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Embracing Effective Transition Plans *for* Transgender Employees

By Victor P. Montoya

Introduction

What happens when a transgender employee decides to transition in the workplace? The term “transition” identifies the process of a transgender individual electing to live as the gender with which they identify, not their birth gender. This means the individual is living as their true gender and should not be confused with the employee becoming a different gender. As part of their transition process, some individuals undergo medical procedures and hormone therapy. But medical treatment can be cost prohibitive to some individuals, and others cannot pursue a medical course of treatment due to their health. An employee’s decision to transition is a life-changing personal decision which can affect all aspects of their life, including their employment.

Many employers will not have had prior experience with supporting a transgender employee with their transition. Further, many employees may not have previously interacted with a transgender individual and may be uncomfortable or anxious about how to interact with them. Employers may assume that older workers may be less accepting of LGBTQ co-workers than younger employees. However, a recent Harris Poll conducted on behalf of GLADD revealed that the number of young Americans aged 18-34 years of age who reported being comfortable with LGBTQ people dropped for the second year in a row – from 53% to 45%. Further, only 18% of respondents reported knowing a transgender employee.¹ Employers therefore must prepare to support and educate its workforce when an employee elects to transition in the workplace.

Facts About Transgender Employees

A 2016 Williams Institute study estimated that 1.4 million individuals identify as transgender in the U.S.² That study also reveals that New Mexico ranks number three in the U.S. based on the estimated percentage of its adult residents who identify as transgender.³ The majority of New Mexico’s transgender residents also are 25-64 years of age.⁴ Transgender individuals therefore are a notable component of New Mexico’s available adult workforce.

“Transgender individuals have a ‘gender identity’— a ‘deeply felt, inherent sense’ of their gender—that is not aligned with the sex assigned to them at birth.”⁵ The term “transgender” includes not only individuals who have transitioned medically to align their gender with their physical presentation, but also those who have not or will not transition medically, as well as other non-binary



or gender-expansive individuals who do not identify as male or female.⁶ “Gender identity is distinct from and does not predict sexual orientation; transgender people, like cisgender people, may identify as heterosexual, gay, lesbian, bisexual, or asexual.”⁷ “[G]ender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics.”⁸

Transgender people often suffer from gender dysphoria, a medical condition, that is exacerbated by employment discrimination.⁹ The American Psychiatric Association defines “gender dysphoria” as “a conflict between a person’s physical or assigned gender and the gender with which he/she/they identify. People with gender dysphoria may be very uncomfortable with the gender they were assigned, sometimes described as being uncomfortable with their body (particularly developments during puberty) or being uncomfortable with the expected roles of their assigned gender.”¹⁰ “If untreated, gender dysphoria can cause debilitating distress, depression, impairment of function, self-mutilation to alter one’s genitals or secondary sex characteristics, other self-injurious behaviors, and suicide.”¹¹

It is estimated that between 67% and 78% of transgender employees are subjected to workplace harassment or mistreatment.¹² In order to avoid discrimination and mistreatment in the workplace, 75% of transgender employees hide their gender identity, delay their medical treatment or transition, or resign from their employment.¹³ Unemployment of transgender individuals is nearly triple that of the adult population at large, and their poverty rate

is nearly double.¹⁴ “This widespread discrimination tangibly and adversely affects the mental and physical health of transgender adults by (1) frustrating treatment protocols for gender dysphoria; and (2) exacerbating the severe health consequences of living with the perceived stigma of being transgender.”¹⁵ Workplace discrimination also interferes with the normal workplace interactions of transgender individuals, given that adults spend a great deal of their time and social interactions in the workplace.¹⁶

Transgender Employees and the Law

Title VII of the Civil Rights Act of 1964 (“Title VII”) provides that it is an unlawful employment practice to discriminate against an individual on the basis of their sex.¹⁷ U.S.’ Equal Employment Opportunity Commission asserts that discrimination against an individual due to their gender identity, including transgender status, or because of their sexual orientation violates Title VII because it is discrimination due to their sex.¹⁸ The current U.S.’ Department of Justice takes a contrary position, and asserts that gender identity, including discrimination against transgender individuals, is not protected under Title VII.¹⁹ The EEOC and DOJ recently asserted these contrary positions before the U.S. Supreme Court in *R.G. & G.R. Harris Funeral Homes v. EEOC*. The issues submitted to the Court were whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.²⁰ In a decision issued on June 15, 2020, the U.S. Supreme Court resolved this dispute and held that an employer who fires an individual merely for being gay or transgender violates Title VII.²¹

Employers in New Mexico also must comply with the protections against discrimination provided by the New Mexico Human Rights Act (“HRA”).²² The HRA specifically prohibits discriminatory employment practices based upon an individual’s sexual orientation and gender identity. Further, the HRA provides a specific definition for “gender identity” which includes “a person’s self-perception, or perception of that person by another, of the person’s identity as a male or female based upon the person’s appearance, behavior or physical characteristics that are in accord with or opposed to the person’s physical anatomy, chromosomal sex or sex at birth.”²³ Employers therefore must take care to comply with both federal and New Mexico law when a transgender employee approaches them to advise that they will be transitioning in the workplace.

