

# KNOW YOUR RIGHTS: TRANSGENDER & GENDER NONCONFORMING EMPLOYEES

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## WHAT ARE MY RIGHTS AS A TRANSGENDER EMPLOYEE?

In New Mexico, it is illegal for an employer with fifteen or more employees to discriminate against a transgender employee.<sup>1</sup> Discrimination that happens during the hiring process, or during employment is illegal.<sup>2</sup> If you're fired for being transgender, that is against the law.<sup>3</sup> Coworkers are also prohibited from harassing and discriminating against an employee based on their transgender status.<sup>4</sup> It is also illegal for an employer, regardless of the number of employees at the company, to verbally or physically harass an employee based on their gender identity.<sup>5</sup> Verbal harassment could include intentionally and repeatedly referring to a transgender employee by an incorrect name and/or pronoun, if this conduct creates a hostile work environment. A hostile work environment is created "when the offensive conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."<sup>6</sup> Even when a reasonable person would feel uncomfortable under the circumstances, simple discomfort, especially over a short period of time, is not sufficient to alter the terms and conditions of employment and will not be sufficient to show a hostile work environment.<sup>7</sup>

You may have rights against the individual who engages in harassing conduct, and/or against your employer. Employers and management are generally not responsible for discriminatory conduct unless they know about it. If you are comfortable approaching management on your own, do so in writing and keep a record. If not, consult an attorney before you discuss your situation with your employer. It is unlawful for employers to retaliate against an employee who reports discriminatory or illegal conduct of other employees or management.

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## DO I HAVE THE RIGHT TO USE THE RIGHT BATHROOM?

All employees have a right to safe and appropriate restroom facilities.<sup>8</sup> This may include the right to use a restroom that corresponds to your gender identity, regardless of your sex assigned at birth, however this question has not yet been decided in New Mexico. If your company or boss attempts to force you to use a single-stalled restroom to the exclusion of any other restroom made available to employees, especially if that bathroom does not match your gender, consult with an attorney regarding whether this could be considered discrimination or harassment.

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<sup>1</sup> N.M. Stat. Ann. § 28-1-7 (West 2014) (Hereinafter HRA).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> HRA.

<sup>5</sup> *Id.*

<sup>6</sup> *Ulibarri v. State of New Mexico Corr. Acad.*, 2006-NMSC-009, 139 N.M. 193, 198-99.

<sup>7</sup> *Id.*

<sup>8</sup> 29 C.F.R. § 1910.141 (mandating that places of employment provide toilet facilities for employees); HRA; *see also Id.* at § 28-1-9 (exception to sex protection of HRA allowing for restrooms to be sex-segregated).

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## DO I HAVE THE RIGHT TO BE CALLED BY MY PREFERRED NAME, EVEN IF I HAVE NOT HAD A LEGAL NAME CHANGE?

While state law does not prohibit employers other employees from making honest mistakes about a person's gender or name, there is legal protection against discrimination or harassment on the basis of gender identity.<sup>9</sup> New Mexico recognizes "common law" name changes for most people in the state, which means that people can change their names without going through a legal name change process in most non-fraudulent circumstances.<sup>10</sup> However, as a practical matter, and possibly for legitimate business purposes, an employer may require a court order before they change an employee's name on payroll records or security clearance paperwork.<sup>11</sup> To be on the safe side, it is always a good idea to get a court ordered name change so that all your employment records match. Employees who have not yet legally changed their names and whose employers refuse to call them by their chosen names should consult with a lawyer because their employer's refusal to use a chosen name may rise to the level of harassment. However, it must be severe, pervasive, and impact your performance to be an actionable form of discrimination.

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## DO I HAVE THE RIGHT TO BE ADDRESSED BY THE PRONOUNS I PREFER?

While state law does not prohibit other employees from making honest mistakes about a person's gender, there is legal protection against discrimination or harassment on the basis of gender identity.<sup>12</sup> Intentionally addressing a coworker or employee by the wrong pronoun after having been informed of that person's gender identity and pronoun preference may create a hostile work environment. However, it must be severe, pervasive, and impact your performance to be an actionable form of discrimination.

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## WHAT IF THERE IS A DRESS CODE?

An employer who requires a dress code must enforce it in a non-discriminatory manner.<sup>13</sup> This means, for instance, that a transgender woman should be allowed to dress in the same way as non-transgender women and that her ability to conform to such a dress code should not be judged more harshly than non-transgender women. Consult with an attorney if this is a problem you face to determine if it is an actionable form of discrimination.

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## WHAT IF THERE ARE SEX-SEGREGATED JOBS DUTIES?

An employer can make job assignments based on sex so long as those assignments are otherwise legal under state law.<sup>14</sup> Transgender employees should be assigned job duties in a manner consistent with their gender identity unless there is a legitimate business purpose for making assignments on a different basis.

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## WHAT RIGHTS DO I HAVE WHEN I AM TRANSITIONING ON THE JOB?

A transgender employee who is transitioning on the job has the right to be treated in a manner consistent with non-transgender employees.<sup>15</sup> Many transitioning employees have concerns regarding their medical privacy. Health Insurance

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<sup>9</sup> HRA.

<sup>10</sup> *Petition of Variable for Change of Name v. Nash*, 2008-NMCA-105, 144 N.M. 633, 635, 190 P.3d 354, 356 (New Mexicans have the "right under the common law to assume any name that he wants so long as no fraud or misrepresentation is involved.").

