

Transgender employees:

HR basics for employers





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Conversations around sexual orientation and gender reassignment can be tricky - especially when it comes to the workplace.

But did you know that both sexual orientation and gender reassignment are protected characteristics under The Equality Act 2010? So, just like with protected characteristics like disability, race, and religion, it's your responsibility as an employer to take them into account and make sure you're providing a safe, inclusive, and equal work environment for all. After all, who doesn't want a happier, healthier, more productive workplace?

So, where do you start? In this guide, we'll explore the key legislation you need to know, decipher key terms you might hear, and discuss how you can meet your legal obligations.

Let's get to it, shall we?

Did you know?

55% of trans workers have experienced conflict and harassment in the workplace, compared to **29%** of heterosexual, cisgender employees.

Before we start - a quick glossary of key terminology

- ✔ **Sexual orientation** - a person's emotional, romantic and/or sexual attraction to another person.
- ✔ **Gender identity** - a person's innate sense of their own gender, whether male, female or something else, which may or may not correspond to the sex assigned at birth.
- ✔ **Non-binary** - someone who doesn't identify with a binary gender (male or female). They may identify as neither man nor woman, both man and woman, fluid between the two, or outside of that binary completely.
- ✔ **Gender reassignment** - gender reassignment is the term used to describe transitioning from one gender to another.
- ✔ **Transition/transitioning** - the term used to describe the process of moving away from the gender assigned at birth towards a person's affirmed gender across all spheres of life - like family, at work, in leisure pursuits, and in society generally.
- ✔ **Transgender woman/man** - trans men are those who were assigned female at birth but who identify as male. Those assigned male at birth but identifying as female may be referred to as 'trans women'.
- ✔ **Cisgender** - where someone's gender identity aligns with the sex they were assigned at birth.
- ✔ **Gender Recognition Certificate (GRC)** - a legal document which changes someone's legal gender and provides them with a new birth certificate.



What the law says

Gender reassignment discrimination is illegal in the UK

Gender reassignment is listed as a protected characteristic in the Equality Act 2010. Discrimination is when someone is unfairly disadvantaged for reasons related to their sexual orientation or because they're transgender - and claims can be brought by people you haven't employed yet (so an interview candidate, for example).

Non-binary people aren't protected by the Equality Act - or are they?

The Equality Act 2010 doesn't explicitly protect non-binary, inter-sex or gender fluid people. However, [case law](#) shows that they could be protected if they're discriminated against on the basis of them considering, going through, or having transitioned from their gender assigned at birth (more on this later).

THE EQUALITY ACT - it's a bit... outdated

Things have moved on quite a lot since the introduction of The Equality Act 2010, and some of the language in the act itself is now considered outdated.

The act uses the word "transsexual" - nowadays we would generally use the word 'transgender', or 'trans'.

However - a wide range of people are included in the terms 'trans' or 'transgender', but they're not protected as transgender unless they propose to change their gender, have started to do so, or have already done so.

IMPORTANT - Points to keep in mind:

- ✓ Under the Equality Act, protection is only intended for those who present permanently in a different binary gender to the one they were assigned at birth.
- ✓ [Government Equalities Commission guidance](#) makes it clear that a person can change gender without any medical intervention and medical processes aren't essential to transitioning.
- ✓ Would not cover cross-dressers or others who choose to temporarily adopt the appearance of the opposite gender.
- ✓ Cross-dressing needs to be motivated by their gender identity and not some other reason - like fancy dress for a work event.



Case in point - when claims go to tribunal

Other than creating a more inclusive - and therefore, as research has shown, a more productive - workplace, making sure you're meeting your responsibilities towards transgender employees under The Equality Act 2010 is important because it can avoid costly tribunal claims. Potential claims under The Equality Act are similar to most protected characteristics:

- Section 13 - Direct Discrimination
- Section 19 - Indirect Discrimination
- Section 26 - Harassment
- Section 27 - Victimisation

Discrimination awards are uncapped and, on average, can cost between **£15k - £25k** to defend, so it's definitely a good idea to make sure you're following best-practice, legally compliant employment law practices to reduce the chance of a claim against you.

Did you know?

Citation clients are **16x less likely** to face an employment tribunal claim, versus the UK average.

For example:

Ms Taylor identified as gender fluid/non-binary and usually dressed in women's clothing. She said: "This is an umbrella term, and in my case the precise word would be gender fluid. I have no plans for surgical transition." She claimed that she then experienced insults and abusive jokes at work, and suffered difficulties with the use of toilet facilities and managerial support.