Embracing Effective Transition Plans

When an employee advises their employer that they are transitioning in the workplace, the employer should take immediate and affirmative steps to develop an effective transition plan for the employee so it may manage the process, ensure the employee’s safety, avoid discriminatory conduct, and educate its employees.

► The First Steps:

- Reassure the employee that the company will support them during their transition.
- If you have a human resources department, get them involved without delay.
- Thank the employee for sharing their transition plan with you.
- Confirm that the company maintains a discrimination free and safe workplace.

- Identify the company representative who will serve as the main contact person for the employee and to whom they can bring their concerns and any requests for accommodations.
- Schedule sufficient time to meet to discuss the employee’s transition, their requested accommodations, and the timing of any disclosures. Be sure to include necessary parties in the meeting, such as the employee’s manager.
- Ensure that employees involved in the transition plan keep information confidential consistent with the plan and the employer’s obligations to protect the employee’s medical information.

► The Planning Meeting:

- Discuss the employee’s timeline for transition frankly and openly.
- Ask the employee if they require any accommodations and, if so, what those accommodations may be.
- Determine who should be notified of the employee’s transition (managers, co-workers, customers, third-party vendors).
- Ask the employee if they have selected a name and what gender pronouns they want to use.
- Inquire when the employee wants management to inform co-workers and others of the employee’s transition and how they want that information relayed.
- Consider if it may be appropriate to include a personal message from the employee as part of any announcement.
- Determine when the employee wants co-workers to begin using their selected name and pronouns.
- Inquire when the employee will begin to dress consistent with their gender identity.
- Confirm that necessary work identification, e-mail, and internal documentation will be changed consistent with the transition plan to reflect the employee’s name and gender identity, and confirm that some documentation, including payroll records and insurance, may not be changed without a legal change of name.
- Review the company dress code applicable to the employee’s gender identity with the employee and answer any questions they may have.
- Jointly discuss bathroom access with the employee and establish if they want to use one specific to their gender or a unisex, single-occupant bathroom, if available, and include changing room or locker room use when those facilities are present.
- Advise employee of any company resources available to assist them during their transition, such as employee assistance plans, affinity or diversity groups, and company insurance or leave representatives.
- Discuss with employee how they should address misgendering by their co-workers during the early stages of transition, and what to do if misgendering persists.
- Discourage employee from discussing medical procedures related to their transition or condition with their co-workers in order to maintain the confidentiality of their medical information.
- Advise employee that any requested changes to the plan must be made in writing and that employer will respond to the request in writing within a reasonable time after receipt.
- Advise employee that failure to comply with the agreed upon transition plan may result in corrective action.
- Confirm the agreed upon transition plan in writing, review it with the employee and have them sign it.

- ▶ Education Once a Transition Plan is Established:
 - Advise co-workers of the timeline for the employee’s transition, including when the employee will begin to use their new name, dress according to their gender identity, and begin using the appropriate bathroom, changing room, or locker room facilities.
 - Inform co-workers of the transitioning employee’s preferred pronouns.
 - Explain to employees that failure to respect the employee’s transition by refusing to use their preferred name and pronouns is not acceptable and is a form of unlawful discrimination.
 - If an employee asserts concerns due to their religious beliefs, advise that employee that the employer provides equal treatment to all employees irrespective of their religious beliefs and consistent with its nondiscrimination policy.
 - Consider coordinating the employee’s transition plan with mandatory diversity and nondiscrimination training, including gender identity issues.
- ▶ Identify the person to whom employees may bring any questions or concerns regarding the transition plan or related issues.
- ▶ Ensure that employees remain aware of how customers, third-party vendors, and other outside parties interact with the transitioning employee and that they know how to report any improper conduct.
- ▶ Address any concerns from customers, third-party vendors and others by asserting the company’s commitment to diversity and nondiscrimination. If any of these parties ask that they not be required to interact with the transitioning employee, you should reject their request even if there is a risk of no longer doing business with those individuals. Discrimination in any form should not be tolerated.
- ▶ Consider holding a voluntary education session with or making contact information available for a LGBTQ resource group where employees may ask questions about the transgender experience. This may help avoid informal discussions in the workplace that may make some employees uncomfortable or result in unintended discrimination or microaggression directed at a transgender employee.
- ▶ Most importantly, foster an atmosphere of respect in the workplace for all employees by consistently disseminating and enforcing your nondiscrimination policies.

