

HR QUESTION ? of the month



Work assignment based on transgender status?

Question: I have a male caregiver who is transgendered to a female. Is it legal/moral for me to send this person to a female patient? Must I disclose this information to patient? Is it legal to not give this person work because I don't know who to send her to?

Response: You indicate that the subject employee is a transgender female - an individual who was assigned male at birth but identifies and now lives as a woman. Subject to industry-specific requirements that mandate otherwise, generally our recommendation is to treat a transgender employee no differently than any other employee relative to employment decisions, including work assignments. In this regard, the employer should assign the employee in question work and to whichever patient, regardless of her biologic or physical attributes or otherwise what gender was assigned at birth, as we trust this is the standard used for all other employees (and if employees or patients ask about it, this should be the response).

We are not aware of any employment law that requires the employer to disclose the fact that an employee is transgender to any patient or to any other employee, and advise against doing so (even if asked). Indeed, absent a statutory exception from some other non-employment law, we would discourage an employer from singling out, or discriminating against, any such employees in this way. This can, among other things, give rise to a gender discrimination claim under federal law. The U.S. Equal Employment Opportunity Commission (EEOC) has held that discrimination against an individual because that person is transgender is discrimination because of sex and therefore is covered under Title VII of the Civil Rights Act of 1964, see <http://www.eeoc.gov/federal/otherprotections.cfm> and for the full text of that 2012 case, please see <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>

We also do not recommend that the employer use other employees' or patients' discomfort as a reason to treat the subject employee (or any other) differently by refusing to assign her work, or even discussing the issue with her or anyone else for that matter. In addition to creating employee relations issues, this could also result in a discrimination claim as mentioned above, and employee/patient preference generally would not be a valid defense.

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Finally, as alluded to in this response, our guidance here is limited to the employment law perspective, consistent with our service. It is not clear from the inquiry whether the employer is obligated under industry-specific, patient care or other regulatory or legal requirements to only assign female caregivers to female patients and male caregivers to male patients. To the extent that the scenario is governed by some other non-employment law for your industry, then we recommend that the employer consult with local counsel who is familiar with such other non-employment laws for further guidance, and prior to refusing to assign the subject employee to any particular patient.

Want to learn more about how to handle issues like this? [Click here](#) to listen to our Podcast about transgender issues.

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