer the case. Employers should not make the same mistake with gender identity and expression.

At least 43 percent of *Fortune 500* companies currently have policies barring discrimination on the basis of gender identity or expression.⁷⁸ These companies have demonstrated that a commitment to a discrimination-free workplace is achievable and providing nondiscriminatory access to restrooms is not a significant issue in practice.

In cases where an employer has not yet educated its employees about issues relating to gender identity and expression, an employee coming out as gender affirmed likely will be willing to work with HR to come up with a solution that helps meets everyone's needs — there are many ways to do this. A gender-affirmed employee generally does not want to make waves and will try to make the process work for everyone as long as HR and senior management are willing to support the employee and make it abundantly clear to all employees that discrimination and harassment on the basis of gender identity or expression will not be tolerated.

⁷⁶ Employers that make the unfounded conclusion that allowing gender-affirmed people to use the bathrooms matching their gender identities will result in a spike in bathroom rapes may violate Title VII (under the sex stereotyping theory) and the ADA (by regarding the workers as mentally impaired).

⁷⁷ See Victoria A. Brownworth, *Lesbian-on-Lesbian Rape*, Curve (2010) (the Santa Fe Rape Crisis and Trauma Treatment Center estimates that one in three lesbians have been sexually assaulted by women), available at www.curvemag.com/Curve-Magazine/Web-Articles-2010/Lesbian-on-Lesbian-Rape; Lori B. Girshick and Shannon Berning, *Woman-Woman Rape*, Our Bodies Ourselves Health Resource Center, Boston Women's Health Book Collective (April 2005) ("Although the majority of rapes are committed by men, women can and do rape. *** [T]he perpetrator may be a partner, an acquaintance, or a stranger, and it can happen to any woman, regardless of her sexual orientation."), available at www.ourbodiesourselves.org/book/companion.asp?id=8&compID=95.

⁷⁸ See 2011 *Corporate Equality Index: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality*, Human Rights Campaign, p. 7 (October 1, 2010), available at www.hrc.org/documents/HRC-CEI-2011-Final.pdf.

This is especially so for older employees, who have a greater fear of employment discrimination and are mature enough to understand a cooperative approach may well yield a better outcome for everyone. On the other hand, younger employees may be more adamant that no negotiations are required and coworkers have to fall into line immediately.⁷⁹ They likely have been using the public bathrooms that match their gender identities for years. Some of these employees may have attended one of the growing number of colleges that have unisex bathrooms and co-ed dorm rooms.⁸⁰

⁷⁹ The New Jersey Law Against Discrimination (NJLAD) does not allow an employer to force gender-affirmed persons to delay their use of the bathrooms that match their gender identities or expressions. In particular, the NJLAD provides that access to public accommodations that are in their nature reasonably restricted exclusively to individuals of one sex may be denied to persons of the opposite sex, “provided individuals shall be admitted based on their gender identity or expression.” N.J.S.A. 10:5-12 (f)(1); L. 2006, c.100, §9, available at www.njleg.state.nj.us/2006/Bills/AL06/100.PDF. Such accommodations include bathrooms and dressing rooms. Id. If an employee agrees to delay the employee’s use of the gender-correct bathroom for a short period of time so that the employer can educate the workforce, the employer probably should ask the employee to sign a document memorializing that the employee voluntarily agreed to the delay.

The new June 2011 Connecticut law is in accord. The extensive colloquy during the legislative debate indicates that an employee who advises an employer that the employee will henceforth present in the gender matching the employee’s gender identity is protected by the law and can immediately begin using the bathroom corresponding to the employee’s expressed gender identity. See *Proceedings of The Connecticut General Assembly: The House of Representatives* (May 19, 2011), available at <http://www.cga.ct.gov/2011/trn/H/2011HTR00519-R00-TRN.htm>; Connecticut Public Act 11-55 (June 14, 2011), available at www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=6599&which_year=2011&SUBMIT1.x=9&SUBMIT1.y=9&SUBMIT1=Normal and www.cga.ct.gov/2011/ACT/PA/2011PA-00055-R00HB-06599-PA.htm.

The May 27, 2011 OPM Guidance Memo makes note of this: “The [Department of Labor’s Occupational Safety and Health Administration \(DOL/OSHA\) guidelines](#) require agencies to make access to adequate sanitary facilities as free as possible for all employees in order to avoid serious health consequences. For a transitioning employee, this means that, once he or she has begun living and working full-time in the gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity. While a reasonable temporary compromise may be appropriate in some circumstances, transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to have access to facilities designated for use by a particular gender. Under no circumstances may an agency require an employee to use facilities that are unsanitary, potentially unsafe for the employee, or located at an unreasonable distance from the employee’s work station.” *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (May 27, 2011) (Transition While Employed – Sanitary and Related Facilities), available at www.opm.gov/diversity/Transgender/Guidance.asp.

⁸⁰ See *2010 Campus Equality Index: Colleges and Universities with Inclusive Rooming Policies*, National Student Genderblind Campaign (July 2010), available at www.genderblind.org/wp-content/uploads/2010/07/2010CampusEqualityIndex.pdf; *More Campuses Embrace Gender-neutral Housing for Spring 2011*, National Student Genderblind Campaign (January 17, 2011), available at

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Here are a number of interim (e.g., one to three months) solutions, *assuming the transitioning employee is agreeable to them*:

1. If the employer has two or more bathrooms that are used by the same gender, then the transitioning employee might agree to use the bathroom closest to the employee's workstation and any coworker who is uncomfortable with that can use the other bathroom.
2. If there is just one bathroom, then the transitioning employee might agree to use that bathroom during the first 30 minutes of each hour.
3. Have a unisex bathroom.⁸¹
4. If there is a separate bathroom that the executive suite uses, allow the gender-affirmed employee to use that bathroom. Executives can lead by example.

If a coworker objects to using the same bathroom with a gender-affirmed person, HR can advise the coworker that that is the coworker's prerogative and the coworker should feel free to use another bathroom in the building. In time, the recalcitrant employee likely will tire of having to walk the extra distance to the bathroom, unless the coworker is one of your underachieving workers looking for a reason not to work.

Pros and cons of stealth

Some people do not want others to know of their prior life in a different gender expression. It is a highly personal choice. For many, they have no choice — if you come out on the job, everyone knows. However, if you change jobs after coming out, you might be able to go stealth.

For me, this was not a choice because I came out while employed. But even when I interviewed for a new job, I was generally open about my situation, perhaps more than I should have been. My philosophy was driven in part by my background as an ethics

www.genderblind.org/2011/01/17/more-campuses-embrace-gender-neutral-housing-options-for-spring-2011.

⁸¹ Yes, they do exist other than at Ally McBeal's law office, such as at the Metro YMCA-YWCA in Ottawa. See Neil McKinnon, *YMCA gets gender-neutral changeroom: New "universal" locker room designed with trans community in mind*, Xtra! (November 8, 2010), available at www.xtra.ca/public/Ottawa/YMCA_gets_gendernull_changeroom-9398.aspx; *Bathrooms for Everyone*, Safe2Pee.Org (2011) (reporting that, as of June 21, 2011, there are over three thousand gender-neutral public bathrooms in 765 cities), available at <http://safe2pee.org/new/stats.php>.

officer — if you expect employees to be open and transparent with you as an ethics officer, you need to lead by example. I also hoped to break down stereotypes by being transparent.

Moreover, two of my former general counsel wrote glowing letters of recommendation for me. When a prospective employer contacted one of them, he slipped up and used my old name, which is quite understandable when recollecting past experiences. Because I was not hiding my past, the slip-up was inconsequential.

In addition, I have written extensively on a number of topics, and I do not want to divorce myself from the professional books and articles I have written and contributed to. I must admit that it is nice when two of the employment law books I have contributed to came out in new editions, with my current name in them.⁸²

Perhaps most important, when you live a stealth existence, you may live in fear of being outed. Having hidden who I was for nearly 50 years, I do not want to live in fear anymore.

It may be somewhat easier for a gender-affirmed male to live a stealth existence. Take some testosterone and his voice automatically will begin to deepen, and he may start to grow facial and experience male-pattern baldness. As he changes his clothing selection to be more masculine, coworkers might not immediately notice, as society has less difficulty with women wearing more masculine-looking clothing.⁸³

In contrast, a gender-affirmed female likely will need many hours of electrolysis to remove a five o'clock shadow. Taking estrogen does not soften the voice or re-grow a lost hairline.

