

FIRM NEWS

FROM MICHIGAN PUBLIC SCHOOL BATHROOMS TO THE WORKPLACE, LGBT ISSUES EXPANDING FOR EMPLOYERS

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PROFESSIONALS

Patricia Nemeth

The Michigan Department of Education's proposed guidance for how Michigan school districts can better serve and accommodate LGBT students has been the subject of dispute, in part, because of its recommendation that transgender students be allowed to use restrooms and locker rooms that accord with their gender identity. Patricia Nemeth, founding partner of Detroit-based labor and employment law firm Nemeth Law, P.C., says regardless of how the guidance issue is resolved by the State Board of Education, it is only a matter of time before public and private sector employers in the state are impacted.

"Employers should be aware of how the issue of transgender bathroom use has been examined by states and government agencies throughout the country so they can be prepared to act," Nemeth said. She offers a quick overview of recent actions throughout the country:

State Legislation and Ordinances

- Earlier this year, California and New York City made headlines with requirements that employers and public facilities guarantee people access to bathrooms that align with their gender identity.
- Also in 2016, North Carolina passed a statute that bans individuals throughout the state from using public bathrooms that do not correspond to their biological sex. The legislation was in response to an ordinance by the city of Charlotte that had expanded protections for LGBT individuals, including letting transgender people choose which bathroom to use. Although similar bills have been proposed in states throughout the country including Indiana, Illinois, Kentucky, and Mississippi, North Carolina's is the first signed into law. The legislation has already sparked a significant backlash from many civil rights organizations and, undoubtedly, will bring even more attention to this already divisive topic.

Federal/Public Sector

- In April 2015, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced it would require most federal contractors to allow transgender employees to use restrooms and other facilities consistent with the gender identity. Further, last year

the Equal Employment Opportunity Commission (EEOC) determined that the Department of the Army discriminated against transgender woman and civilian worker, Tamara Lusardi, by denying her access to the women's restroom and allowing supervisors to refer to her by male pronouns. Lusardi was hired as a civilian employee by the Army in 2004 and began the process of gender transition in 2010. Lusardi started using the common restroom for her identified gender, but was soon told by her supervisor that she was making people uncomfortable and would have to use a separate single-user restroom until she underwent gender transition surgery. Lusardi filed a complaint with the EEOC alleging disparate treatment and hostile work environment based on sex. Ultimately, the EEOC found the Army had violated Title VII by denying Lusardi access to the common restrooms, stating "supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment."

Private Sector

- In 2015, the Occupational Safety and Health Administration (OSHA) issued a non-binding best practices guide for employers on restroom access for transgender workers stating, "All employees, including transgender employees, should have access to restrooms that correspond to their gender identity." The guidelines included model practices for employers, including: allowing the employee to determine the most appropriate and safest facility for him- or herself; not asking an employee to provide medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities; not requiring an employee to use a segregated facility apart from other employees; and, when possible, providing employees with single-occupancy gender-neutral facilities or multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.
- The California Department of Fair Employment & Housing recently issued guidance clarifying transgender employee rights in the private sector under the state's Fair Employment and Housing Act (FEHA). Best practices issued for employers include: allowing employees access to a restroom or locker room that corresponds to the employee's gender-identity, regardless of his or her assigned sex at birth; providing an easily accessible unisex single stall bathroom for use by any employee who desires increased privacy, regardless of the underlying reason; and not asking an employee or applicant questions that would elicit information regarding his or her sexual orientation or gender identity.

Michigan

- Neither Michigan's Elliott-Larsen Civil Rights Act nor Title VII explicitly include transgender status or gender identity as a protected class currently. However, the laws do not restrict employers from promulgating policies that accommodate transgender workers.

So what does this all mean? Nemeth says employers should consider how transgender bathroom policies and related issues may affect their workplace now, before they incur costly litigation.

"Although the model practices and policies suggested by state and federal agencies thus far are not rule of law, they do provide important information on what may be required of employers in the future," Nemeth said. "The recent legislation in North Carolina may spark a windfall of legislation by states across the country, with each state deciding where it will stand on this issue. Employers should stay tuned and be prepared to act accordingly."

About Nemeth Law, P.C.

Nemeth Law specializes in arbitration, mediation, workplace investigations, employment litigation, traditional labor law and management consultation/training for private and public sector employers. It is the largest woman-owned law firm in Michigan to exclusively represent management in the prevention, resolution and litigation of labor and employment disputes.