

OSHA Releases Guidance on Restroom Access for Transgender Employees

June 3, 2015

The Occupational Safety and Health Administration (OSHA) requires employers to provide all employees with easy access to clean restrooms. In response to increasing concerns and confusion over requests from transgender employees to use restrooms specific to the gender with which they identify, OSHA, citing its "Sanitation Standard" as its authority.

Problems arise, according to OSHA, when an employer restricts restroom access for transgender employees. For instance, employers sometimes require transgender employees to use the bathroom specific to the sex of the employee at birth but not the gender with which the employee identifies. OSHA says that this leads to employees feeling afraid for their physical safety by having to use a restroom in which they do not feel comfortable. Another problem arises when employers require transgender employees to only use gender-neutral bathrooms. OSHA says this leads to employees feeling that they are singled out and treated differently. According to OSHA, if employees are afraid or uncomfortable in using a particular restroom, they might avoid using the restroom while at work altogether, creating serious health concerns.

OSHA's guidance states that an employer should allow employees to use the bathroom specific to the gender with which they identify. That is, an employee who identifies as male should be allowed access to male-only bathrooms and an employee who identifies as female should be allowed access to female-only bathrooms, regardless of the employee's sex at birth. Furthermore, OSHA says the "best" policy would also provide additional options for employees: namely single-occupancy gender-neutral restrooms and multiple-occupant, gender-neutral restrooms with lockable single-occupant stalls.

OSHA instructs further that employers should not ask employees to provide any documentary proof of their gender identity. Furthermore, employees should not be required to use facilities far away from their worksite.

OSHA states that its guidance is consistent with a recent EEOC decision that, under Title VII of the Civil Rights Act, a transgender employee may not be denied access to the restroom used by other employees of the same gender identity, "regardless of whether that employee has had any medical procedure or whether other employees' [sic] may have negative reactions to allowing the employee to do so."

OSHA's "best practices" do not include guidance for how to address other employees' concerns, if any, about sharing multiple-occupant restrooms with members of the opposite gender; to what extent employers must make architectural changes to its facilities; how to communicate with transgender employees about these issues; or how its guidance might impact the application of other civil rights laws in the workplace. Employers – with and without transgender employees – should give these issues serious consideration now so that they are well-prepared to address them as they arise. Miller Canfield is available to help.