

TRANSGENDER RIGHTS MOVEMENT

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Discrimination and harassment has no place in society. Not only should we strive to eradicate discrimination in the context of race, religion, national origin, age, disabilities, and the like, we must also be mindful of discrimination against transgender people. Lately, many advocates of transgender rights have been successfully changing laws and raising awareness. But the transgender movement is not new. Champions of the movement have been fighting transgender discrimination in employment, child care, sports, housing, and public places - including restrooms – for years. Only recently, however, has the issue become front and center in real estate. This article will take a brief look at the history of the transgender movement and its impact on your commercial properties.

Some Major Milestones In the Transgender Movement:

In 1952, Christine Jorgensen, a former U.S. Army private from the Bronx, New York, became the first documented American to undergo a sex-change operation. At that time, Jorgensen had to travel to Denmark for her operation and related hormone treatments. When Jorgensen returned to New York, she publicly announced her transition, and became a huge advocate for the transgender movement until her death in 1989.

In 2015, Caitlyn Jenner, formerly Bruce Jenner, an Olympic gold medalist, author, actor and television star, discussed her transition from a man to a woman in a well-publicized Vanity Fair article. Jenner also appeared, clad in lingerie, on the cover of that month's Vanity Fair magazine. While some critics claim that Jenner's transition was relatively easy due her existing celebrity status and financial wherewithal, Jenner has raised public awareness about transgender issues across the world.

Jorgensen and Jenner were not the only advocates for transgender rights. Transgender men and women have been increasingly creating awareness and garnering legal rights and protections over the years. For example, in 1977, Renée Richards, a transgender tennis player, was initially denied the right to play in United States Open tennis tournament. However, Richards took the case to the New York State Supreme Court and successfully won the right to play in the tournament as a woman. In 1993, after a convincing public campaign, transgender advocates were successful in their quest for Minnesota to be the first state to extend existing laws protecting transgender people from discrimination. Other examples, such as in 2003 when George W. Bush became the first president to officially welcome an openly transgender person, Petra Leilani Akwai, into the White House, may not have been a victory in the court of law, but greatly advanced the transgender movement in the court of public opinion. Numerous other prosperous transgender judges, athletes, and entertainers have also publically advocated for the transgender cause, and have steadily chipped away at the legal restraints and discrimination experienced by transgender people. However, two legal decisions in the past few years have set the stage for the current state of transgender laws. In 2012, a bi-partisan Equal Employment Opportunity Commission ruled that Title VII of the 1964 Civil Rights Act, which made it illegal to discriminate based on sex, also protected transgender employees who were discriminated against after they changed sexes. Then, in December, 2014, U.S. Attorney General Eric Holder

announced that the Department of Justice extend Title VII of the Civil Rights Act of 1964 to discrimination claims based on an individual's gender identity, including transgender status.

Transgender legal issues are clearly not new. Even though the law has been clarified over the years with respect to treatment of transgender workers, there are many aspects of the law that are still developing. For example, in the spring of 2016, the Department of Education imposed new guidelines requiring schools to allow transgender students to use the restroom and locker rooms that correspond to their chosen gender – not necessarily their “birth gender”. This was a significant rule change because any school that violated the rules were subject to federal enforcement — including a loss of federal education funds. President Obama was very vocal in his support for these new rules. However, about three months after the Department of Education's rules were enacted, a federal judge in Texas blocked the directive just before kids across the country went back to school for the 2016-17 academic year. Nevertheless, the President's advocacy catapulted the transgender movement into the public spotlight and set off a firestorm of lawsuits, as well as multiple states' introducing legislation on the subject.

The transgender movement clearly has had an impact on our legal landscape. To date, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia have all passed laws prohibiting discrimination against transgender people. However, these laws are not all uniform – for example, Nevada bans transgender discrimination in employment, housing, restaurants, hospitals, and retail stores. California covers those same categories, but also prohibits against transgender discrimination in health care. In addition to these state laws, at least 200 cities and counties have banned gender identity discrimination.

Transgender Issues in Real Estate:

In the intervening sixty-three years between Jorgensen's and Jenner's respective transitions from men to women, the transgender movement has transcended the political, business, sports, pop-culture and legal worlds. Now it is transcending the real-estate world.