A Glimpse Into the Future of Transgender Individuals in the Workplace

In July 2017, California instituted new regulations to its Fair Employment and Housing Act (“FEHA”) to protect transgender expression and identity in the workplace.²⁴ The new regulations provide a glimpse into the future and may serve as helpful guidelines to employers when crafting effective transition plans for transgendered employees. Generally, the new regulations prohibit discrimination against an individual who is transitioning, has transitioned, or is perceived to be transitioning. Under these new regulations, employers must:

- ▶ abide by the employee’s stated preferred gender, name, and/or pronoun, including gender-neutral pronouns;
- ▶ not discriminate against an applicant based on their failure to designate male or female on an application form;
- ▶ recruit individuals of both sexes for all jobs unless based upon a permissible defense;
- ▶ use an employee’s gender or legal name as indicated on a government-issued identification document only if necessary to

meet a legally mandated obligation, otherwise an employer must use the employee’s preferred gender identity and name;

- ▶ permit employees to perform jobs or duties that correspond to their gender expression or identity, regardless of their assigned sex at birth.

Further, an employer only is permitted to discuss an employee’s sex, gender, gender identity, or gender expression when an employee initiates communications regarding their working conditions. An employer’s bona fide occupational qualification (“BFOQ”) defense to a discrimination claim also is limited in several ways. Significantly, a BFOQ defense may not be based upon a customer’s preference for employees of one sex, the necessity of providing separate facilities for one sex, the fact that an individual is transgender or gender non-conforming, that the individual’s sex at birth is different than the sex required for the job, or that traditionally members of one sex have been hired to perform a particular type of job. Further, an employer’s BFOQ defense may only be based upon personal privacy considerations were: the job requires an individual to observe others in a state of nudity or conduct body searches; and, based on prevailing social standards, it would be offensive to have an individual of a different sex present; and it is detrimental to the mental or physical welfare of those being observed or searched to have an individual of a different sex present. The new regulations also place an affirmative duty on employers to assign job duties and make reasonable accommodations to minimize the number of jobs for which sex is a BFOQ.

The California regulations also provide requirements for bathroom and other facilities, including locker rooms, applicable to transitioning employees.

- ▶ Employers shall permit employees to use facilities that correspond to the employee’s gender identity or gender expression, regardless of the employee’s assigned sex at birth.
- ▶ Employers and other covered entities with single-occupancy facilities under their control shall use gender-neutral signage for those facilities, such as “Restroom,” “Unisex,” “Gender Neutral,” “All Gender Restroom,” etc.
- ▶ To respect the privacy interests of all employees, employers shall provide feasible alternatives such as locking toilet stalls, staggered schedules for showering, shower curtains, or other feasible methods of ensuring privacy. However, an employer or other covered entity may not require an employee to use a particular facility.
- ▶ Employees shall not be required to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to utilize facilities designated for use by a particular gender.
- ▶ However, employers are permitted to make a reasonable and confidential inquiry of an employee for the sole purpose of ensuring access to comparable, safe, and adequate multi-user facilities.

Finally, the FEHA regulations make it unlawful to impose upon an applicant or employee any physical appearance, grooming or dress standard which is inconsistent with an individual’s gender identity or gender expression. The California regulations reveal that they are intended to eliminate improper sex stereotyping and workplace

continued on page 11

WAGE THEFT IN NEW MEXICO: Opportunities for Firms to Create Wins for Workers

Richard L. Branch, J.D. and Deborah L. Williamson, Ph. D.

In 1991, I found myself in an unenviable position: Recently graduated from law school and having passed the bar, I was jobless. Unsure about what I wanted to do with my life—as 24-year-olds frequently are—I’d eschewed recruitment rituals that most law students undergo, save for interviewing for a couple government and legal services jobs that didn’t pan out. I considered returning to journalism, my first love, but a recession and looming student loan payments nixed that option. Desperate, I carpet-bombed practitioners with resumes and writing samples, eventually finding research and writing work with an attorney who strung me along for months and refused to pay me for my services. He never returned my calls inquiring about payment.

I found more reliable employment several months later and moved on with my life, taking a loss on what I was owed. At the time I didn’t understand that my experience had a name: wage theft. Decades of practicing employment law have convinced me that unfair employment practices such as this are all too common in the American workplace, fueled by the deep economic disparity that exists between employers and workers. Now it’s my job to enforce New Mexico’s laws regulating the payment of wages by suing employers who seek to skirt these laws.

