

BEYOND THE WAR ON RESTROOMS -- THE WORKPLACE IN TRANSITION

Ryan Derry, Los Angeles
M'Alyssa Mecnas, Los Angeles

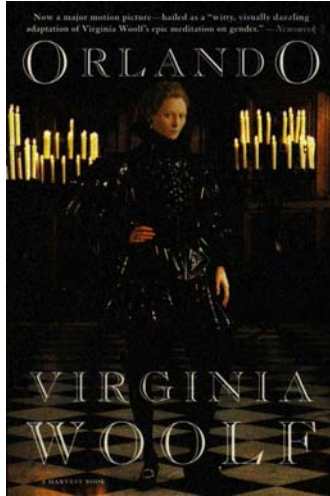
PAUL
HASTINGS

TOPICS TO COVER

2

- Introduction and Key Terms
- Legal Framework
 - State Law Protections
 - Municipal Protections
 - Federal Authority
- Select Issues In the Workplace
- Designing Inclusive Employee Benefits
- Questions?

PAUL
HASTINGS



PAUL
HASTINGS

KEY TERMS

PAUL
HASTINGS

KEY TERMS

5

- **Gender Identity**: The gender by which an individual identifies, regardless of sex assigned at birth.
- **Gender Expression**: How an individual physically presents his/her gender.
- **Transgender**: An umbrella term where gender identity and/or gender expression does not conform with sex assigned at birth.
- **Cisgender**: Gender identity conforms to sex assigned at birth.
- **Transition**: Where gender identity and sex assigned at birth are discordant, the process by which an individual conforms one's sex assigned at birth to gender identity.

PAUL
HASTINGS

TRANSITIONS ARE INDIVIDUAL

6

- Employee transition needs are likely to be different from one person to the next
- It may not be realistic or possible to try to create a “one size fits all” approach – flexibility is important
- Transitions:
 - May or may not involve surgery
 - May or may not involve conditions that qualify as “disability” under employee benefit plans
 - May or may not involve name changes
 - May or may not trigger leave rights
 - Etc.

PAUL
HASTINGS

LEGAL FRAMEWORK

PAUL
HASTINGS

STATE LAW PROTECTIONS

- 20 States and the District of Columbia have non-discrimination laws that incorporate gender identity to varied effect:

California	Minnesota
Colorado	Nevada
Connecticut	New Jersey
District of Columbia	New Mexico
Delaware	New York
Hawaii	Oregon
Illinois	Rhode Island
Iowa	Utah
Maine	Vermont
Maryland	Washington
Massachusetts	

PAUL
HASTINGS

STATE LAW PROTECTIONS

9

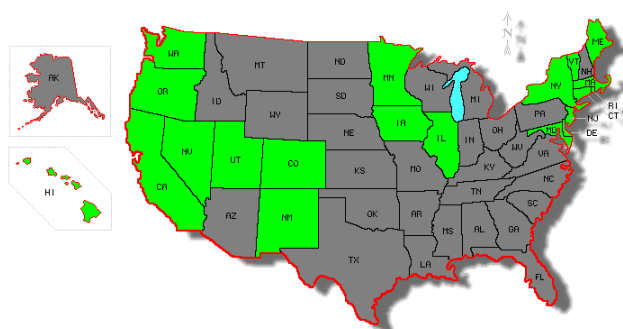
- 20 States and the District of Columbia have non-discrimination laws that incorporate gender identity to varied effect:

California	Minnesota **
Colorado	Nevada
Connecticut	New Jersey
District of Columbia	New Mexico
Delaware	New York
Hawaii	Oregon
Illinois	Rhode Island
Iowa	Utah
Maine	Vermont
Maryland	Washington
Massachusetts	

PAUL
HASTINGS

STATE LAW PROTECTIONS

10



Source: Synops.net (2)

PAUL
HASTINGS

NORTH CAROLINA – HB2

11

- March 2016.
- Limits anti-discrimination legislation statewide to “biological sex.”
- Eliminated city ordinances.
- Transgender individuals can only use public restrooms corresponding to biological sex.

PAUL
HASTINGS

NORTH CAROLINA – HB2

12

- Various legal challenges
 - ACLU (March 2016)
 - U.S. DOJ (May 2016)
- *Carcaño v. McCrory* (August 28, 2016)
 - Preliminary injunction - UNC cannot force plaintiffs into bathrooms and locker rooms that correspond with biological sex.