Coming out on the job

How should this be handled? There is no one-size-fits-all answer. The process likely will be smoother if the company has already amended its EEO policy to include gender identity and expression, and has presented harassment prevention training that introduced employees to the topic.

If these preliminary steps have not occurred, then HR will need to catch-up, which might include a formal memo to employees, from the senior HR officer or the general manager

⁸² See Ethan Lipsig, Mary C. Dollarhide, and Brit K. Seifert, *Reductions in Force in Employment Law*, BNA Books, p. 795 n. 1 (2007); Rosemary Alito, *New Jersey Employment Law*, New Jersey Law Journal Books (3rd ed. 2010) (title page).

⁸³ See David Crary, *Gender Stereotypes Easing More for Girls than Boys*, The Associated Press (May 7, 2011), available at www.cbsnews.com/stories/2011/05/07/ap/national/main20060780.shtml.

of the operating division, that reiterates the company's zero tolerance policy for discrimination and harassment on the basis of enumerated protected classes, including gender identity and expression.

In either case, HR should instruct the gender-affirmed or gender-nonconforming employee that if the employee experiences any harassment, such as crude jokes or demeaning conduct, then the employee should immediately notify HR. This instruction will be far more meaningful if the company has a track record of promptly and appropriately responding to misconduct and complaints thereof.

Similarly, coworkers should be instructed to direct their concerns to HR, not the gender-affirmed or gender-nonconforming person, and reminded that, in accordance with the company's respect in the workplace policy, harassment of any kind directed at the transitioning employee will not be tolerated.

One common approach to advising coworkers about a workplace coming out is for the employee to take a week off from work and then come back presenting in the gender the employee has affirmed. During that week, HR and managers might educate the workforce about what is going to happen and the employer's expectation that the employee will be treated with dignity and respect. If a transitional bathroom game plan has been agreed to, that would be explained to coworkers.

If this approach is followed, it may be a good idea to have a professional photograph of the employee, presenting in the "new" gender. This can help coworkers adjust, and not speculate about what the employee will look like the following week. As I learned, a picture is worth 10,000 words.

Some transitioning employees do not want to take a week off and want to be present at the all-hands meeting. Some employees will be willing to answer questions. Some will write a letter to some or all coworkers.

It is very important for the management representatives at these coming out meetings to get the pronouns right, use the employee's new name, and not use the word "transgender" if the gender-affirmed employee does not so identify.⁸⁴ At the beginning of the meeting, the manager will refer to the employee by the name coworkers are familiar with. But once the coworkers are told that the employee will be return to work

⁸⁴ The May 27, 2011 *OPM Guidance Memo* makes note of this: "Some individuals who would fit this definition of transgender do not identify themselves as such, and identify simply as men and women, consistent with their gender identity. The guidance discussed in this memorandum applies whether or not a particular individual self-identifies as transgender." *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (May 27, 2011) (Core Concepts – Transgender), available at www.opm.gov/diversity/Transgender/Guidance.asp.

with a modified gender presentation, the employee's new name and matching pronouns should be used consistently thereafter. This will reinforce the message that the company fully supports the employee and will help coworkers ease into the new name and matching pronouns.

People will innocently mess up on the name and pronouns occasionally. In time, this will naturally dissipate. If someone who knew the "old" me mistakenly uses a wrong pronoun when referring to me, I ignore it. If someone seems really embarrassed by having used my old name, I will tell him/her not to worry about it, or I'll share the fact that when I mess up on something, my mind still blames Kevin for the mistake.

HR and the employee need to carefully discuss and agree to the game plan, especially the limits on what, if anything, will be mentioned about the employee's medical condition and stage of affirmation. Sometimes the less said is better, letting time educate coworkers, with management ensuring the employee is treated respectfully.

As noted above, older employees may have heightened fear of losing their jobs as a result of coming out. They might be risk averse because of personal and family financial responsibilities. Thus, they likely will be more willing to work with HR in devising a win-win game plan.

Younger workers may have already experienced immediate acceptance by their schools and, in many cases, from their families and friends. They likely will be well informed about the laws that protect them from discrimination and, thus, they may be less willing to accept anything other than coworkers accepting them immediately.

Customer-facing positions/objecting customers and vendors

It may be easier for a professional employee to come out than for a non-professional employee. A lot will depend upon the employee's position, the geographic location, the industry, the age of coworkers, and the organization's ethical culture.

For non-managerial positions, especially people who work in retail, a transition may be more difficult, as there may be unspoken concerns about how customers may react to the "strange looking" employees who are changing their gender expressions real time in the workplace. These same "concerns" were raised when the laws were amended to allow racial minorities and the disabled to work side-by-side with other employees.

HR needs to make sure it works closely with line managers to ensure these concerns are properly addressed and that the employee receives support. HR professionals already have the toolkit to handle such situations.

Names, pronouns and telephone etiquette

Government agencies differ on when they will allow a gender-affirmed person to receive identification cards with a new name and revised gender marker. Generally, corrective surgery is not required for a name change; a court order is required. When presented with a court order, most government agencies will allow people to change their names on ID cards, such as social security cards, drivers' licenses, and passports.

As explained in the *Confidentiality* section above, the Social Security Administration will not change a person's gender marker in its records without proof of "sexual reassignment surgery." A small number of states allow gender marker changes without proof of corrective surgery.⁸⁵

In 2010, the United States Department of State revised the rules applicable to passport. Prior to the change, people undergoing gender affirmations but who had not yet had corrective surgery could receive a passport that showed their destination gender, but the passport was valid for only one year. Under the revised policy, a new gender-correct passport with no time restriction will be issued based on a certification of a licensed physician without proof of surgery.⁸⁶

Most employees coming out on the job will likely have changed their names with the appropriate government agencies. In such cases, the employer has no reason not to honor that name change in the workplace.

Even if the employee has not yet changed the employee's name with the government, the employer should recognize the name change.⁸⁷ The employee may be beginning

⁸⁵ Harper Jean Tobin, *Fair and Accurate Identification for Transgender People*, LGBTQ Policy Journal (2011) ("Nationally, the percentage of transgender people who are unable to update identification and official records to reflect their lived gender varies from 41 percent for driver's licenses and 51 percent for Social Security records to 74 percent for birth certificates."), available at <http://isites.harvard.edu/icb/icb.do?keyword=k78405&pageid=icb.page414493>.

⁸⁶ See *Foreign Affairs Manual – Volume 7 Consular Affairs*, U.S. Department of State, Appendix M (Gender Change) (January 20, 2011), available at www.state.gov/documents/organization/143160.pdf (this link may need to be cut-and-pasted into the web browser in order to be activated). See *Understanding the New Passport Gender Change Policy*, National Center for Transgender Equality (January 2011), available at http://transequality.org/Resources/passports_2011.pdf; Katy Steinmetz, *New Passport Rules Ease Switch for Transgenders*, Time (June 12, 2010), available at www.time.com/time/nation/article/0,8599,1996302,00.html.

⁸⁷ The May 27, 2011 *OPM Guidance Memo* makes note of this: "[T]he records in the employee's [personnel file] and other employee records (pay accounts, training records, benefits documents, and so on) should be changed to show the employee's new name and gender, once the employee has begun working full-time in the gender role consistent with the employee's gender identity." *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of

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the “real life experience” (see the *Fenway Glossary*) that is required before healthcare professionals will approve the employee for surgery. It would be a reasonable accommodation for the employer to allow the employee to use the new gender-appropriate name in the workplace.⁸⁸ Many of us have worked at one time or another with people who use a first name — a nickname — that is not their legal first name. I have never heard of an employer making an issue over that. Of course, until the name is changed through the judicial system, the employer will need to use the employee’s legal name in filings with the government.