I litigate and manage cases as a staff attorney for the Labor Relations Division of the New Mexico Department of Workforce Solutions. I’ve done much of this work alongside Deborah Williamson, who until recently was the NMDWS’s Director of Labor Relations. We have seen a *potpourri* of ploys that, either by design or impact, avoid the worker protections enacted by New Mexico’s Legislature and local jurisdictions. Such violations can include failing to pay overtime, failing to pay the minimum wage, skimming tips from individuals making \$2.35 an hour, working employees off the clock, taking improper payroll deductions, and misclassifying workers as independent contractors. While it’s tempting to write off such abuses as the sporadic misdeeds of a few bad actors, the numbers suggest a more widespread problem.

The U.S. Department of Labor’s Wage and Hour Division alone collected \$322 million in back wages from errant employers throughout the U.S. in fiscal year 2019, closing out a five-year period in which \$1.4 billion was recouped on behalf of more than 1.3 million workers.¹ The WHD found that employees were owed an average of \$1,025 in back wages. This represents three whole paychecks for your average maid/housekeeper, 2.3 paychecks for



your average security guard and 3.1 paychecks for your average retail cashier. It also equates to more than four weeks’ worth of groceries, an entire month’s rent, more than three months of utilities and more than a month of childcare.

In New Mexico, the number of wage complaints filed with the LRD has shown a steady increase in recent years, with LRD collecting \$322,994 in the first five months of 2020. With co-enforcement from the U.S. Department of Labor’s regional office in Albuquerque and the use of certified contract mediators, LRD management anticipates additional wins for workers in short order. Still, the state’s system for combating wage theft is overwhelmed, with a backlog of 1,939 unresolved complaints pending as of January.² Investigations are frequently complex and intensive for each constituent’s claim, with many lasting several months if not years, and such volume indicates that a significant number of working people regularly experience difficulties getting paid in full and on time.

Among the statutes the LRD enforces is the Wage Payment Act.³ The WPA regulates when and how employers must pay their employees, requiring prompt payment of wages every 15 days or more frequently; requiring payment of the agreed upon wage rate in full; prohibiting unlawful and unauthorized payroll deductions; and mandating that employers pay employees all final wages due within specified timeframes following job separation. It also requires employers to keep true and accurate time and pay records, maintain those records for a specified period of time, and cooperate with LRD when it investigates wage complaints.

Additionally, the Minimum Wage Act⁴ establishes a base minimum wage rate applicable statewide, although local home-rule jurisdic-

tions such as the cities of Albuquerque, Santa Fe and Las Cruces may and have set higher minimum wage rates.⁵ The MWA also requires employers to pay workers at time-and-one-half their normal hourly rate for all hours worked over 40 in a week; pay tipped employees a statewide tipped minimum wage; and pay secondary students at least \$8.50 per hour. Employers are prohibited from keeping employee tips except in furtherance of a valid tip pool among “wait staff,” and from retaliating against workers asserting any rights under the MWA. Finally, each employer is required to post a summary of employee rights under the MWA in a conspicuous location of the workplace.

Both the WPA and MWA contemplate workers enforcing their rights through private actions or by assigning their rights of action to the LRD for prosecution. The state’s district attorneys must prosecute, both civilly and criminally, all cases LRD refers to them and must assist LRD in the prosecution of violations of the wage statutes. Employers adjudicated to have violated the MWA are liable not only for any back wages found to be due but also for treble damages and interest, reasonable attorney fees, and costs of the action. Employers who fail to pay all wages conceded due by the deadlines set in the WPA upon a worker’s separation can be assessed damages equal to what the worker would have earned working his or her regular weekly schedule, up to a maximum of 60 days. These liquidated damages—intended to discourage employers from flouting our wage statutes—can quickly add up and multiply the amount employers owe affected workers.

The Legislature did not specify a requisite mental state on the part of noncompliant employers when it crafted the wage statutes. Therefore, liquidated damages are payable regardless of whether a violation is willful or not. Additionally, any violation of either the WPA or MWA constitutes a misdemeanor and can be prosecuted as such. When LRD works in partnership with district attorneys, this option is always on the table and may be exercised depending on the egregiousness of an employer’s conduct. Fines and penalties are a distinct possibility. The MWA also provides for more than just monetary relief. Courts can order “appropriate injunctive relief, including requiring an employer to post in the place of business a notice describing violations by the employer as found by the court or a copy of a cease and desist order applicable to the employer.” If these things do not sufficiently dissuade employers from engaging in illegal pay practices, there is another strong disincentive: individual liability.

Ordinarily, individual owners and managers of corporate entities are shielded from liability for a business’s debts. However, an individual can be held personally liable as an “employer” for paying employees’ unpaid wages and damages if that individual exercises sufficient control over employees and their working conditions.⁶ Case law supports individual liability for wage debts based on four factors, including whether the individual had the power to hire and fire employees; supervised and controlled employee work schedules and conditions of employment; determined the rate and method of payment; and/or maintained employment records.⁷ Accordingly, LRD directs its enforcement efforts at both corporations and individuals, joining as defendants any and all individuals who satisfy this balancing test. This means that even where a company is insolvent, LRD may still attach personal assets of the company’s owners to satisfy judgments. Attorneys representing employers would do well to

counsel clients as to the exposure that owners may face as individuals when it comes to wage debts.

