



## WORDS ON WISE MANAGEMENT

### How do 'bathroom bills' affect employers in Arizona?

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Much attention has been given recently to laws passed concerning transgender individuals' use of public restrooms. Over the past few years, state legislatures have passed or proposed "bathroom bills" that generally require individuals to use the bathroom that corresponds to the gender listed on their birth certificate and prevent transgender individuals from using public bathrooms that correspond to their gender identity. In Arizona, a bill was introduced, but it did not pass. However, Arizona has joined several other states in a lawsuit challenging the U.S. Department of Education's directive that under Title IX of the Civil Rights Act of 1964, schools must let transgender students use the restroom that matches their gender identity. Conversely, bathroom bills that passed, most notably in North Carolina and Mississippi, are being challenged.

Employers may feel like they are caught in the middle and wonder what their duties are regarding employee restroom access. The Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA) have issued guidance, both stating that discrimination based on gender identity is illegal. The EEOC's "Fact Sheet on Bathroom Access Rights of Transgender Employees Under Title VII" summarizes its position:

- (1) Title VII, which applies to private employers with 15 or more employees, prohibits employment discrimination based on sex, and "sex" includes gender identity.
- (2) Title VII prohibits gender-based stereotyping.
- (3) Denying an employee equal access to a common bathroom corresponding to the employee's gender identity is sex discrimination.
- (4) Contrary state law or local ordinance is not a defense for an employer facing charges of discrimination under Title VII.

Regarding the deeply held beliefs asserted by proponents of so-called bathroom bills, the EEOC emphasizes that Title VII addresses workplace conduct, not personal beliefs. The EEOC explains: "These protections do not require any employee to change beliefs. Rather, they seek to ensure appropriate workplace treatment so that all employees may perform their jobs free from discrimination."

OSHA has also offered its "Best Practices Guide to Restroom Access for Transgender Workers" to employers on the issue of providing bathroom access to transgender employees. It is OSHA's position that employers must permit employees to use the facilities that correspond with their gender identity. OSHA suggests, but does not require, that employers provide options such as gender-neutral single-occupant restrooms or lockable single-occupant stalls. However, OSHA emphasizes that, regardless of the workplace's layout, "all employers need to find solutions that are safe and convenient and respect transgender employees."

There are several principles employers should consider from the EEOC's and OSHA's guidance:

- (1) Employers cannot require transgender employees to provide proof of surgery or gender reassignment before they are permitted to use the bathroom that corresponds with their gender identity or expression.
- (2) If common bathrooms (e.g., gender-specific restrooms with multiple stalls or urinals) are available for nontransgender employees, employers cannot require transgender employees to use a single-user bathroom in lieu of common bathrooms.
- (3) Employers may make single-user bathrooms available for all employees, and all workers may choose to use single-user bathrooms.
- (4) The sentiments, beliefs, confusion, comfort level, or anxiety of employees is not a defense for discrimination, nor do those things excuse an employer from providing transgender employees access to a common bathroom that corresponds with their gender identity or expression.

The debate and litigation over bathroom bills is sure to continue until the issue is resolved, likely by the U.S. Supreme Court. Employers should rely on the EEOC's guidance on bathroom access to ensure compliance with Title VII. To maintain a workplace free of discrimination, employers must dispel gender stereotypes and provide transgender employees with access to the bathroom that matches their gender identity.



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