One easy way for un-accepting coworkers to harass a gender-affirmed or gender-nonconforming employee is to make homophobic comments or purposely using the wrong pronouns — or even worse, a combination of opposite gender pronouns (e.g., “please give this report to *he-she*”) — to refer to the employee. HR and line managers need to be ready to nip such crude conduct in the bud.⁸⁹

Personnel Management (May 27, 2011) (Transition While Employed – Recordkeeping), available at www.opm.gov/diversity/Transgender/Guidance.asp. The OPM, in its May 27, 2011 guidance on *How to Reconstruct a Personnel Folder due to a Change in Gender Identity*, provides that “If evidence of change of gender in the identity documents is not obtainable because of state or local requirements or any other reason, the personnel folder may still be reconstructed with the employee’s new name and gender to reflect a change in gender identity based on a medical certification *** stating that the employee has had appropriate clinical treatment for transition to the new gender.” *Operating Manual: The Guide To Personnel Recordkeeping, Chapter 4*, U.S. Office of Personnel Management (September 2008), available at www.opm.gov/feddata/recguide.pdf, as amended by *How to Reconstruct a Personnel Folder due to a Change in Gender Identity*, U.S. Office of Personnel Management, p. 1 (June 1, 2011), available at www.opm.gov/feddata/Ch4_ReconstructPersonnelFolder.pdf. If an employer is going to require a medical certification, then it should first check to see if such requirement violates state anti-discrimination and/or privacy laws that are more restrictive in terms of what information an employer may request.

⁸⁸ An employee who starts the gender affirmation process may abort the process, though this rarely happens today, especially if the workplace is supportive. In a recent, sad situation, a *Los Angeles Times* employee was so torn by the process, the employee committed suicide. From the accounts I have read, there is no indication that the employer’s actions played any part in the employee’s decision to commit suicide; if anything, it appears the employer was highly supportive. Rather, it seems that the employee’s coming out became so high profile that the employee had no space for the private aspects of the affirmation process. See Christopher Goffard, *Public triumph, private torment*, *Los Angeles Times* (March 27, 2010), available at <http://articles.latimes.com/print/2010/mar/27/local/la-me-sportswriter27-2010mar27>.

⁸⁹ The May 27, 2011 *OPM Guidance Memo* makes note of this: “Managers, supervisors, and coworkers should use the name and pronouns appropriate to the employee’s new gender. Further, [they] should take care to use the correct name and pronouns in employee records and in communications with others regarding the employee. Continued intentional misuse of the employee’s new name and pronouns, and reference to the employee’s former gender by managers, supervisors, or coworkers may undermine the employee’s therapeutic treatment, and is contrary to the goal of treating transitioning employees with dignity and respect. Such misuse may also breach the employee’s privacy, and may create a risk of harm to the employee.” *Guidance Regarding the Employment of*

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During the early stages of coming out, I tried my best to alter my voice.⁹⁰ It was not easy because I am tone deaf. One day, I was visiting with Mike Hoffman, the Director of the Center for Business Ethics at Bentley University and a fellow member of the New England Ethics Forum. We had been having numerous discussions about the ethics of coming out, a topic I never envisioned many years earlier when I attended my first compliance officer training program at the Center. We went to the cafeteria for lunch. While paying for my food, I tried my best female voice. When we sat down to eat, Mike asked, "What was that voice you were using at the register?" Mike added that my regular voice was fine; it was me. I realized that I was trying to be someone I was not. It was a reminder to be myself, be authentic. Goodbye dreams of a voice like Sarah Brightman or Karen Carpenter.

On occasion, people on the telephone will "sir" me: "I'm sorry sir, we don't have that in stock." They will even do this despite the fact that I introduced myself as "Christine." (So much for listening!) Many customers are gender-affirmed or gender-nonconforming people. It would be a good idea for companies to train their operators and telephone-based sales personnel to not assume people's gender from the mere sound of their voices and to carefully listen to the first names of their customers. These telephone responders can just as easily say, "I'm sorry, we don't have that in stock." No need to say sir or ma'am.

The hiring process and employment forms

The general rules that apply to the hiring process are equally applicable to transgender hires. An employer should not ask questions about an applicant's sex, gender, or surgical history.⁹¹ If there is a legal obligation or legitimate business need to record a

Transgender Individuals in the Federal Workplace, U.S. Office of Personnel Management (May 27, 2011) (Transition While Employed – Names and Pronouns), available at www.opm.gov/diversity/Transgender/Guidance.asp.

⁹⁰ There are some excellent resources available to assist gender-affirmed persons to improve voice quality. See, e.g., Rebecca Shafir, *Transgender Voice Training*, available at www.mindfulcommunication.com/transgender.htm; Jeannie Greeley, *The Art of Transforming Gender*, Boston Spirit Magazine, pp. 66-71 (August - September 2006), available at www.totalimageconsultants.com/downloads/BostonSpirit2006.pdf, and Richard K. Adler, Sandy Hirsch, and Michelle Mordaunt, *Voice and Communication Therapy for the Transgender/Transsexual Client: A Comprehensive Clinical Guide*, Plural Publishing (2006).

⁹¹ See the discussion above in the section *Medical confidentiality and documentation*.

For a recent example of an employer crossing the line in asking impermissible questions, see Richard Pérez-Peña, *A Lawsuit's Unusual Question: Who Is a Man?*, The New York Times (April 10, 2011) (supervisor for a post-surgery gender-affirmed man, whose birth certificate, driver's license, and social security card reflect his male gender, told subordinate that he heard that the subordinate is transgender and asked if he had had any surgeries), available at

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worker's sex or gender once employed, an employer should collect the information on an appropriate form and consider including an additional, *optional* question that permits the employee to indicate if the employee has a gender identity that differs from the sex checked off in the previous question.

Instead of asking an employee to check off the F or M box, an employer might be better off with a space where the employee writes in the employee's sex. In this manner, the employees can write in Female, Male, Gender Nonconforming, or whatever term that best describes the situation. HR can then address any concerns directly with the employee.

If an employer does not offer employees such options, then if an employee checks off the sex that matches the employee's gender identity but differs from the employee's biological sex, then this should not be deemed a falsification of company records.

Some applications request applicants to disclose any prior names by which they were previously known. I recommend that such an inquiry be asked only after a conditional job offer has been made and only if relevant (e.g., in order to complete a background check). Asking for prior names may tend to reveal a change in marital status (e.g., different last names) or a gender affirmation (e.g., different first names, one of which is generally associated with females and the other with males). For the same reasons, credit reports should not be ordered prior to a conditional job offer.

Some gender-affirmed people will be open about their pasts if they have substantial achievements under their old names. For example, I have written extensively on a variety of topics. I think my publications are a plus on my resume. A conscientious background checker using the internet would discover the disconnect with my first name. Employers that search the internet as part of their background checking process should designate a specific person who is not involved in the hiring decision to conduct the internet search, and that person should turn over to the hiring team only information that is directly relevant to workers' qualifications for employment. The fact that an applicant had a different first name likely would not be relevant at the interview stage. The potential for resume fraud can be ferreted out once a conditional job offer has been made.

www.nytimes.com/2011/04/11/nyregion/11sexchange.html?nl=todaysheadlines&emc=tha29. The Transgender Legal Defense & Education Fund has filed a lawsuit on behalf of the gender-affirmed employee, El'Jai Devoureau, who was terminated by his employer. See *TLDEF Files Suit on Behalf of Transgender Man Fired from Male-Only Job*, Transgender Legal Defense & Education Fund (April 11, 2011) (copies of pleadings filed with the New Jersey Division on Civil Rights and the New Jersey Superior Court are accessible from this posting), available at http://transgenderlegal.org/headline_show.php?id=346. New Jersey's statewide daily newspaper condemned the termination. See Editorial, *Protect transgender job rights*, Star-Ledger (April 16, 2011), available at http://blog.nj.com/njv_editorial_page/2011/04/protect_transgender_job_rights.html.

I think humor, when appropriately used in a non-malicious way, can help break tension. When I interviewed for a position and could tell the interviewer was very uncomfortable with my gender identity, I advised him that by hiring me he could get the man he wanted, yet pay me a woman's wage. But because humor can be a two-edged sword, it is generally a better practice to avoid it.⁹²

Employee benefits

With rare exception, employee benefits are provided on a gender-neutral basis. Thus, whether a person's sex is checked off as F or M should make no difference.

If an employee comes to HR and advises that the employee is in the process of a gender affirmation and will be using a new first name, HR should respect the employee's decision and treat the employee in accordance with the gender the employee identifies with. Third-party plan administrators should be notified to update their records to reflect the new name and identified gender.⁹³ For example, the health insurance carrier should be advised to issue a new benefit card to the employee.⁹⁴ Failure to do so will expose the employee to embarrassment at a healthcare provider's

⁹² The use of humor can be a dangerous proposition, as some people may be offended. I rarely use humor with coworkers, as I do not want to open myself up to charges of harassment.

