

Transgender Bathroom Rights

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IREM® Legislative White Paper



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Current Laws Prohibiting Discrimination Against Transgender People

Over the past year, the transgender rights movement has found momentum. 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 all have such laws. Their protections vary. For example, Nevada’s law bans discrimination in employment, housing, and public accommodations like restaurants, hospitals, and retail stores; Maine’s law covers those categories plus access to credit and education.

At least 200 cities and counties have banned gender identity discrimination, including Atlanta, Austin, Boise, Buffalo, Cincinnati, Dallas, El Paso, Indianapolis, Kansas City, Louisville, Milwaukee, New Orleans, New York City, Philadelphia, Phoenix, Pittsburgh, and San Antonio, as well as many smaller towns.

The governors of Indiana, Kentucky, Michigan, New York, and Pennsylvania have issued executive orders banning discrimination against transgender state workers. Some cities and counties have also protected their transgender public employees through local ordinances, charter provisions, or other means.

Transgender Restroom Signage Guidance

One of the most controversial aspects surrounding the transgender issue is the use of restrooms by transgender individuals. There is very little guidance about this coming from courts or government agencies. And, as might be expected, the guidance that is available is often contradictory.

In two recent decisions, an administrative agency in Colorado in 2013 and the Maine Supreme Court in 2014 both ruled that under those states’ gender identity discrimination laws, transgender girls had the right to use girls’ restrooms at their public schools. However, a 2001 Minnesota Supreme Court decision found that even a law prohibiting gender identity discrimination didn’t necessarily protect a transgender

woman's right to use the women's restroom at work. And a federal appeals court in 2007 upheld the Utah Transit Authority's decision to fire a transgender bus driver, based on a claim that her employer could be sued for her use of women's public restrooms along her bus route. In a non-workplace context, a New York appeals court ruled in 2005 that it wasn't sex discrimination for a building owner to prevent transgender people from using gender identity-appropriate restrooms in a building where several businesses shared restrooms.

According to the ACLU (<https://www.aclu.org/know-your-rights/transgender-people-and-law>) authorities in some jurisdictions (e.g., Colorado, Iowa, Oregon, Washington State, San Francisco, New York City, and the District of Columbia), have specifically said that denying transgender people the right to use a gender identity-appropriate restroom violates their nondiscrimination laws. Some jurisdictions (e.g., Iowa, San Francisco, and D.C.) go farther and make clear that transgender people can't be required to prove their gender to gain access to a public restroom, unless everyone has to show ID to use that restroom. Other jurisdictions (e.g., Chicago) continue to allow businesses to decide whether a transgender patron may access men's or women's restrooms based on the gender on their ID, which may or may not reflect accurately the person's gender identity. Some cities (such as Austin, Philadelphia, Washington, D.C., and West Hollywood) have local laws that require single-stall public restrooms to be labeled as unisex.

From a federal agency perspective, the Occupational Safety & Health Administration (OSHA), within the US Department of Labor, has published a "[Guide to Restroom Access for Transgender Workers](https://www.osha.gov/Publications/OSHA3795.pdf)." (<https://www.osha.gov/Publications/OSHA3795.pdf>). In the guide OSHA states "a person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms. The employee should determine the most appropriate and safest option for him- or herself." Options include having a single occupancy gender neutral facility and use of multiple occupant gender neutral restroom facilities with lockable single occupant stalls. OSHA requires all employers to find solutions that are safe and convenient and to respect transgender employees. While OSHA guidelines are directed at employers, they would have an impact on how real estate managers satisfy the needs of their tenants who have employees.

Current Practices

Given the uncertainty on legal requirements, it is hard to truly identify best practices in this area. There are very few state or local laws establishing restroom requirements. An example of one of the few specific laws to exist is the District of Columbia "Safe Bathrooms Act", enacted in 2006. This law requires all single occupancy restrooms to be gender neutral. It does not require any modifications to the existing building or restrooms, only signage. Examples given that would satisfy the law include using an inclusive sign that denotes "Male and Female", or simply replacing the sign with one that says "Restroom"

If there is no specific state or local laws laying out restroom requirements, it is up to the real estate manager to figure out a solution of their own.

Some businesses have gone as far as to have three bathroom designations; Male, Female and Gender Neutral. This might be the least controversial method, as nothing will change for most people. Those who traditionally identify with male or female are free to use their respective bathrooms as they always had. The gender neutral bathroom is typically a single occupancy facility open to anyone who wishes to use it. However, while this is a fairly safe solution, it may not be the most cost effective if it requires building new, or retrofitting old restroom facilities.

A much simpler route that is gaining popularity is similar to the solution provided in the District of Columbia law, requiring only a modification of signage. Rather than the customary “Male” and “Female” signs with figures denoting the gender of each, a sign can read “Male, transgender people welcome” and “Female, transgender people welcome.” This signage would make it clear that one restroom is for all who identify as female, and the other is for all who identify as male, regardless of the sex assigned to them at birth. Examples of some of the signage used is contained below.

Summary

The transgender discussion is likely to continue to be a hot topic the next few years. The restroom issue is only one of many related issues that could impact the real estate management industry. Since it is such a relatively new topic, IREM will continue to monitor what is happening at all levels of government – and will work through IREM’s Legislative and Public Policy Committee to develop policy statements and informational materials for use by members of the industry.

Examples of Signage Options