While the LRD and the state’s district attorneys have primary enforcement authority with respect to our wage statutes, this authority is by no means exclusive. The WPA and MWA also provide for private rights of action, though perhaps the private bar might not find such cases enticing due to the perception of no financial payoff. This is unfortunate because LRD’s current case backlog makes it hard to enforce the state’s wage laws quickly enough to enable many wage theft victims to make their rent, pay for childcare, or even buy food. District attorneys also face resource limitations that force them to prioritize prosecution of murders, rapes, and other violent crimes. Yet wage theft cases need not fall through the cracks. The LRD encourages partnerships or co-enforcement opportunities not only with government and community social service agencies, but all competent attorneys interested in helping affected workers. Where unlawful wage practices of a single employer or group of employers impact numerous workers, class certification under Rule 1-023 NMRA is available. The MWA’s allowance of attorney fees and costs means that litigation in this field can yield significant dividends to attorneys willing to see these cases through to the end.

The ultimate goal of any robust multi-faceted enforcement system is deterrence of the kind of wage-payment practices I experienced as a new attorney. Along with vigorous enforcement, LRD seeks to further its deterrence goal by educating employers who sincerely want to comply with the law by offering informational webinars on wage-payment obligations, giving targeted presentations to specific worker, employer or industry groups upon request, and making our Investigations Manual available to the public online at <https://www.dws.state.nm.us/Labor-Relations/Labor-Information/Wage-and-Hour>. Together, we can ensure that wage theft is not another stifling economic problem with which New Mexico must contend. ■

Endnotes

¹ U.S. Department of Labor: “Wage and Hour Division Data,” Wage and Hour Division Website, available at, <https://www.dol.gov/agencies/whd/data> (last visited March 8, 2020).

² McKay, Dan. NM faces backlog of wage claims. *Albuquerque Journal*, available at, <https://www.abqjournal.com/1412441/nm-faces-backlog-of-wage-claims.html>, (2020, January 22).

³ NMSA 1978, §§ 50-4-1 through 50-4-18.

⁴ NMSA 1978, §§ 50-4-19 through 50-4-30.

⁵ § 50-4-29; *New Mexicans for Free Enterprise v. City of Santa Fe*, 2006-NMCA-007, ¶ 44, 138 N.M. 785, 802, 126 P.3d 1149, 1166 (“Minimum wage policymaking is within the scope of municipal power unless the legislature clearly intends to remove it or when there is a conflict between an ordinance and general state law”).

⁶ *Perez v. ZL Rest. Corp.*, 81 F.Supp. 3d 1062, 1070 (D.N.M. 2014).

⁷ *Id.*; see also 29 C.F.R. Part 791.2(a)(1) (same balancing test used to determine when a person is an employee’s “joint employer” under the Fair Labor Standards Act).

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Considering Everything at Once: Navigating the WCA, FMLA, and ADA

By Jacqueline Kafka, Samantha Adams and Alana De Young

When an employee is injured at work, employers often find themselves bewildered by the interplay between the Worker's Compensation Act, the Family Medical Leave Act, and the Americans with Disabilities Act. Broadly speaking, employees injured at work are generally entitled to monetary benefits and reasonable accommodations allowing them to continue to work under the WCA; may be eligible for 12 weeks of unpaid leave for a serious health condition under the FMLA; and may need reasonable accommodations for impairments that limit one or more major life activity under the ADA. Adding to the confusion, an employee may be eligible for all of these benefits at the same time.

Many employers analyze the specific requirements under the WCA and the FMLA, both of which are very technical in nature and have strict deadlines, but fail to consider the potential overlap among the WCA, the FMLA, and the ADA. For example, employers that approve an employee's FMLA leave often forget that leave afforded an employee as an ADA accommodation may also count toward, and overlap with, FMLA leave. Similarly, when it comes to making reasonable accommodations for an employee who returns to work, many employers incorrectly believe an employee must be fully recovered from an injury. This is incorrect, however, because the WCA, FMLA, and ADA all require different levels of documentation demonstrating an employee is able to return to work, even if not fully healed from an injury. This article explores two hypothetical situations employers may face when an employee is injured at work, and then explains both the employees' rights and the employers' respective responsibilities under the WCA, FMLA, and ADA.

Hypothetical 1: Sarah's Back Injury

Sarah is a delivery person for Delivery Express, a national company with its principle place of business in New Mexico. The Delivery Express New Mexico location includes a home office as well as a shipment, processing, and delivery center. Delivery Express employs 95 total employees in New Mexico, with employees in Albuquerque, Rio Rancho, Santa Fe, and Las Cruces.