Holiday Inn ran its gender-charged "high school reunion" commercial just one time, during Super Bowl XXXI, on January 26, 1997. Various groups objected to it. I think it is very funny and not offensive; others disagree. Regardless of what you think, the commercial, available at www.commercialcloset.org/common/adlibrary/adlibrarydetails.cfm?QID=46&clientID=11064, serves as an excellent vehicle to open debate on a wide range of gender-related issues, though I would not use it in an employment setting.

⁹³ The May 27, 2011 *OPM Guidance Memo* makes note of this: "Employees in transition who already have Federal insurance benefits must be allowed to continue their participation, and new employees must be allowed to elect participation, in their new names and genders." *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (May 27, 2011) (Transition While Employed – Insurance Benefits), available at www.opm.gov/diversity/Transgender/Guidance.asp.

⁹⁴ On May 27, 2011, OPM advised federal group health insurance carriers: "Carriers who receive written requests from enrollees who have transitioned from one sex to another should allow them to select their preferred gender designation for carrier records. Carriers which issue ID cards with gender as one of the elements should then issue gender-appropriate cards to the enrollees. Enrollees should also be provided appropriate benefits in accordance with their individual medical status. For example, an individual who undergoes reassignment from female to male, but who still needs routine mammograms and pap smears, should be provided benefits for those services. The same rule applies to the medical needs and benefits of male-to-female transitioners." *Federal Employees Health Benefits Program Carrier Letter re Gender Reassignment*, U.S. Office of Personnel Management (May 27, 2011), available at www.opm.gov/cARRIER/cARRIER_letters/2011/2011-12.pdf.

office when the employee checks in under the new name and the benefit card bears the old name.

One issue that arises with respect to health benefits is the taxability of company-provided group health insurance for the employee's spouse. In the case of a married different-sex couple, the employee is not taxed on the employer-paid portion of group health insurance coverage provided to the employee's spouse. In the case of a married same-sex couple, federal tax law and the majority of state tax laws require that the employee pay income tax on the employer-paid portion of health insurance provided to the employee's spouse.⁹⁵ To help ameliorate the inequity of this result, some employers will gross up the employee's pay to offset the extra income taxes the employee has to pay.⁹⁶

This inequity is due to Section 3 of the federal Defense of Marriage Act (DOMA), which reads in part:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.⁹⁷

Earlier this year, the President and the Attorney General opined that Section 3 of DOMA is unconstitutional and directed the United States Department of Justice to no longer defend the constitutionality of Section 3 in some pending litigation.⁹⁸ Nonetheless,

⁹⁵ The portion of the employee's share of the health insurance premium that is attributable to the employee's same-sex spouse's coverage must be contributed on a post-tax basis; it is not eligible to be paid on a pre-tax basis via an Internal Revenue Code Section 125 cafeteria plan.

To read more about the taxation of domestic partner health insurance benefits, see Evan Miller and Brian L. Shiker, *Employee Benefits For Domestic Partners and Same Sex Spouses*, Association of Corporate Counsel InfoPAKSM, pp. 20-25 (April 2007), available at www.acc.com/legalresources/resource.cfm?show=19629; Todd A. Solomon, *Domestic Partner Benefits: An Employer's Guide*, Thompson Publishing Group (6th ed. 2010); *Taxation of Domestic Partner Benefits*, Human Rights Campaign (2011), available at www.hrc.org/issues/workplace/benefits/domestic_partner_benefit_taxation.htm.

⁹⁶ See *Domestic Partner Benefits: Grossing Up to Offset Imputed Income Tax*, Human Rights Campaign (2011), available at www.hrc.org/issues/workplace/benefits/grossing_up.htm.

⁹⁷ 1 U.S.C. §7; Public Law 104-199, §3 (September 21, 1996), available at www.gpo.gov/fdsys/pkg/PLAW-104publ199/pdf/PLAW-104publ199.pdf.

⁹⁸ See *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, U.S. Department of Justice (February 23, 2011), available at www.justice.gov/opa/pr/2011/February/11-ag-223.html.

because the Executive Branch will continue to enforce DOMA until Congress repeals it or there is a final judicial decision invalidating it,⁹⁹ a brief discussion of DOMA's impact on a gender affirmation is warranted.

What happens when one person in a different-sex marriage "changes" genders? Prior to the affirmation, the employee was not taxed on the employer-paid portion of group health insurance coverage provided to the employee's spouse. After the affirmation, the result should be the same because the employee remains married for purposes of DOMA. Under the common law, a marriage ends only upon death or judicial decree.¹⁰⁰ The Congressional record underlying DOMA reaffirms that the legal status of being married as husband and wife affixes at the point of marriage and can be changed only by death or judgment of divorce.¹⁰¹ Thus, for purposes of federal law, the marriage is still valid after a gender affirmation, and the couple remains husband and wife.¹⁰² The

⁹⁹ See *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, U.S. Department of Justice (February 23, 2011), available at www.justice.gov/opa/pr/2011/February/11-ag-222.html. But see *Matter of Paul Wilson Dorman*, 25 I&N Dec. 485 (A.G. 2011) (on April 26, 2011, Attorney General Holder vacated the decision of the U.S. Board of Immigration Appeals and remanded for the Board to make specific findings, with regard to Paul Wilson Dorman's eligibility for cancellation of removal, as may be necessary to determine whether and how the constitutionality of DOMA is presented in this deportation case), available at www.justice.gov/eoir/v7/intdec/vol25/3712.pdf; Julia Preston, *Judge Gives Immigrant in Same-Sex Marriage a Reprieve From Deportation*, The New York Times (May 6, 2011) (federal district judge temporarily suspends deportation of Henry Velandia in view of Attorney General Holder's decision a week earlier in *Matter of Paul Wilson Dorman*), available at www.nytimes.com/2011/05/07/us/politics/07marriage.html.

¹⁰⁰ See *Transgender Family Law Facts: A Fact Sheet for Transgender Spouses, Partners, Parents and Youth*, Transgender Law Center, p. 1 (October 2006) ("California marriage law generally says that a valid marriage can only be ended through death or divorce"), reprinted in Association of Corporate Counsel 2009 Annual Meeting Materials, available at www.acc.com/legalresources/resource.cfm?show=784236, and also available at www.transgenderlawcenter.org/pdf/Family%20Law%20Facts.pdf; Shannon Minter, *Transgender People and Marriage: The Importance of Legal Planning*, National Center for Lesbian Rights, p. 1 (2002) ("when one of the spouses in a heterosexual marriage comes out as transsexual and transitions within the marriage[, if] the couple chooses to stay together, as many do, the result is a legal marriage"), reprinted in Association of Corporate Counsel 2009 Annual Meeting Materials, available at www.acc.com/legalresources/resource.cfm?show=784353, and also available at www.nclrights.org/site/DocServer/tgmarriage.pdf?docID=1182; Editorial, *In Favor of Same-Sex Marriage II*, New Jersey Law Journal, 197 N.J.L.J. 574 (August 17, 2009) ("Under New Jersey law, a person once legally married remains married until the marriage is terminated by judicial decree or the death of a spouse."), available at www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202433065545.

¹⁰¹ *Defense of Marriage Act*, House Report 104-664, Committee of the Judiciary of the U.S. House of Representatives, p. 31 and fn. 79 (July 9, 1996), available at www.gpo.gov/fdsys/pkg/CRPT-104hrpt664/pdf/CRPT-104hrpt664.pdf.

¹⁰² The May 27, 2011 OPM Guidance Memo makes note of this: "If the employees in transition are validly married at the time of the transition, the transition does not affect the validity of that marriage, and spousal coverage should be extended or continued even though the employee in transition has a

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employee can continue to file tax returns and select income tax withholdings based on married status.