PAUL
HASTINGS

MUNICIPAL PROTECTIONS

13

- As of January 2015, 225 cities and counties have ordinances prohibiting employment discrimination on the basis of gender identity, including:

Atlanta, GA	Miami Beach, FL
Austin, TX	Milwaukee, WI
Chicago, IL*	New Orleans, LA
Cincinnati, OH	New York, NY*
Cleveland, OH	Philadelphia, PA
Dallas, TX	Phoenix, AZ
Detroit, MI	Pittsburgh, PA
Indianapolis, IN	Portland, OR*
Kansas City, MO	San Francisco, CA*
Los Angeles, CA*	Seattle, WA*

* Also subject to state non-discrimination protections

Source: Human Rights Campaign

PAUL
HASTINGS

LOCAL ORDINANCES

14

Where local ordinances have failed
– what's the result?

PAUL
HASTINGS

FEDERAL AUTHORITY

15

- **No Express Federal Statutory Protection:**
 - **Title VII (42 U.S.C. §§ 2000, et seq.):**
 - Generally prohibits employment discrimination, including discrimination, retaliation, and harassment on account of race, color, religion, sex, and national origin.
 - No express protections for “gender identity” or “gender expression.”
 - **Employment Non-Discrimination Act (“ENDA”):**
 - Introduced in every Congress since 1994.
 - On November 7, 2013, ENDA passed the Senate, but it subsequently did not pass in the House of Representatives.
 - But even then...

PAUL
HASTINGS

FEDERAL AUTHORITY

16

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

- Plaintiff was a firefighter in Salem, Ohio.
- Terminated after informing her supervisor that she was transgender and transitioning from male to female.
- Trial court dismissed complaint: “Title VII protection is unavailable to transsexuals.”
- Sixth Circuit reversed: The plaintiff established a *prima facie* claim for sex stereotyping discrimination under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

PAUL
HASTINGS

FEDERAL AUTHORITY

17

***Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007):**

- Utah Transit Authority hired Plaintiff as a male uniformed employee.
- Plaintiff informed UTA that she was transgender, would transition to female.
- UTA terminated her because of liability concerns based on her use of public women's restrooms while on the job.
- UTA Prevailed: “[A] requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes.” *Id.* at 1225.

PAUL
HASTINGS

FEDERAL AUTHORITY – EEOC INTERPRETATION

18

***Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012):**

- ATF hired Macy as a male.
- Macy disclosed she was in the process of transitioning, and later was denied a position allegedly promised to her.
- Macy filed internal EEO complaint with ATF alleging discrimination on account of “sex, *gender identity (transgender woman)* and on the *basis of sex stereotyping*.”
- ATF responded that only the claim of discrimination on account of “sex” could proceed under Title VII.

PAUL
HASTINGS

FEDERAL AUTHORITY – EEOC INTERPRETATION

19

***Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012) (continued):**

- Macy appealed to EEOC.
- EEOC Decision: discrimination on account of “gender identity” is protected under Title VII.
- Relying on *Price Waterhouse v. Hopkins*, EEOC explained:
 - “[T]he term ‘gender’ encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.” *Id.* at **6-9.
 - “[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.” *Id.* at *14.

PAUL
HASTINGS

FEDERAL AUTHORITY

20

**EEOC’s Strategic Enforcement Plan
December 2012:**

- Made enforcement of Title VII’s sex discrimination provisions on behalf of lesbian, gay, bisexual, and transgender, to the extent “they may apply”, an enforcement priority for 2013-2016.

PAUL
HASTINGS

FEDERAL AUTHORITY

21

***EEOC v. Lakeland Eye Clinic, P.A.*, Case No. 8:14-cv-2421-T35 AEP, 2014 WL 4784114 (M.D. Fla., filed Sept. 25, 2014):**

- Settled in April 2015 for: (i) \$150,000; and (ii) defendant's implementation of discrimination policy and training.

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, Case No. 2:14-cv-13710-SFC-DRG, 2014 WL 4784115 (E.D. Mich., filed Sept. 25, 2014):**

- August 18, 2016: court granted partial summary judgment for employer: imposition of Title VII and sex-stereotyping case law "would impose a substantial burden on its ability to conduct business in accordance with its sincerely held religious beliefs."

