



Transgender people at work

GUIDE FOR EMPLOYERS



TRANSGENDER PEOPLE AT WORK – GUIDE FOR EMPLOYERS

Introduction

This guide specifically addresses issues that employers of transgender employees may need to consider. Trans¹ people experience significant discrimination, particularly in the workplace. Overseas research suggests that between 20%-57% of trans people experienced workplace discrimination, while others face significant barriers as job applicants.²

Equal opportunity employment guidelines and policies are not about special treatment, but rather ensuring that every employee is treated fairly, with equal access to opportunities, regardless of race, age, sex, gender identity or sexual orientation. EEO policies enacted by employers send a clear positive signal to both prospective job applicants and existing employees, that the employer is committed to treating their employees fairly and with dignity. This can have a positive effect on both recruitment and retention. The information below builds on best practice approaches and tools currently used by employers and human resource practitioners, including clear policies to change records and protect employees' privacy.

The Department of Labour has developed another factsheet that is specific to trans employees, which provides information on legal and employment rights, as well as different workplace issues that trans people may encounter in their working lives.

Definitions

Sex – A person's biological and physical make-up, defined usually as either 'male' or 'female' and including indeterminate sex.

Gender – The social and cultural construction of what it means to be a man or a woman, including roles, expectations and behaviour.

Gender Identity – A person's internal, deeply felt sense of being male or female (or wherever they find themselves on the gender continuum). A person's gender identity may or may not correspond with their sex.

Gender Expression – How someone expresses their sense of masculinity and/or femininity externally.

Trans People - People who refer to themselves, among other terms, as transsexual, male-to-female, female-to-male, transgender, whakawahine, fa'afafine or tangata ira tane.

Transgender – A person whose gender identity is different from their physical sex at birth.

¹ 'Trans' is a generic term that includes people who refer to themselves, among other terms, as transsexual, male-to-female, female-to-male, transgender, whakawahine, fa'afafine and tangata ira tane.

² Human Rights Campaign Foundation, "*Transgender inclusion in the workplace, 2nd edition*", www.hrc.org/workplace/transgender

Transsexual - A person who has changed, or is in the process of changing, their physical sex to conform to their gender identity.

Transitioning - Steps taken by trans people to live in their gender identity. These often involve medical treatment to change one's sex through hormone therapy and may involve gender reassignment/realignment surgeries.

FtM/trans man – Female to Male – someone born with a female body who has a male gender identity.

MtF/trans woman – Male to Female – someone born with a male body who has a female gender identity.

Fa'afafine Fakaleiti, Akava'ine, Mahu, Vaka sa lewa lewa, Rae rae, Fafafine – Pasifika terms describing someone born with a male body who does not have a male gender identity and often, but not always, lives as a woman. These terms are best understood within their cultural context.

Whakawahine – a Maori term describing someone born with a male body who has a female gender identity.

Tangata ira tane – a Maori term describing someone born with a female body who has a male gender identity.

What legal protections apply to trans people?

The Human Rights Act 1993 prohibits discrimination on the grounds of sex. The same prohibition is also in the Employment Relations Act 2000. A Crown Law opinion released in 2006, citing decisions by Canadian, United Kingdom and European courts, found that the prohibition of discrimination on the grounds of sex in the Human Rights Act includes a prohibition of discrimination on the grounds of gender identity. This means that trans people are protected under the Human Rights Act from discrimination on the grounds of gender identity.

The Human Rights Act applies to almost all aspects of employment, including job advertisements, application forms, interviews and job offers. It also applies to unpaid workers and independent contractors.

Discrimination in employment can involve:

- refusal or failure to offer an employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion or transfer as other employees with the same or similar qualifications, experience or skills working in the same or similar circumstances;
- dismissal or detriment by the employer or employer's representative in circumstances in which other employees doing the same kind of work are not, or would not be, treated in such a way; and
- retirement or being made to retire or resign by the employer.

The Employment Relations Act contains several provisions that apply when an employment relationship has been established. One of which is a duty of good faith, which includes employers and employees being responsive and communicative. Both employers and employees have an obligation to communicate openly and try to deal with any issues that affect their employment relationship.

An employer cannot pressure an employee to resign or create unfavourable working conditions in order to make an employee resign. This is known as a “constructive dismissal” and may be the basis for raising a personal grievance under the Employment Relations Act. It may also be the basis for making a complaint under the Human Rights Act if the employer’s actions involved unlawful discrimination against the employee.