A second issue that arises with respect to health benefits is insurance policy language that precludes medical coverage for “transsexual related” health issues. Employers are beginning to eliminate such exclusions in their group health plans.¹⁰³ The American Medical Association and the American Psychological Association oppose such exclusions.¹⁰⁴ Some insurance companies have determined that transgender exclusions are not justifiable.¹⁰⁵

Another significant health benefits issue relates to flexible spending arrangements (FSAs), health savings accounts (HSAs), and health reimbursement arrangements (HRAs), which I will collectively refer to as FSAs. One basic rule applicable to FSAs is that generally only medical expenses that qualify for the medical and dental expenses deduction on Form 1040 may be reimbursed.¹⁰⁶ For a period of time, the Internal

new name and gender.” *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (May 27, 2011) (Transition While Employed – Insurance Benefits), available at www.opm.gov/diversity/Transgender/Guidance.asp.

¹⁰³ See *Transgender-Inclusive Benefits for Employees and Dependents*, Human Rights Campaign (2011), available at www.hrc.org/issues/transgender_inclusive_benefits.htm; [2011] *Corporate Equality Index: List of Businesses with Transgender-Inclusive Health Insurance Benefits*, Human Rights Campaign (October 1, 2010), available at www.hrc.org/issues/workplace/benefits/7644.htm. Commencing with the Human Rights Campaign’s 2012 Corporate Equality Index, an employer will not receive a perfect equality score if its health insurance plan includes a transgender exclusion. See *HRC’s New Corporate Equality Index Requires Removal of Exclusions to Transgender Healthcare and Benefits*, Human Rights Campaign (October 6, 2010), available at www.hrcbackstory.org/2010/10/hrc%20%99s-new-corporate-equality-index-requires-removal-of-exclusions-to-transgender-healthcare-and-benefits.

¹⁰⁴ See *Compendium of AMA Policy on GLBT Issues*, American Medical Association (undated), H-185.950 (Removing Financial Barriers to Care for Transgender Patients) and H-180.980 (Sexual Orientation and/or Gender Identity as Health Insurance Criteria), available at www.ama-assn.org/resources/doc/rfs/qlbt-policy.pdf; *House of Delegates 2008 Annual Meeting Resolution 122 (A-08): Removing Financial Barriers to Care for Transgender Patients*, American Medical Association (April 18, 2008), available at www.ama-assn.org/ama1/pub/upload/mm/471/122.doc; *House of Delegates 2008 Annual Meeting Resolution Minutes*, American Medical Association (June 2008), p. 489 (Resolution 122 adopted), available at www.ama-assn.org/resources/doc/hod/a08resolutions.pdf; *APA Policy Statement: Transgender, Gender Identity, & Gender Expression Non-Discrimination*, American Psychological Association (August 2008), available at www.apa.org/about/governance/council/policy/transgender.aspx.

¹⁰⁵ See, e.g., *Clinical Policy Bulletin: Gender Reassignment Surgery*, Aetna Inc. (rev. March 25, 2011), available at www.aetna.com/cpb/medical/data/600_699/0615.html.

¹⁰⁶ See *Health Savings Accounts and Other Tax-Favored Health Plans*, Internal Revenue Service Publication 969 (2010), available at www.irs.gov/pub/irs-pdf/p969.pdf. See also *Medical and Dental*

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Revenue Service denied taxpayers the right to take a deduction for gender-related medical procedures, asserting that such procedures are cosmetic.

In 2010, in *O'Donnabhain v. Commissioner of Internal Revenue*, the Tax Court rejected the IRS' position and adopted a commonsense approach to deciding when a medical procedure will be deemed cosmetic and thus not deductible.¹⁰⁷ As a result, the costs of most physician-approved medical procedures that some gender-affirmed employees may undergo should be eligible for reimbursement from FSAs.

Sometimes there is a visceral reaction that gender-related medical issues will require special leave accommodation. That is not the case. HR professionals are already equipped to handle leave requests, using the normal rules applicable pursuant to company leave policies (assuming such policies are nondiscriminatory) and under laws granting leave rights and/or requiring reasonable accommodations for disabilities.

Yes, some requests may be a bit out of the ordinary, but they should not present any difficulties in administering. For example, for a gender-affirmed woman wanting to eliminate her five o'clock shadow, it will take many hours of electrolysis and the embarrassing need to let the beard grow for two or three days prior to each treatment. In my case, I had several hundred hours of facial electrolysis. Instead of doing a few hours a week for several years, initially I had three rounds of electrolysis, lasting five, then four, then three full days, carried out by two technicians simultaneously. This approach dramatically expedited the process and minimized the embarrassment.

If anyone thinks people go through gender affirmations just for the fun of it, trust me — several hundred hours of electrolysis are not fun!

Apearance, dress, and grooming codes

Do not worry. Reasonable dress codes are still enforceable. Courts have tended to be highly deferential to employer dress codes that have some generally accepted, gender-specific elements. Even the generally liberal federal Ninth Circuit Court of Appeals, en banc, upheld an employer policy that required female bartenders to wear makeup and

Expenses, Internal Revenue Service Publication 502 (2010), available at www.irs.gov/pub/irs-pdf/p502.pdf.

¹⁰⁷ *O'Donnabhain v. Commissioner of Internal Revenue*, 134 T.C. No. 4, Tax Ct. Rep. (CCH) 58,122, 2010 WL 364206 (Tax Court 2010), available at www.ustaxcourt.gov/InOpHistoric/ODonnabhain.TC.WPD.pdf. Ms. O'Donnabhain was represented by the Gay & Lesbian Advocated & Defenders (GLAD), which has a set of web pages related to the litigation at www.glad.org/work/cases/in-re-rhiannon-odonnabhain.

barred male bartenders from wearing makeup.¹⁰⁸ Nonetheless, as fashions and society change, what qualifies as generally accepted has changed and, thus, employers must respond accordingly.

Employers need to use a fair dose of commonsense in this area, as they do not want to be sucked into a lawsuit based on the sex stereotyping theory of discrimination discussed earlier in this article.¹⁰⁹ The New Jersey Law Against Discrimination (NJLAD) provides an excellent rule for addressing issues in this area:

Nothing in the provisions of [the NJLAD] shall affect the ability of an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards not precluded by other provisions of State or federal law, except that an employer shall allow an employee to appear, groom and dress consistent with the employee's gender identity or expression.¹¹⁰

¹⁰⁸ See *Jespersen v. Harrah Operating Company*, 444 F.3d 1104 (9th Cir. 2006) (en banc), available at www.ca9.uscourts.gov/datastore/opinions/2006/04/13/0315045.pdf. Judge Alex Kozinski penned a dissent, joined in by Judges Susan Graber and William Fletcher, taking judicial notice of a fact that many people will appreciate:

But is there any doubt that putting on makeup costs money and takes time? Harrah's policy requires women to apply face powder, blush, mascara and lipstick. You don't need an expert witness to figure out that such items don't grow on trees.

Nor is there any rational doubt that application of makeup is an intricate and painstaking process that requires considerable time and care. Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and pointing to our wrists. It's hard to imagine that a woman could "put on her face," as they say, in the time it would take a man to shave ***. Makeup, moreover, must be applied and removed every day; the policy burdens men with no such daily ritual." [444 F.3d at 1117.]

For an analysis of the *Jespersen* decision, see Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 Duke Journal of Gender Law & Policy 243 (2007), available at www.law.duke.edu/shell/cite.pl?14+Duke+J.+Gender+L.+&+Pol'y+243+pdf.

¹⁰⁹ If HR is concerned that an employee (whether gender-affirmed, gender-nonconforming, or otherwise) may be having difficulties with *professional-looking* clothing selection and makeup, there are excellent mainstream image consultants HR can refer employees to. See, e.g., Ginger Burr, *Services for the Transgender Community*, available at www.totalimageconsultants.com/transgender.shtml; David Nicholas, *Bio*, www.makeupdni.com/dnibio.html; and Jeannie Greeley, *The Art of Transforming Gender*, Boston Spirit Magazine, pp. 66-71 (August - September 2006), available at www.totalimageconsultants.com/downloads/BostonSpirit2006.pdf. However, employers cannot use this as a means of implementing or reinforcing impermissible gender stereotypes.

¹¹⁰ N.J.S.A 10:5-12(p); L. 2006, c.100, §9, available at www.njleg.state.nj.us/2006/Bills/AL06/100_.PDF.