PAUL
HASTINGS

FEDERAL AUTHORITY

22

***Seidler v. Sanford Health*, Case No. 3:15-cv-00111 (N.D.D.C., filed Dec. 1, 2015):**

- Seidler applied and began working as technician in September 2013, shortly after starting hormone therapy.
- Seidler informed her employer she would be presenting as a woman during 90-day review.
- Seidler was not permitted to use the women's locker rooms.
- Case resolved August 19, 2016.

PAUL
HASTINGS

FEDERAL AUTHORITY

23

Executive Order 13672 -- July 21, 2014:

- Executive Order 13672 prohibits federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity.
- Office of Federal Contract Compliance Programs (OFCCP), within Department of Labor, amended regulations to conform. The amended regulations took effect on April 8, 2015.

PAUL
HASTINGS

INCREASING LITIGATION

24

EEOC Claims Regarding Gender Identity and Transgender Status Are Increasing:

- FY2013 -- 147 charges
- FY2014 -- 202 charges
- FY2015 -- 271 charges

PAUL
HASTINGS

SELECT ISSUES AFFECTING TRANSGENDER EMPLOYEES

PAUL
HASTINGS

TRANSITIONS ARE INDIVIDUAL

- How specific is too specific when it comes to employment policies?



PAUL
HASTINGS

ISSUES AFFECTING TRANSGENDER EMPLOYEES ²⁷

Transition Planning

- Communicate with transitioning employee
- Communicate with supervisor(s)/management
- With employee, select a transition date:
 - Communications with coworkers
 - Pronoun usage
 - Name change
 - Payroll records
 - Personnel records
 - Business cards
 - Phone lists
 - ID badge
 - Email address
 - Grooming standards
 - Leave considerations
 - Accessibility to restroom / changing facilities

PAUL
HASTINGS

ISSUES AFFECTING TRANSGENDER EMPLOYEES ²⁸

Restroom Accessibility: OSHA – Best Practices Guide to Restroom Access for Transgender Workers -- June 1, 2015:

- All employers must provide employees with safe and sanitary toilet facilities.
- Single-occupancy restrooms shall be gender-neutral.
- Transgender employees should have access to the restroom that corresponds to their gender identity.
- No employee should be asked to provide medical or legal documentation of gender identity.
- No employee should be required to use a segregated facility apart from other employees because of their gender identity.

PAUL
HASTINGS

RESTROOM ACCESSIBILITY

29



PAUL
HASTINGS

HANDLING COMPLAINTS

30

Focus on Conduct

Bottom Line

- Complaining employee/customer made aware of other restroom options.
- Transgender employee not required to use restroom facilities somewhere else.

PAUL
HASTINGS

ISSUES AFFECTING TRANSGENDER EMPLOYEES 31

- Restroom Accessibility
- Locker Rooms and Changing Facilities Accessibility

PAUL
HASTINGS

32

**TO MY EMPLOYER, THANKS FOR EVERYTHING:
DESIGNING INCLUSIVE EMPLOYEE BENEFITS**

PAUL
HASTINGS

HEALTH PLAN COVERAGE – BENEFITS OF INTEREST

33

World Professional Association for Transgender Health (WPATH) Standards of Care – May include:

- Changes in gender expression and role
- Hormone therapy
- Surgery
- Psychotherapy
- Hair removal

PAUL
HASTINGS

HEALTH PLAN COVERAGE

34

“Do we have to cover benefits for transgender employees?”

- In addition to the laws and cases mentioned earlier:
- Affordable Care Act
 - Section 1557 Anti-discrimination provision – No broad ACA requirement for employer plans to cover transgender medical benefits, but limited rule released in 2016 for certain covered entities
 - Preventive care considerations

PAUL
HASTINGS

HEALTH PLAN COVERAGE

35

- Some states and the District of Columbia currently have insurance bulletins indicating that blanket coverage exclusions are illegal under state non-discrimination laws
- State laws might be preempted by federal laws

PAUL
HASTINGS

HEALTH PLAN COVERAGE

36

- Executive Order 13672 (federal contractors)
- CA SB 703 (state contractors)

PAUL
HASTINGS

HEALTH PLAN COVERAGE

37

“What if our insurer won’t cover benefits for transgender employees?”

- Reimbursing employees for premiums for private coverage – no go under ACA
- Self-Insuring benefits
- Can also look for a new insurer or try to convince your current insurer to change its policy

And a PSA on being more generous than the law requires...