Generally, an employer cannot alter terms and conditions of employment to the employee’s detriment or disadvantage, or offer less favourable terms and conditions of employment just because of the employee’s sex. This may form the basis of a personal grievance under the Employment Relations Act or a complaint under the Human Rights Act.

There are some employment situations where it is lawful to treat people differently because of their sex³. However, the Human Rights Act contains a general qualification, which states that an employer cannot treat people differently because of their sex if the employer is able to adjust some of the duties of the position (without unreasonable disruption to the employer’s activities) so that some other employee carries out the particular duties in question.

Where it is legal for an employer to treat people differently because of their sex, the employer should treat a trans woman (MtF) the same as other women, and a trans man (FtM) should be treated the same as other men.

Can an employer ask someone if they are trans?

Generally, an employer should not ask a prospective employee about their gender identity, because in most cases, an employee’s gender identity has no bearing on their ability to perform the job.

There are some specific employment situations⁴ where it is legal to employ only a woman or a man for a particular position. In these situations, some trans people may need to provide evidence about their sex.

A trans person’s gender identity is something that is private and intensely personal. As with any other personal matters, the employer must take great care when asking such

³ Such as: for reasons of authenticity being of a particular sex is a genuine occupational qualification for the position or employment; domestic employment in a private household; counselling on highly personal matters such as sexual matters or the prevention of violence; situations where the position needs to be held by one sex to preserve reasonable standards of privacy; and situations where the nature or location of the employment makes it impracticable for the employee not to live in premises provided by the employer and it is not reasonable for the employer to provide separate sleeping accommodation or premises for each sex.

⁴ See footnote 3.

questions, as they may be perceived as discriminatory. Under the Human Rights Act it is unlawful to ask questions of (or about) a job applicant that indicate an intention to discriminate on one of the grounds covered by the Act, and asking these sort of questions may be grounds for the applicant to make a complaint under the Act.

Some jobs may require an applicant to pass credit, criminal or police checks before they can commence employment. If an employer requires a list of previous names from all applicants as part of the employment process, then an employer can ask a trans applicant to provide previous name details. Care must be taken to ensure that such details are used for a legitimate purpose, such as verifying identity for background checks that the position may require.

An employer cannot ask a trans applicant to provide previous name details, if such information is not required from other applicants. This may be grounds for a complaint of discrimination on the basis of sex under the Human Rights Act.

Can an employer dismiss or refuse to hire someone who is trans?

In most circumstances, an employer cannot dismiss or refuse to hire someone just because they are trans. In some specific circumstances⁵, an employer can lawfully treat job applicants or employees differently on the basis of sex.

A person's gender identity and expression is not a lifestyle choice, it is simply a part of who they are. A trans person is not being deceptive or dishonest if they do not disclose their gender identity. They are simply refraining from sharing very personal information, often because of fear that they will be discriminated against.

An employer cannot refuse to hire a trans person just because "they won't fit in" or unilaterally move them away from frontline work just because they are trans. This may provide grounds for a complaint of discrimination on the basis of sex under the Human Rights Act or, in the case of an employee, a personal grievance under the Employment Relations Act.

Dismissing an employee just because they are trans, or pressuring them to resign by changing their working conditions may be grounds for a personal grievance under the Employment Relations Act or making a complaint under the Human Rights Act.

How can an employer help an employee transition at work?

Gender transitioning is a unique and personal experience. It is important that the employer and employee meet and discuss what steps, if any, the employer should take. The employee may wish to bring a union delegate or other person along for support.

It is good practice to develop these steps into a written action plan, so that the employer and employee are able to agree in advance on how to manage any employment issues around the employee's transition. It might include identifying what information is relevant (and that personal medical details do not fall into that category), who needs to

⁵ See footnote 3.

be told and how and when they will be informed. It can be useful to discuss a possible timeline including any dates when the employee would like to be:

- known by their new name;
- referred to by new pronouns;
- able to adopt a workplace dress code matching their gender identity;
- able to use facilities such as restrooms and changing rooms matching their gender identity; and
- able to take time off work for medical treatment relating to their transition, if necessary.

It is important that the employer sets a good example to other employees and is supportive and reassuring during the employee's transition. This will help the employee to carry on with their job as usual.