On May 24, 2011, Nevada amended its law to expressly bar employment discrimination on the basis of gender identity or expression. The amended law contains language nearly identical to the New

(footnote continues on next page)

On occasion, there may be a situation that requires HR and legal professionals to step back and carefully think about the facts before responding. Consider Jennifer Miller, a well-known performing artist and educator, whose gender expression is somewhat androgynous, occasionally masculine, though on occasion she has been seen in a dress. Ms. Miller has a beard.¹¹¹ A few years ago, I shared two pictures of Ms. Miller with another lawyer who went through a gender affirmation. The lawyer remarked:

The pictures are disarming, ... with so much beauty in them, for all the reasons she'd best understand. It takes me a moment to adjust, still seems odd to me, and I can only imagine how most others must feel. So then I can imagine better how they feel about me.

Management must reflect on its values, its EEO policy, its diversity inclusion programs, and the real message it will send to employees if it were to deny employment to an

Jersey text quoted above. Nevada Law 2011, Chapter 112, §9 (May 24, 2011), available at www.leg.state.nv.us/Session/76th2011/Bills/AB/AB211_EN.pdf.

The May 27, 2011 *OPM Guidance Memo* makes note of this: "Employees who begin the 'real life experience' stage of their transition are required under the ... Standards of Care to live and work full-time in the target gender in all aspects of their life, which includes dressing at all times in the clothes of the target gender. Once an employee has informed management that he or she is transitioning, the employee will begin wearing the clothes associated with the gender to which the person is transitioning. Agency dress codes should be applied to employees transitioning to a different gender in the same way that they are applied to other employees of that gender. Dress codes should not be used to prevent a transgender employee from living full-time in the role consistent with his or her gender identity." *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (May 27, 2011) (Transition While Employed – Dress and Appearance), available at www.opm.gov/diversity/Transgender/Guidance.asp.

¹¹¹ To learn about Jennifer Miller and view some pictures of her, see Susan Monagan, *The Artmaker as Active Agent: Six Portraits – Chapter 7: Jennifer Miller*, Cornell University Graduate School Thesis, pp. 92-107 (May 2005), available at http://wayback.archive-it.org/2077/20100906211735/http://www.communityarts.net/readingroom/archive/monagan/monagan_web.pdf (full thesis) and <http://wayback.archive-it.org/2077/20100906211753/http://www.communityarts.net/readingroom/archive/monagan/ch7-miller.php> (Chapter 7); Dinitia Smith, *Step Right Up! See the Bearded Person!*, The New York Times (June 9, 1995), available at www.nytimes.com/1995/06/09/arts/step-right-up-see-the-bearded-person.html?scp=1&sq and www.circusamok.org/presssmithreview; Andrew Grant, *Icons: Jennifer Miller*, Independent Film Channel (August 2, 2010), available at www.ifc.com/icons/2010/08/jennifer-miller.php; *Jennifer Miller - Associate Professor*, Pratt Institute, available at www.pratt.edu/academics/liberal_arts_and_sciences/humanities_media_studies/faculty_and_staff/bio/?id=jmille11; Jennifer Miller, Wikipedia (November 8, 2010), available at http://en.wikipedia.org/wiki/Jennifer_Miller; Jennifer Miller, Circus Amok, available at www.circusamok.org/node/96; Myles Ellison, *Jen Miller Runs Amok*, MCLE Beacon (April 8, 2009), available at www.mclabeacon.com/jen-miller-runs-amok-1.1649743; Jennifer Miller, World News Network (videos), available at http://wn.com/Jennifer_Miller.

otherwise talented person such as Ms. Miller simply because she is gender nonconforming.¹¹² A company's willingness to employ people such as Ms. Miller and me reflects its underlying ethical culture and acceptance of diversity, something that all employees can learn from.

Diversity issues

As employers have come to appreciate the issues relating to gender identity and expression, they have seen acceptance of people with different gender identities and expressions as a positive in their recruitment and retention efforts. Employees who are not afraid to express their true selves tend to be more productive and creative workers.

Some employers have created various employee resource groups (ERGs), as part of their efforts to be welcoming to various minority groups within the workplace. If an organization has a robust respect in the workplace policy and actively mentors all new talent, there is less need for ERGs.¹¹³

Some employers have used the simple expedient of adding transgender people to their existing ERGs for lesbian and gay employees. However, some of these employers have undermined that expansion by failing to change the names of their ERGs that have a clear lesbian and gay mission — e.g., the Federal Aviation Administration's GLOBE: Gay Lesbian Or Bisexual Employees.¹¹⁴ This does not send a very welcoming message to the newly invited transgender workers, and it furthers the misconception that gender identity is a subset of sexual orientation, which it is not.

In addition, as noted above, some gender-affirmed and gender-nonconforming people do not identify as "transgender."¹¹⁵ Simply adding a "trans" sounding word to the ERG's name or mission may be counterproductive.

¹¹² Denying employment to a bearded woman because she has a beard likely would violate the Americans with Disabilities Act, for the reasons discussed earlier in this article.

¹¹³ As Rich Baer, General Counsel and Chief Administrative Officer for Qwest Communications, recently pointed out, effective mentoring requires mentees taking an active role in the process. See Rich Baer, *Create Your Mentors*, Corporate Counsel (March 25, 2011) ("[T]he responsibility for mentorship is as much, if not more, on the mentee, as the mentor. Seek out mentors; it is your career, not theirs.'"), available at www.law.com/jsp/cc/PubArticleCC.jsp?id=1202487812517.

¹¹⁴ See Federal Aviation Administration's *FAA GLOBE*, available at www.faaglobe.org.

¹¹⁵ The May 27, 2011 *OPM Guidance Memo* makes note of this: "Some individuals who would fit this definition of transgender do not identify themselves as such, and identify simply as men and women, consistent with their gender identity. The guidance discussed in this memorandum applies whether or not a particular individual self-identifies as transgender." *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (May 27, 2011) (Core Concepts – Transgender), available at www.opm.gov/diversity/Transgender/Guidance.asp.

Consider using program names and acronyms that do not use terms with any part of LGBT in them. Many companies do this — e.g., 3M: PLUS (People Like Us);¹¹⁶ Best Buy: PRIDE (People Respecting Individual Differences Equally);¹¹⁷ Ernst & Young: bEYond;¹¹⁸ and Hallmark: HERE (Hallmark Employees Reaching Equality).¹¹⁹ Within the programs, consider using “gender minority” instead of “transgender.”

Impact on significant others (spouses, partners, parents, and children)

One issue that is seldom talked about, and often overlooked, is the impact of a gender affirmation on significant others. Older employees who have struggled with gender dysphoria throughout their lives often have not mentioned their anguish to anyone — not a doctor, not a family member. When they finally come to terms with their gender identity, they are ready to address the issue after years of denial. When significant others are finally told, they generally do not have the benefit of years to come to terms with the employees’ decisions to affirm their true gender.

Employers of the significant others need to be aware that the journeys family members are beginning to travel are often more difficult than the remaining journeys that the gender-affirmed people will be travelling. It may not be easy for someone who married Prince Charming to comprehend what life will be like when Cinderella arrives on the scene. It may not be easy for a child to tell her friends about Cinderella, or to refer to her as “Dad.”

If a person who comes out as gender affirmed will face discrimination from a current employer, then significant others may feel distress and fear the loss of income in the event the employee is terminated. It takes extraordinary strength and compassion for significant others to navigate the road ahead. I was very fortunate that my wife and daughter had those attributes.

Employers need to be ready to use their normal HR toolkits to help significant others. The issues that arise generally may be somewhat akin to those experienced by an employee whose loved one has (1) a very serious medical condition and dies after a

¹¹⁶ See 3M’s *People Like Us*, available at http://solutions.3m.com/wps/portal/3M/en_US/us-diversity/diversity/3M/employee-resource-affinity-groups/people-like-us-plus.

¹¹⁷ See Best Buy’s *Employee Business Networks*, available at www.bestbuy-jobs.com/content/employee-business-networks/.

¹¹⁸ See Ernst & Young’s *Making LGBTA inclusiveness real every day*, available at www.ey.com/US/en>About-us/Our-people/About-Us-Our-people-lebian-gay-bisexual-transgender.

¹¹⁹ See Hallmark’s *Employee Groups Bring Diversity to Workplace*, available at www.hallmark.com/online/corporate-citizenship/employee-groups.aspx.

prolonged illness, or (2) been publicly-exposed as having had an illicit sexual affair. There may be deep, painful emotions of loss and embarrassment. Employers will need to be on watch for coworkers who may make snide remarks, thereby making the workplace uncomfortable for significant others.