<sup>11</sup> HRA;

<sup>12</sup> HRA.

<sup>13</sup> HRA.

<sup>14</sup> HRA;

<sup>15</sup> HRA.

Portability and Accountability Act (HIPAA) provisions apply to both transgender and non-transgender employees, which means that your medical records and medical history are legally required to be kept confidential under most circumstances unless you authorize their release.<sup>16</sup> As a practical matter, though, coworkers (and likely management) will be aware of a name and gender change and may have questions. As a result, you may want to create a “transition plan” with your employer to help your transition go smoothly.

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#### DO I HAVE TO ANSWER QUESTIONS ABOUT MY BODY, SUCH AS WHETHER I AM HAVING SURGERY OR NOT?

Generally your medical history and plans for the future are private and protected.<sup>17</sup> Your medical records are protected by HIPAA, however you may need to disclose information about your health and your transition to your employer through insurance forms, or when requesting time off.<sup>18</sup> One exception is if the details of your anatomy are somehow related to your job. But otherwise, you are not required to discuss the medical details of your transition.

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#### CAN I TAKE MEDICAL LEAVE TO HAVE SURGERY DURING MY TRANSITION?

You can take medical leave for transition-related surgery on the same terms as you could take leave for any other medically-necessary condition. You may need documentation from your referring physician or surgeon indicating that your transition-related surgery is medically necessary.

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#### DO I HAVE TO DISCLOSE MY TRANSGENDER STATUS ON A JOB APPLICATION?

Not specifically. However, a job application may ask for all previous names used in order to run a background check, and if you omit this information or fail to answer it truthfully, you may not be hired and/or may be subject to other consequences.

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#### WILL AN EMPLOYER WHO RUNS A BACKGROUND CHECK FIND OUT THAT I AM TRANSGENDER?

Possibly. It is very difficult in this day and age for a person to remain “stealth.” This is because employers may have access to databases tied to a person’s social security number, which may contain information about a previous name and/or gender. For certain jobs, New Mexico law limits inquiries in background checks made by potential employers.<sup>19</sup> You can request a copy of your background check from the potential employer though there is no requirement in New Mexico that employers provide a copy to potential employees.

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#### CAN A POTENTIAL EMPLOYER VIEW MY MEDICAL RECORDS?

No. In most cases, medical records are strictly protected by HIPAA and other privacy laws.<sup>20</sup>

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<sup>16</sup> 42 U.S.C.A. § 12112 (West).

<sup>17</sup> *Id.* at (d)(4)(A) “A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.”

<sup>18</sup> *Id.*; 42 USCA § 1320d–6 (West).

<sup>19</sup> *See e.g.* N.M. Stat. Ann. § 9-11-10.1 (West).

<sup>20</sup> 42 USCA § 1320d–6.

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## CAN A POTENTIAL EMPLOYER ASK MY OLD EMPLOYER ABOUT MY TRANSGENDER STATUS?

Not specifically. A potential employer's inquiries can only be about job performance-related topics.<sup>21</sup> However, a former employer may disclose information about your transgender status accidentally or in connection with a potential employer's other questions.

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## DOES MY EMPLOYMENT-OFFERED HEALTH INSURANCE HAVE TO COVER TRANSITION-RELATED CARE?

There is currently no requirement that an insurance policy cover transition-related care. In general when an employer covers an employer selects a plan with the most coverage and the lowest cost. This often means selecting plans that have lots of exclusions, and one of the most common exclusions is for procedures related to gender transition. If your plan has such an exclusion, you may have trouble getting coverage of your transition-related care. If your plan does not have this exclusion, you may be able to obtain this care if it is pre-authorized or otherwise deemed medically necessary by your doctor. If you have questions about your insurance coverage, you can call the ACLU of New Mexico.

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## I THINK I HAVE BEEN DISCRIMINATED AGAINST ON THE BASIS OF MY GENDER IDENTITY. WHAT CAN I DO?

Discrimination claims have strict deadlines. Consult an attorney and be sure to investigate those deadlines before taking any action. To seek attorney representation to assist you through this process, **contact the ACLU of New Mexico at 505-266-5915, or the New Mexico State Bar Association at (505) 797-6000.**

You may want to make a complaint to your employer through an internal complaint process. This gives your employer a chance to stop the discrimination before it becomes worse. It also creates a record that you tried to resolve the situation before seeking legal action.

You may also want to file a complaint either through the New Mexico Human Rights Division or through the Federal Equal Employment Opportunity Commission (EEOC). Filing one complaint with either agency is sufficient to alert both agencies.

To learn how to file a Complaint of Discrimination with the New Mexico Human Rights Division visit <http://www.dws.state.nm.us/LaborRelations/HumanRights/FilingaComplaintofDiscrimination>. You can also contact the Human Rights Division by calling (800) 566-9471 (toll-free in New Mexico) or (505) 827-6838.

To learn how to file an EEOC complaint visit [www.eeoc.gov](http://www.eeoc.gov).

For more information about your rights please contact the Transgender Resource Center of New Mexico at 505-200-9086, or the ACLU of New Mexico at 505-266-5915.

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<sup>21</sup>42 U.S.C.A. § 12112 (West); N.M. Stat. Ann. § 50-12-1 (West).