So how does all of this apply to your commercial properties?

First and foremost, keep in mind that there are currently no one-size-fits all laws about transgender discrimination. Like many other laws affecting real estate, transgender discrimination laws vary greatly from state to state and city to city. Each property manager and owner must rely on their legal counsel for proper advice and guidance to determine whether or not they must comply with any applicable transgender discrimination laws. Even though the media discusses this issue in the context of “restrooms”, most of the laws on this subject speak to “public accommodations”, and not just restrooms. Not all commercial properties fit into the category of “public accommodations”. In general, **a public accommodation is a private entity that owns or leases space that is generally open to the public, such as restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and daycare centers.** Certain types of properties, such as warehouses, some office buildings, private clubs and religious organizations are not “public accommodations”. If your jurisdiction makes it illegal to discriminate against transgender people in public accommodations, you must first determine if your property is a public accommodation, and then you must decide which part of your property could reasonably be considered discriminatory against transgender people. The most obvious hot buttons are bathrooms, locker rooms, fitting rooms, dressing rooms and any other part of your property that could attempt to segregate men from women. Even if your property is not in a jurisdiction that makes it illegal to deny transgender use of certain portions of your property, some owners and managers are trying to be

proactive about this issue – either in anticipation of a change in the law in their jurisdiction, or in an effort to openly welcome transgender people. Whether you are legally prohibited from discriminating against transgender people, or desire to help the cause out of pure altruism or openness, the Institute of Real Estate Management (IREM) has recently suggested the following ideas for addressing transgender bathroom issues:

- Add a third gender-neutral bathroom option alongside male and female restrooms. These gender-neutral bathrooms are typically single occupancy facilities available for anyone to use. However, it's not always cost-effective because it could require building new bathrooms or retrofitting existing ones.
- Modify the signage of existing bathrooms to include language welcoming transgender individuals, for example: "Male, transgender people welcome" and "Female, transgender people welcome."
- For smaller commercial properties like restaurants or bars that already have single-use bathrooms, a simple option is to replace male and female signage with a generic "restrooms" sign that has no gender identification.

Placing signs by your bathrooms and fitting rooms is a relatively straight-forward measure. However, hanging a sign isn't the end of the story. For example, in a jurisdiction that makes it illegal to discriminate against transgender people, how is a landlord or tenant supposed to confirm an invitee's sexual orientation? Many of us have had our age questioned when buying alcohol, or have been asked by a store clerk for "another form of ID" when using a credit card, but that approach won't work for landlords. **The current laws do not require a landlord to verify someone's sexuality, just like a landlord isn't required to verify if someone is eligible to utilize a guide dog or a certain parking space. But this writer surmises that this "verification" scenario will eventually lead to a controversy that plays out in courtrooms and our living rooms during the nightly news.**

Opponents to the transgender "bathroom" initiative often express concern that allowing transgender women to use the women's restroom would allow sexual predators or Peeping Toms to use those protections as a dangerous ruse to get into female spaces. This raises all sorts of issues for a landlord or tenant. For example, if you are in a jurisdiction that prohibits transgender discrimination at your premises, and a sexual predator enters the ladies' restroom or locker room under the guise of being transgender, then commits a sexual crime in the female space, can the landlord be liable for failing to provide adequate security? As of the date of this article, there have not been any reported cases on this issue, but as a general rule, landlords are not responsible for criminal conduct of third parties. There are some exceptions to this general rule, for example, if the landlord has reason to suspect that the criminal conduct might occur, then the landlord can be liable (e.g., if the landlord is aware of other criminal conduct in the neighborhood, or repeated criminal conduct at the premises or building). Presuming this general rule applies to this scenario, the landlord would not be liable for the criminal conduct unless it had reason to suspect the Peeping Tom would commit the crime.

Given the uncertainty on current legal requirements for landlords and property managers, it is hard to truly identify best practices in this area and give advice on potential legal outcomes. One thing is for sure: transgender issues will continue to be a topic of interest for many years to come in real estate and nearly every other aspect of our lives. It is important to monitor the movement and keep up with changes in trends and the law.