If the employer of the employee who came out and the employers of the significant others apply their workplace policies in a non-discriminatory manner and afford the usual workplace benefits to all of these workers, stress levels can be reduced significantly and the employees can remain productive at work.

Highly educated workforce

I have met hundreds of people who have travelled journeys similar to mine. As I look back, I am still amazed that for nearly 50 years I thought I was so different, so alone.

One thing I have noticed among these people is that they are generally well educated. Many have tended toward successful careers as academics, military personnel, and professionals, careers that let them control significant parts of their work interactions with others. Once they came out, they tended to be more productive employees, with the weight of their secrets lifted from their shoulders. They generally value their jobs because their employers' actions have showed them that their companies truly value them.

Are not these the sorts of workers your organization could use?

An older gender-affirmed person, having experienced life in two gender expressions, better appreciates the subtleties of gender discrimination in the workplace. I am not sure if HR and legal professionals will see this as a pro or a con.

Conclusion

In one of the first court decisions relating to acquired immune deficiency syndrome (AIDS), Judge Burrell Ives Humphreys, whose courtroom in Jersey City, New Jersey was not far from the Statue of Liberty, commented:

The [New Jersey] Law Against Discrimination has been a shining beacon of reason and hope to those who have suffered the painful sting of prejudice. * * * As the Statue of Liberty beams its message to the “poor, huddled masses yearning to breathe free,” so does the Law Against Discrimination proclaim its

message of freedom and equality of opportunity for all, unfettered by the mythology of prejudice and discrimination.¹²⁰

Judge Humphreys' words are a powerful reminder of the important role of HR and legal professionals in ensuring that the workplace is free of discrimination against people who are different, but just as competent to perform their jobs as other workers are. When you think about it, we are all different in some way, so a workplace free of discrimination and harassment benefits all of us.

I hope this article has helped you appreciate that workers' varying gender identities and expressions are not something to fear, can easily be accommodated, and should be valued. Readers with questions or comments about this article should feel free to contact me at genderquestions@hotmail.com. If you e-mail me, please be sure to include your name, your organization's name (for conflicts purposes), and a telephone number.

Training resources

If a company has sound HR practices and qualified HR professionals who have read up on the issues pertaining to gender identity and expressions and have good training skills, then it should be able to navigate the key workplace issues relating to gender identity and expression using its respect in the workplace toolkit. If this is the case, then there may be no need to buy publications or hire an outside trainer to educate the workforce about gender identity and expression.

Free resources

The New Jersey Division on Civil Rights has a good guide to help employers navigate compliance — *Getting the E.D.G.E. in Compliance: Equality and Diversity for GLBT Employees*.¹²¹

Out & Equal Workplace Advocates sponsors an annual summit on LGBT-related workplace issues. This group's website collects the workshop handouts on its website, though earlier years' handouts have disappeared from the website.¹²²

¹²⁰ *Poff v. Caro*, 228 N.J.Super. 370, 380-81, 549 A.2d 900, 905 (Law Div. 1987), available at http://leagle.com/xmlResult.aspx?xmlDoc=1987598228NJSuper370_1561.xml&docbase=CSLWAR2-1986-2006.

¹²¹ *Getting the E.D.G.E. in Compliance: Equality and Diversity for GLBT Employees*, New Jersey Division on Civil Rights (February 2008), available at www.state.nj.us/lps/dcr/edge-booklet.html.

¹²² See the dropdown menu under the words "Workplace Summit" in the left margin at <http://outandequal.org/annual-summit>. When you open a particular year, then shift over the right margin and select "Workshops."

The United States Office of Personnel Management issued three important guidance documents on May 27, 2011 that provide an excellent overview of workplace issues relating to gender identity and expression.¹²³

Websites

1. National Gay and Lesbian Task Force: www.thetaskforce.org/issues/transgender (Transgender Issues),
www.thetaskforce.org/reports_and_research/all_jurisdictions (Jurisdictions with Explicitly Trans-Inclusive Discrimination Laws), and
www.thetaskforce.org/reports_and_research/nondiscrimination_laws (Nondiscrimination laws map)
2. Gay & Lesbian Advocates & Defenders:
www.glad.org/work/initiatives/c/transgender-rights-project (Transgender Rights Project), www.glad.org/rights/topics/c/transgender-issues (Know Your Rights: Information by Topic: Transgender Issues),
www.glad.org/rights/publications/c/transgender-issues (Know Your Rights: Publications: Transgender Issues), and www.glad.org/rights/publications (Know Your Rights: Publications)
3. National Center for Lesbian Rights:
www.nclrights.org/site/PageServer?pagename=issue_transgender (Transgender Law: Home) and
www.nclrights.org/site/PageServer?pagename=issue_transgender_docsDownloads (Transgender Law: Publications)
4. Human Rights Campaign: www.hrc.org/issues/transgender.asp (Transgender Issues) and www.hrc.org/issues/workplace/7204.htm (Resources for Transgender Employees)
5. American Civil Liberties Union (ACLU): www.aclu.org/lgbt-rights/transgender (Transgender Issues), www.aclu.org/hiv-aids_lgbt-rights/know-your-rights-

¹²³ *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (May 27, 2011), available at www.opm.gov/diversity/Transgender/Guidance.asp; *Federal Employees Health Benefits Program Carrier Letter re Gender Reassignment*, U.S. Office of Personnel Management (May 27, 2011), available at www.opm.gov/carrier/carrier_letters/2011/2011-12.pdf, and *Operating Manual: The Guide To Personnel Recordkeeping*, Chapter 4, U.S. Office of Personnel Management (September 2008), available at www.opm.gov/feddata/recguide.pdf, as amended by *How to Reconstruct a Personnel Folder due to a Change in Gender Identity*, U.S. Office of Personnel Management (June 1, 2011), available at www.opm.gov/feddata/Ch4_ReconstructPersonnelFolder.pdf.

[transgender-people-and-law](#) (Know Your Rights - Transgender People and the Law), and <http://gbge.aclu.org/transgender> (Transgender)

6. National Center for Transgender Equality:
www.transequality.org/Resources/index.html (Resources) and
www.transequality.org/federal_gov.html (Issues)
7. Fenway Health:
www.fenwayhealth.org/site/PageServer?pagename=FCHC_srv_services_trans (Transgender Health) and www.fenwayhealth.org/site/DocServer/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms_fi.pdf?docID=7081 (Glossary of Gender and Transgender Terms)

Bibliographies

1. Gay, Lesbian, Bisexual, and Transgendered Round Table (GLBTRT) of the American Library Association:
www.ala.org/ala/mgrps/rts/glbtrt/popularresources/index.cfm (GLBTRT Resources) and <http://isd.usc.edu/~trimmer/glbtrt/biblist.htm> (Bibliographies and Other Resources)
2. Trans-Academics.org: www.trans-academics.org (Home Page) and www.trans-academics.org/biblio (Bibliography)
3. San Francisco Public Library: <http://sfpl.org/index.php?pg=0200002401> (James C. Hormel Gay & Lesbian Center) and <http://sfpl.org/index.php?pg=2000108901> (TRANScending Identities)
4. University of Illinois at Urbana-Champaign Library:
www.library.illinois.edu/edx/womensstudies (Women's Studies) and
www.library.illinois.edu/edx/womensstudies/transbiblio.html (Trans Bibliography)

Documentaries

One of the more poignant documentaries about gender identity, through the eyes of gender-affirmed children, is the ABC News full-hour 20/20 episode *My Secret Self*, which aired on April 27, 2007:

1. Video broadcast in five parts:
 - a. www.youtube.com/watch?v=Utpam0IGYac
 - b. www.youtube.com/watch?v=j8F9CaPyQz8
 - c. www.youtube.com/watch?v=1W17z6KeiNY

- d. www.youtube.com/watch?v=hSkQIWUX_el
 - e. www.youtube.com/watch?v=ib_yE5WILJc
2. Related news content:
- a. Alan B. Goldberg and Joneil Adriano, *Jazz' Story - I'm a Girl - Understanding Transgender Children*, ABC News Online (April 27, 2007):
<http://abcnews.go.com/2020/story?id=3088298&page=1>
 - b. Alan B. Goldberg and Joneil Adriano, *Jeremy's Story - I Want to Be Seen as Male*, ABC News Online (April 26, 2007):
<http://abcnews.go.com/2020/story?id=3077906&page=1>
 - c. *Jeremy's Letter to His Parents*, ABC News Online (September 19, 2004):
<http://abcnews.go.com/2020/story?id=3078716&page=1>
 - d. Alan B. Goldberg, *Riley's Story - Born With the Wrong Body*, ABC News Online (April 25, 2007):
<http://abcnews.go.com/2020/story?id=3072518&page=1>

Chaz Bono's recent coming out is recorded live in his own Oprah Winfrey Network documentary, *Becoming Chaz* (May 10, 2011), available at www.oprah.com/own-doc-club/Sneak-Peek-Becoming-Chaz.