Sarah picks up packages every morning from Delivery Express, many of which weigh more than 20 pounds, and delivers the pack-



ages around town. On Tuesday, Sarah clocked in at 8 a.m., picked up her packages, and headed out to her first delivery. On her way to the delivery, Sarah was involved in a serious car accident and suffered a major back injury.

Due to her back injury, Sarah now cannot sit the long hours required to drive a truck without enduring a lot of pain. Her doctor allows Sarah to return to work but prohibits Sarah from sitting for long periods or lifting anything over 10 pounds. Because Sarah can stand as needed and is not required to lift items weighing more than 10 pounds, Delivery Express allows Sarah to work as a receptionist when Sarah returns to work, but the receptionist position pays less than a delivery driver and Sarah's pay is reduced accordingly.

Sarah's doctor now recommends restorative surgery for Sarah's back. Sarah requests leave for the surgery and the accompanying recovery period. After the surgery and Sarah's return to work, she requests and takes additional time off to attend physical therapy appointments. A few months later, Sarah's doctor determines she is fully recovered. However, although her doctor certifies that Sarah can return to work as a delivery person without risk of reinjuring her back, her doctor diagnoses Sarah with a permanent partial impairment. Thereafter, Sarah applies for, and is again hired as, a delivery person with Delivery Express..

1. Sarah's eligibility for WCA benefits and FMLA leave.

Sarah is likely eligible for some workers' compensation benefits because her employer has at least 3 employees and she was injured

while at work. Indeed, Sarah was in route to her first delivery for Delivery Express when the accident occurred. Therefore, Sarah was injured “on the job.” To receive workers’ compensation benefits, pursuant to WCA requirements, Sarah must provide Delivery Express notice of the injury within 15 days of the accident.

Sarah may also be eligible to take FMLA leave if: her employer employs more than 50 employees within a 75 mile radius; Sarah has been employed by Delivery Express for at least 12 months; and Sarah has worked at least 1,250 hours for Delivery Express over the previous 12-month period. The FMLA allows an eligible employee to take leave for continuing medical treatment as well as recovery time absences that result from multiple treatments, such as surgery or physical therapy. Sarah’s back injury constitutes a serious health condition under the FMLA, and Sarah requested time off for her restorative surgery and physical therapy appointments. Accordingly, following Sarah’s injury, Delivery Express is required to allow Sarah to use FMLA leave if she is eligible and if she has not already used all of the 12 weeks of FMLA time she is allotted each year of employment after her first year.

Is Sarah eligible for ADA accommodations? While Delivery Express is clearly subject to the ADA requirements because it employs 15 employees, it is less clear whether Sarah has suffered a permanent disability that impairs one or more life activities. While it seems her abilities to speak, work, and care for herself are only impacted on a temporary basis, the ADA Amendments Act of 2008 provides that a temporary impairment *might* trigger a right to an accommodation that would allow Sarah to perform her job as an unimpaired person would, but only if the impairment is “sufficiently severe.” The inquiry is very fact-specific and should be considered carefully under the ADAAA’s broad reach. Here, the facts are not specific enough for us to know definitively whether the ADA requires accommodation.

2. Sarah will receive monetary benefits under the WCA and unpaid leave under the FMLA.

After the accident and before surgery, Sarah is likely entitled to temporary partial disability benefits under the WCA. When Sarah first returns to work with restrictions, she cannot resume her job as a delivery person because her doctor’s restrictions prevent her from sitting for extended periods of time and lifting packages weighing over 10 pounds. Because Sarah could only work as a receptionist at a reduced wage rather than as a truck driver for her full wages, Sarah is likely entitled to temporary partial disability benefits.

Sarah will also likely receive partial permanent disability benefits even after Sarah’s doctor has determined she is fully recovered because Sarah has been diagnosed with a permanent partial impairment with the benefit amount determined by a statutory formula.

Because Sarah was eligible to take leave under the FMLA, Delivery Express likely will be required to make use of this unpaid “job protection” leave, but is not required to pay Sarah while she is on leave. Notably, employers often overlook the fact that any overtime Sarah does *not* work during her FMLA leave *could also count* toward her 12 weeks of FMLA leave.

Delivery Express must also provide Sarah the same job or an equivalent job (the same benefits, pay, and employment terms) upon her return to work from FMLA “job protection” leave. Here, because

Sarah ultimately returned to work as a delivery person, Delivery Express has complied the FMLA.

3. Delivery Express must try to find Sarah a job that accommodates her injury during her recovery under the WCA and must provide her FMLA leave if she gives reasonable notice.