PAUL
HASTINGS

HEALTH PLAN COVERAGE

38

- Determining what evidence *can* be requested for coverage
 - HIPAA
 - ADA Considerations
- Common concern/challenge: how to design inclusive policies that also protect against healthcare fraud?

PAUL
HASTINGS

HEALTH PLAN COVERAGE

39

- Medical coverage for dependents who are transgender
- What limits can apply?
- What limits if any should apply?
- Age? Procedural requirements?

PAUL
HASTINGS

AND WHAT ABOUT...

40

- Retirement and pension considerations
 - Mortality assumptions to apply
 - Anti-cutback rules
- Disability plan coverage
- Leave considerations
- Interaction between guidance affecting transgender employment policies/benefits and RFRA - evolving

PAUL
HASTINGS

QUESTIONS?

41

- Ryan D. Derry, Associate, Los Angeles
 - ryanderry@paulhastings.com



- M'Alyssa B. Mecnas, Associate, Los Angeles
 - malysamecnas@paulhastings.com



PAUL
HASTINGS

OUR OFFICES

42

NORTH AMERICA

Atlanta
1170 Peachtree Street, N.E.
Suite 100
Atlanta, GA 30309
t: +1.404.815.2400
f: +1.404.815.2424

Chicago
71 S. Wacker Drive
Forty-Fifth Floor
Chicago, IL 60606
t: +1.312.499.6000
f: +1.312.499.6100

Houston
600 Travis Street
Fifty-Eighth Floor
Houston, TX 77002
t: +1.713.860.7300
f: +1.713.353.3100

Los Angeles
515 South Flower Street
Twenty-Fifth Floor
Los Angeles, CA 90071
t: +1.213.683.6000
f: +1.213.627.0705

New York
75 East 55th Street
First Floor
New York, NY 10022
t: +1.212.318.6000
f: +1.212.319.4090

Orange County
695 Town Center Drive
Seventeenth Floor
Costa Mesa, CA 92626
t: +1.714.668.6200
f: +1.714.979.1921

Palo Alto
1117 S. California Avenue
Palo Alto, CA 94304
t: +1.650.320.1800
f: +1.650.320.1900

San Diego
4747 Executive Drive
Twelfth Floor
San Diego, CA 92121
t: +1.858.458.3000
f: +1.858.458.3005

San Francisco
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
t: +1.415.856.7000
f: +1.415.856.7100

Washington, D.C.
875 15th Street, N.W.
Washington, D.C. 20005
t: +1.202.551.1700
f: +1.202.551.1705

EUROPE

Brussels
Avenue Louise 480-5B
1050 Brussels
Belgium
t: +32.2.641.7460
f: +32.2.641.7461

Frankfurt
Siesmayerstrasse 21
D-60323 Frankfurt am Main
Germany
t: +49.69.907485.0
f: +49.69.907485.499

London
Ten Bishops Square
Eighth Floor
London E1 6EG
United Kingdom
t: +44.20.3023.5100
f: +44.20.3023.5109

Milan
Via Rovello, 1
20121 Milano
Italy
t: +39.02.30414.000
f: +39.02.30414.005

Paris
96, boulevard Haussmann
75008 Paris
France
t: +33.1.42.99.04.50
f: +33.1.45.63.91.49

ASIA

Beijing
19/F Yintai Center Office Tower
2 Jianguomenwai Avenue
Chaoyang District
Beijing 100022, PRC
t: +86.10.8567.5300
f: +86.10.8567.5400

Hong Kong
21-22/F Bank of China Tower
1 Garden Road
Central Hong Kong
t: +852.2867.1288
f: +852.2526.2119

Seoul
33/F West Tower
Mirae Asset Center1
26, Eulji-ro 5-gil, Jung-gu,
Seoul, 04539, Korea
t: +82.2.6321.3800
f: +82.2.6321.3900

Shanghai
43/F Jing An Kerry Center Tower II
1539 Nanjing West Road
Shanghai 200040, PRC
t: +86.21.6103.2900
f: +86.21.6103.2990

Tokyo
Ark Hills Sengokuyama Mori Tower
40th Floor, 1-9-10 Roppongi
Minato-ku, Tokyo 106-0032
Japan
t: +81.3.6229.6100
f: +81.3.6229.7100

For further information, you may visit our home page at www.paulhastings.com or email us at info@paulhastings.com

www.paulhastings.com

©2016 Paul Hastings LLP

PAUL
HASTINGS