Photo essay

For a beautifully done and very educational photo essay on a group of gender-different people, visit Jana L. Marcus' ***Transfigurations*** presentation at www.janamarcus.com/docus/TransPresentation/index.htm. I hope you will carefully read the stories that accompany each of Jana's pictures, and reflect on the lives, the diversity of the people Jana has been kind enough to introduce us to.

Appendix

Excerpts from the Fenway Health *Glossary of Gender and Transgender Terms*¹²⁴

Sex. In a dichotomous scheme, the designation of a person at birth as either “male” or “female” based on their anatomy (genitalia and/or reproductive organs) and/or biology (chromosomes and/or hormones).

Sometimes “sex” and “gender” are used interchangeably. For clarity, it is better to distinguish sex, gender identity, and gender expression from each other.

Gender identity. A person’s innate, deeply-felt psychological identification as a man, woman, or something else, which may or may not correspond to the person’s external body or assigned sex at birth (i.e., the sex listed on the birth certificate).

“Sexual identity” should not be used as a synonym for, or as inclusive of, “gender identity”.

Gender expression. The external manifestation of a person’s gender identity, which may or may not conform to the socially-defined behaviors and external characteristics that are commonly referred to as either masculine or feminine. These behaviors and characteristics are expressed through carriage (movement), dress, grooming, hairstyles, jewelry, mannerisms, physical characteristics, social interactions, and speech patterns (voice).

Those people whose gender expression is (1) neither masculine nor feminine or (2) different from traditional or stereotypic expectations of how a man or woman should appear or behave are sometimes referred to as gender non-conforming.

Cross-dressers generally express the gender that matches the clothing they are wearing when they are cross-dressing. In most cases, their gender expression while cross-dressing does not match their gender identity.

¹²⁴ *Glossary of Gender and Transgender Terms*, Fenway Health (rev. January 2010), available at www.fenwayhealth.org/site/DocServer/Handout_7-C_Glossary_of_Gender_and_Transgender_Terms_fi.pdf?docID=7081.

Sexual orientation. A person's enduring physical, romantic, emotional, and/or spiritual attraction to another person. May be lesbian, gay, heterosexual, bisexual, pansexual, polysexual, or asexual. Sexual orientation is distinct from sex, gender identity, and gender expression. A person's sexual orientation should not be assumed based on the perceived sex of that person's partner(s). For example, a man who identifies himself as heterosexual may have sexual relationships with men and women.

"Affectional orientation" is sometimes used as a more encompassing term.

Transgender. An umbrella term for people whose gender identity and/or gender expression differs from their assigned sex at birth (i.e., the sex listed on their birth certificates). Some groups define the term more broadly (e.g., by including intersex people) while other people define it more narrowly (e.g., by excluding "true transsexuals").

Transgender people may or may not choose to alter their bodies hormonally and/or surgically.

While "transgender" is a popularly used word and generally seems to be a safe default term to use, some people find the term offensive as a descriptor of themselves. It is best to ask clients which terms, if any, they use or prefer.

Use "transgender", not "transgendered".

Cisgender. People whose gender identity and gender expression align with their assigned sex at birth (i.e., the sex listed on their birth certificates). Cisgender is a newer term that some people prefer when writing and speaking about transgender and non-transgender people, with the non-transgender people being referred to as "cisgender". In this manner, a transgender person is not singled out as being different or not normal.

Intersex. A spectrum of conditions involving anomalies of the sex chromosomes, gonads, reproductive ducts, and/or genitalia. The most traditional definition of intersex refers to individuals born with both male and female genitalia, or genitalia that are not clearly male or female. A person may have elements of both male and female anatomy, have different internal organs than external organs, or have anatomy that is inconsistent with chromosomal sex. This condition is sometimes not

identified until puberty, when the person either fails to develop certain expected secondary sex characteristics, or develops characteristics that were not expected.

* * *

The term “Disorders of Sex Development” (DSD) is currently recommended where the medical care of infants is considered. Sometimes written as “Disorders of Sexual Development” or “Disorders of Sex Differentiation”. These terms are controversial and not widely accepted.

Some people suggest that a better term is “Variation in Sex Development” or “Variability in Sex Development” (VSD), thus eliminating the negative connotation of the word “disorder”.

Some people suggest that gender-dysphoric people may be intersex or have a variation in sex development because their anatomical sex does not match their gender identity, perhaps as a result of cross brain feminization or masculinization.

“Hermaphrodite” is an old term previously used instead of “intersex” and is now considered pejorative.

Transition. The process that people go through as they change their gender expression and/or physical appearance (e.g., through hormones and/or surgery) to align with their gender identity. A transition may occur over a period of time, and may involve coming out to family, friends, co-workers, and others; changing one’s name and/or sex designation on legal documents (e.g., drivers’ licenses, birth certificates); and/or medical intervention.

Some people find the word “transition” offensive and prefer terms such as “gender affirmation” or “process of gender affirmation”. It is best to ask clients which terms they prefer.

Gender affirmation. Many people view their coming out as an affirmation of the gender identity they have always had, rather than a transition from one gender identity to another. They may prefer to call themselves “affirmed females” (or just “females”) or “affirmed males” (or just “males”) rather than “transgender” or “transsexuals” because the “trans” prefix suggests they have changed, rather than

accepted, their true gender identity. This is consistent with the concept that people do not need to have any surgery in order to affirm their gender.

Related terms are “process of gender affirmation”; “gender-affirmed female” (or just “affirmed female”); and “gender-affirmed male” (or just “affirmed male”).

Gender minority. Used to describe people whose gender expression and/or gender identity does not match traditional societal norms.

“Sexual minority” should not be used as a synonym for, or as inclusive of, “gender minority”.

Sexual minority. Used to describe people whose sexual orientation is not heterosexual only.

LGBT. Acronym for Lesbian, Gay, Bisexual, and Transgender. Sometimes written as GLBT.

LGBTIQQAA. There are numerous variations of the basic LGBT acronym used by some people in order to be more inclusive, with “I” for Intersex, “Q” for Queer and/or Questioning, and “A” for Asexual and/or Ally.

Real life experience (RLE). Generally accepted guideline, from the Standards of Care for Gender Identity Disorders (see www.WPATH.org), that requires clients to live outwardly in the gender that matches their gender identity for a specified period of time (typically one year) prior to being eligible for genital surgery.

Surgery. Persons with gender dysphoria may or may not have surgery and, if they have surgery, they may have one or more types of surgery, depending upon their circumstances.

Numerous terms are used to describe the genital surgeries that some people may undergo, including “gender affirmation surgery” (GAS), “gender reassignment surgery” (GRS), “genital reassignment surgery” (GRS), “genital reconstruction surgery” (GRS), “genital surgery” (GS), and “sex reassignment surgery” (SRS). The foregoing terms are purposely listed in alphabetical order in view of the strong

feelings some people have with respect to what is the right or better term to use; clinicians should listen to their clients to see which terms they prefer.

Sometimes, though very infrequently, “realignment” is used instead of “reassignment” or “reconstruction”.

“Sex reassignment surgery” is increasingly falling into disuse as many people find the term offensive.

In discussions with clients, all a clinician really needs to say is “genital surgery”.

* * *

Surgery is not essential for some people to resolve their gender dysphoria. Moreover, for some people, surgery is a relatively minor aspect of their gender affirmations.

Some people cannot have surgery because of, among other reasons, financial constraints and health reasons.

* * *

Many people consider “sex change”, “sex change operation”, “sex change surgery”, “pre-op”, and “post-op” as pejorative and, therefore, these terms should be avoided.