Name and Records

The employer should ask the employee what name and pronoun they wish to use. If the employee wishes to formally change these details in the workplace, the employer should have clear procedures for such details to be changed on all workplace records, including any past records.

Dress Code

The employee should be able to adopt the style of dress that matches their full-time gender presentation and gender identity, and this should be similar to people of the same gender performing the same work. The employer should avoid having a dress code that is based on gender stereotypes and should enforce any dress code consistently.

Use of the Facilities

The use of facilities that match their gender identity is particularly important for trans people. It is part of the 'Real Life Experience' that is taken into account when health professionals assess whether someone is ready to medically transition. An employee should be able to use facilities that match their gender identity, for example: trans women should be able to use a women's toilet, and trans men should be able to use a men's toilet. While a unisex toilet is a positive way to ensure facilities are inclusive (and may be more comfortable for a trans person early in their transition), a trans employee should not be excluded from using the appropriate single sex toilet. If a trans employee prefers to use a single sex toilet, an employer may wish to include this in the agreed action plan, including a process for informing other staff. It may help to affirm that all staff, including trans employees, have the right to expect privacy and safety when using these facilities.

Medical

Not all trans people will transition medically, or through surgery. The immediate medical needs of an employee who is intending to transition are most likely to be for counselling appointments or to see a medical specialist. Any leave should be treated by the employer the same as any other medically necessary appointments for any other employees. There may be special provisions in an employment agreement that clarify sickness or medical leave, or access to an Employee Assistance Programme. By law,

after six months with an employer, an employee is entitled to five days' paid sick leave during the next 12 months of employment and each subsequent 12 month period.

Providing a Reference

If an employer has been asked to give a reference for a trans employee, they should refer to them by their new name and pronoun. Unless the employee allows the employer to do so, the employer must not disclose the employee's previous name or that they are trans. If a question that relates to any previous names of the employee is asked, the employer should verify that such information is required for all other applicants and will be used for a legitimate purpose. If the employer is satisfied that such information is sought for a legitimate purpose, it is good practice for the employer to only confirm the old name if asked directly, and not to disclose it voluntarily.

How can an employer manage the transition with other employees?

The employer should discuss with the employee how to inform other employees. The transitioning employee should decide how much and what information other employees will be told. It is important that other employees are informed of the situation and the employer's expectations of them. Properly informing other employees will not only dispel any misunderstandings or rumour, but will also discourage or prevent inappropriate behaviour, such as harassment or bullying, from other employees. Employers have a legal responsibility to ensure that employees are not subject to stress through workplace bullying.

If an employee has any concerns, it is important that the employer resolves them fairly and quickly. The employer should emphasise that any workplace policies relating to trans employees are not special rights or privileges. The employer should explain that such policies ensure that all employees are treated with respect, and are not subject to harassment or discrimination, regardless of sex, age, ethnicity or gender identity or sexual orientation.

How can an employer address any concerns from customers?

In most cases customers will not consider interacting with a trans employee to be an issue, and may not even notice. If a customer raises concerns, the employer should assure them that the employee is a valuable member of their staff and that their gender identity or expression has absolutely no bearing on their ability to perform the job.

Further information

For enquiries about employment, pay, holidays and leave contact the Department of Labour on 0800 20 90 20 or visit

- Employment Relations website www.ers.dol.govt.nz
- Mediation Service website www.ers.dol.govt.nz/help/mediation.html
- Employment Relations Authority contact details - www.ers.dol.govt.nz/help/authority.html

Human Rights Commission InfoLine phone 0800 496 877

- Action and Resources on the Transgender Inquiry www.hrc.co.nz/transgenderinquiry
- Getting a Job: A-Z Pre-Employment Guidelines www.hrc.co.nz/employmentguidelines

New Zealand Council of Trade Unions union.org.nz/

- CTU Out @ Work Network union.org.nz/outatwork

Business New Zealand www.businessnz.org.nz/

GenderBridge phone 0800 844 357 www.genderbridge.org or email info@genderbridge.org

Agender New Zealand phone 0800 AGENDER (0800 2436337) or visit www.agender.org.nz

- Agender Christchurch www.agenderchch.com

EEO Trust www.eeotrust.org.nz/

Disclaimer

The content of this document covers common problems. It will not answer every question and should not be used as a substitute for legislation or legal advice.

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