Under the WCA, when Sarah first returns to work, Delivery Express is also required to try to place her in a job that complies with the restrictions imposed by her doctor, that is, a job where Sarah is not required to sit for long periods of time or lift anything over 10 pounds. Thus, so long as Sarah is allowed to stand at reception and does not have to lift items that weigh over 10 pounds, she likely has been afforded the proper accommodations under the WCA. Importantly, Delivery Express is permitted to (and does) allow Sarah to return to work before reaching maximum medical improvement.

Under the WCA, an employer must rehire an employee that applies for the same pre-injury job, or a modified job that is similar to the pre-injury job, so long as (1) the employee’s treating doctor certifies the employee can return to the work without risk of re-injury; and (2) the employee applies for an available job. Here, Delivery Express properly rehired Sarah as a delivery person/truck driver after Sarah’s doctor certified that Sarah could return work as a truck driver without risk of reinjuring her back. These circumstances likely demonstrate Delivery Express’s compliance.

Under the FMLA, Sarah must provide Delivery Express *timely* notice of her need to take time off for her restorative surgery *and* the accompanying recovery time *and* her need for time to engage in physical therapy. So long as Sarah provides notice for all three of these needs for leave within a reasonable time, and so long as Sarah has not already used all her FMLA leave, Delivery Express likely must accommodate Sarah’s FMLA leave requests.

Hypothetical 2: Jack Smith’s Broken Hip

Jack is a retail worker for Shiny Trinkets in Santa Fe, New Mexico and has been one of two full-time employees for the past 15 years. He and his co-worker do everything for the shop to help the elderly owners, who also work at the shop. Jack is a “jack of all trades” and handles all of the accounting and payroll functions for the shop. At one point about five years ago, Jack was so enthusiastic about his Human Resources duties that he copied and pasted the “employment manual” from Target® verbatim and slapped on a Shiny Trinkets cover. Jack was so excited about his project that he had everyone in the shop sign an acknowledgment of receiving the manual. No one has looked at it since.

Jack walks to work every morning. On Sunday morning, while on his way to work, Jack slipped and fell on some ice a block away from Shiny Trinkets, breaking his hip in the process. Consequently, Jack took time off for hip surgery and the associated 10-week recovery period.

Even after the surgery, Jack now has a limp and is unable to walk without a cane. Jack tries to return to work but has a difficult time walking or standing around Shiny Trinkets. In an effort to improve his hip pain, Jack takes more time off for physical therapy appointments. The physical therapy helps but does not fully rehabilitate Jack. Jack now walks with a permanent limp and has difficulty

standing for extended periods of time. Jack continues to work at Shiny Trinkets, but asks for a chair to sit in periodically during his shifts.

1. Jack's eligibility for FMLA leave and ADA accommodations.

Jack's broken hip likely constitutes a serious health condition under the FMLA, but because he works for a small specialty shop, his employer may not be a "covered employer" with 50 employees or more within a 75 mile radius. If Shiny Trinkets *were* such a "covered employer," however, Jack may be entitled to FMLA because he has been working for Shiny Trinkets for much more than the 12 month required for FMLA eligibility and he has worked at least 1,250 hours during the immediately-previous 12-month period. As such, if Shiny Trinkets were a "covered employer," Jack could take leave for both his surgery *and* the 10-week recovery period without fear of losing his job. Again, if his employer were "covered," Jack may also take intermittent leave for his physical therapy appointments *provided* he still has some of the 12-week FLMA leave bank remaining for the year.

Jack's limp and inability to stand for extended periods of time likely constitutes a "qualified disability" under the ADA. Accordingly, Jack *could* request accommodations for the disability and Shiny Trinkets may have to provide one or more reasonable accommodations, *but only if* Shiny Trinkets employs more than 15 employees.

The WCA may also provide benefits to Jack if Shiny Trinkets' owners are also considered employees of the business because the WCA applies to employers with *more than three* employees. Jack likely is not eligible for workers' compensation benefits because he was injured *on his way* to work before his shift began, not while "on the job."

2. If Jack is afforded FMLA leave, he may have to provide a certification demonstrating his need for the leave.

Although Shiny Trinkets has at most four employees under the facts of Jack's scenario, and would not ordinarily be required to provide statutory FMLA leave to an employee, Jack could nonetheless be entitled to FMLA leave from Shiny Trinkets if the employment manual he copied from Target® provides for the same. Employers should be careful not to make promises of benefits they are neither required, nor able to, honor because a court might find the promise constitutes a contract and thus, the employer is bound to uphold the same.

Assuming the employment manual promises FMLA leave, Shiny Trinkets may have to accommodate Jack's request for leave for the surgery, recovery time, and physical therapy if Jack provides reasonable notice of his need to take time off and he has not already used all of his FMLA leave before this request. If FMLA leave applies here, Shiny Trinkets is required to offer Jack the same or equivalent job, even for the Human Resources position, upon his return to work after the surgery. Because Shiny Trinkets allowed Jack to return to work as a retail worker and "jack of all trades" after his surgery and physical therapy appointments, Shiny Trinkets has probably complied with the FMLA by holding his job for him.