When she told her manager, he said that she was "not normal" and told her not to dress in women's clothing and told her to use the disabled toilets. Following that, she was subjected to numerous instances of bullying and harassment. She brought a claim with a wide range of allegations, including harassment due to a protected characteristic (gender reassignment), direct discrimination, unfair dismissal, and victimisation.

The result?

The employment tribunal ruled in her favour on most of these and, importantly and unprecedentedly, held that a person who identified as gender fluid/non-binary and was on a transitioning journey was covered by Section 7 of the Equality Act 2010. She was awarded **£180,000** by the tribunal (not including costs).





Key considerations for employers

So, now you know the law and how it can be upheld. But how does it look in practice? What policies or procedures do you need in place? What are the HR implications?

Policies and training

- ✓ Do your policies – such as anti-harassment/bullying policies – currently deliver equality of outcomes and impact? Are they clearly and effectively enforced? Because this, supported by regular equality, diversity and inclusion training, can help stamp out homophobic, biphobic and transphobic bullying and help protect your business.
- ✓ Do your policies include practical examples of unacceptable behaviour and best practice?
- ✓ Do your managers understand The Equality Act 2010 and how to support trans workers? Do you have training in place to make sure they do?
- ✓ If staff have questions, how will you handle them in a respectful and sensitive way?

Use of facilities

- ✓ Do you have designated male and female toilets?
- ✓ A trans person should be free to select the facilities appropriate to the gender in which they present – so how will you make sure they feel safe to do so, and handle any complaints raised by other employees who may feel uncomfortable with this?

Absences from work

- ✓ How will you manage and record absences for transitioning employees? There may be absences for medical reasons and other appointments associated with the transition process which should be recorded, and any absence management process should be adjusted accordingly.
- ✓ You also must make sure you're not treating absences in relation to the transition process any less favourably than you would sickness absence, for example – otherwise you'll be in breach of Section 16 of the Equality Act.

Contracts

- ✓ Do your contracts reflect your employees' correct gender identity? Do you have a process in place to keep on top of this?
- ✓ Do you have the same process in place for non-binary employees? Have you checked their contracts reflect their chosen pronouns?

A tricky situation...

If a cisgender female employee says she feels uncomfortable with a trans woman using the same facilities as her, be careful how you approach the situation. Yes, sex is a protected characteristic – but it's unlikely that, if you prevented the trans woman from using the facilities, a tribunal would rule in your favour if the trans employee brought a discrimination claim. You're better off asking the cisgender female employee why they feel uncomfortable and try to find a solution through discussion and education.

It's always best to seek advice on these scenarios – our 24/7 advice line is there for this very purpose. Call **0345 844 1111** to find out more.



Bullying

- ✓ Is the bullying of trans workers treated with the same degree of seriousness as other instances of bullying in your organisation? (It absolutely must be, at all times.)
- ✓ How will you make sure you're aware of and can address more subtle forms of bullying - like excluding people from distributions lists, or persistent use of the wrong pronoun?

Data and GDPR

- ✓ How are you currently/how will you process data relating to employee gender reassignment and history? Gender reassignment and any information related to an individual's gender history constitutes special category data under the UK GDPR and the Data Protection Act 2018 - meaning it can only be processed for certain specified reasons.
- ✓ How will you make sure that trans employees aren't "outed" due to old data emerging from your systems - for example, a record of maternity leave for a trans man?
- ✓ Do you store sensitive data on remote, secure databases? (If not, you should be.)
- ✓ How do you make sure that informal sharing of this information is prevented? Not doing so could be unlawful - under Section 22 of the Gender Recognition Act 2004, it's a criminal offence for a person who has acquired, in an official capacity, protected information regarding an individual's gender identity (like a Gender Recognition Certificate) to disclose that information to any other person.

Did you know?

CIPD research found that **over 10%** of employees had experienced their LGBT+ identity being disclosed without their permission.





Recruitment

Are you confident your current recruitment processes and procedures don't breach The Equality Act 2010 in relation to gender reassignment and sexual orientation? For example: the information you require from candidates, asking potentially discriminatory questions when interviewing and selecting a candidate, access to facilities if you invite a transgender candidate to your workplace for an interview, etc.

Did you know?

Over 20% of LGBT+ workers experience discrimination during recruitment and promotion.

A trans candidate isn't required to inform you that they've transitioned, but it may become clear during the document checks. Do you know how to handle this and what to do next?

Keep in mind:

The Disclosure and Barring Service (DBS) offers a confidential check for trans applicants, known as the sensitive applications route. This gives transgender applicants the choice not to have any gender or name information disclosed on their DBS certificate

Managers need to take their lead from the trans employee in relation to the frequency and type of support that you provide during and after transition.



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