

Gender Identity and Gender Expression: Things Employers Should Know

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On April 26, 2022, members of Cox & Palmer's Regional Employment & Labour group presented a webinar titled "[Hot Topics in Human Resources: Spring 2022](#)" which included the subtopic of Gender Identity and Gender Expression.

With Pride Month on the horizon, we wanted to continue the conversation and provide employers with further insight on how to adequately support employees whose gender identity or gender expression does not align with conventional social expectations for their birth-assigned sex.

Gender Identity and Gender Expression

Gender Identity and Gender Expression are prohibited grounds of discrimination in employment under both federal and provincial human rights legislation. This means that employers cannot discriminate against employees and job candidates on these grounds. Although the legislation does not provide definitions for Gender Identity and Gender Expression, adjudicators, as well as publications from human rights tribunals throughout Canada, have cited the following definitions from the Ontario Human Rights Commission's policy on preventing discrimination because of gender identity and gender expression^[1]:

Gender Identity

Each person's internal and individual experience of gender. It is a person's sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex.

Gender Expression

How a person publicly expresses or presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender. Others perceive a person's gender through these attributes.

Accommodation

In the employment context, where an employee requires an accommodation because of their gender identity or gender expression, the employer has a duty to provide the accommodation, to the point of undue hardship, unless the accommodation is required for a "bona fide occupational requirement."^[2]

While there are several accommodations that an employee may require because of their gender identity or gender expression, not all requests are accommodations.

Basic Obligations

Some requests are basic obligations. For example, in [Nelson v Goodberry Restaurant et al.](#), the British Columbia Human Rights Tribunal stated as follows:

All employees have the right to a workplace free of discrimination. Trans employees are entitled to recognition of, and respect for, their gender identity and expression. This begins with using their names

and pronouns correctly. This is not an 'accommodation'; it is a basic obligation that every person holds towards people in their employment.

[Emphasis added.]

Another basic obligation is to deal with medical leave requests made by employees for reasons relating to their transition on the same basis as any other medical leave request. Additionally, employees cannot be denied medical coverage or group benefits because of their gender identity or gender expression. In these instances, the undue hardship analysis does not arise.

While access to washrooms or change facilities according to an employee's lived gender identity may require accommodation, ultimately, every employee has this right. Accommodations must be *reasonable* as opposed to *perfect*, and depending on the workplace, renovating or creating new facilities to include single-occupancy or gender-neutral facilities may be the only workable solution. While there is little case law on undue hardship in the context of gender identity and gender expression, there is ample case law on the point of undue hardship where the accommodation requires an employer to renovate. In those cases, courts have said that while there are some circumstances where excessive cost may justify a refusal to accommodate, overall, the threshold for accommodation on that basis is high.^[3]

Accommodations vs. Basic Obligations

Examples of what may be considered a reasonable accommodation include:	Examples of basic obligations not considered accommodations include:
Washrooms	Medical leave
Changing facilities	Medical coverage and benefits
Dress codes and uniforms ⁴	Names and pronouns

Key Takeaways for Employers:

Overall, while it is the employee's responsibility to bring the need for accommodations to the employer's attention, employers should proactively identify and remove barriers in the workplace. Employers can create an inclusive workplace by:

- Ensuring privacy and confidentiality of transgender employees in the collection and use of personal information;
- Addressing the concerns of co-workers who may lack education or hold certain beliefs;
- Working with the employee(s) to understand and address their needs;
- Implementing an LGBTQ policy to provide guidelines for amending personnel forms and communicating with co-workers during an employee's transition;
- Supporting LGBTQ initiatives;
- Ensuring workplace harassment policies address gender identity and gender expression;
- Ensuring workplace policies and forms are gender-neutral and do not have an adverse affect; and,
- Receiving education to better understand the lived experiences of employees.

[1] Ontario Human Rights Commission, [Policy on preventing discrimination because of gender identity and gender expression](#), (2014).

[2] Employers may have *bona fide* or reasonable job requirements or qualifications that result in a discriminatory standard that cannot be accommodated; however, those requirements must be carefully considered. Employer's will have to justify the standard set out in [Meiorin](#) by establishing on the balance of probabilities:

- That the employer adopted the standard for a purpose rationally connected to the performance of the job;
- That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[3] [British Columbia \(Superintendent of Motor Vehicles\) v British Columbia \(Council of Human Rights\)](#), [1999] SCJ No. 73 at paragraph 41.

[4] Employees should be permitted to dress in accordance with their chosen gender expression.

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