Shiny Trinkets can request a certification that demonstrates Jack's need to take FMLA leave for his surgery, the associated recovery time, and physical therapy appointments, and Jack must provide such certification. If Shiny Trinkets has questions about the certification, Shiny Trinkets may contact Jack's doctor to verify the information in the certification so long the person making the call is not Jack's direct

supervisor due to HIPAA and human resources concerns. Shiny Trinkets must be careful, however, not to request *additional* information from Jack's doctor.

3. Shiny Trinkets must provide a reasonable ADA accommodation for Jack if doing so does not impose an undue hardship on Shiny Trinkets.

Although we already determined Shiny Trinkets has at most four employees, and would not ordinarily be required to provide ADA accommodations to an employee, Jack could nonetheless be entitled to the same if the employment manual confers ADA protections and constitutes a contractual promise to Jack. In that event, Shiny Trinkets may have to accommodate Jack's request to sit in a chair during his shifts. An employer's obligation to provide a reasonable ADA accommodation may be triggered simply by such a request from an employee. Thus, if a court were to determine the employment manual constitutes a contract extending ADA protection to Jack, Jack's request for a chair initiates Shiny Trinkets' obligation under the ADA to, at a minimum, engage in a discussion with Jack regarding the request.

Even if Shiny Trinkets is subject to the ADA, it must provide an accommodation to Jack *only* if the accommodation is reasonable and does not pose an undue hardship on Shiny Trinkets. If providing a chair for Jack to sit in periodically during his shifts will result in significant difficulty or expense to Shiny Trinkets, then Shiny Trinkets does not have to provide the accommodation. Courts are more likely to find undue hardships exist for small businesses like Shiny Trinkets, rather than big business because courts often consider a business's size and resources when determining whether an accommodation is reasonable or constitutes an undue hardship. Thus, Shiny Trinkets needs to consider whether providing Jack a chair and Jack periodically sitting during his shifts will result in an undue hardship to Shiny Trinkets. (Most courts would not consider providing a chair under these facts to be an unreasonable accommodation *or* undue hardship).

If Shiny Trinkets must extend ADA protection to Jack, it can also require proof that Jack is fit to return to work by asking for a fitness-for-duty certification from Jack. Jack is required to provide the fitness-for-duty certification at his own cost. Of note, Shiny Trinkets may only ask for the fitness-for-duty certification if it has a uniform practice of requesting fitness-for-duty certifications from all retail workers following a serious injury; it cannot require the certification only from Jack.

In Conclusion

While at first blush it may seem obvious that an employee is entitled to either WCA benefits *or* FMLA leave *or* an ADA accommodation, employers should be aware that all three statutes may be triggered by a single injury. Taking the time to analyze how the WCA, FMLA, or ADA may interact to protect an employee is crucial in providing employees the proper benefits and accommodations under New Mexico and federal law. Moreover, employers should be very conscientious about how their verbal or written policies/practices may modify their obligations under these (and other employment-related) statutes. ■

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Embracing Effective Transition Plans for Transgender Employees *continued from page 5*

discrimination. Employers therefore may wish to review the regulations and consider whether their own policies and jobs descriptions are based upon actual business necessity, or if they improperly perpetuate discriminatory gender roles or stereotypes.

Best practice for employers

- ▶ Have an open door policy so employees are comfortable with approaching management to discuss their transition.
- ▶ Be proactive when an employee reveals they are undergoing transition to address their concerns, craft an effective transition plan, and properly disseminate it to employees.
- ▶ Update your anti-discrimination policies to include gender expression and identity.
- ▶ Ensure that gender expression and identity issues are included in your discrimination and harassment training.
- ▶ Provide appropriate bathroom and other facilities for employees with proper signage.
- ▶ Review dress codes to ensure that they are not based on gender stereotypes and are consistent with business necessity.
- ▶ Consider coordinating mandatory nondiscrimination training for all employees with an employee's transition plan, when appropriate.
- ▶ Confirm that employees are aware of available company resources to assist them with any transition, benefits, and discrimination concerns.
- ▶ Ensure confidentiality of employee information, including any medical information related to the transition of transgendered employees.
- ▶ Review job descriptions to ensure they do not improperly distinguish between female and male employees, and remove those distinctions or ensure there is an available BFOQ defense for potential claims.
- ▶ Review your health benefits to ensure that coverage is not excluded for transgender employees or employee dependents.

Endnotes

¹ GLADD.org, Accelerating Acceptance 2019, Executive Summary, Conducted by the Harris Poll, <https://www.glaad.org/sites/default/files/Accelerating%20Acceptance%202019> (last visited June 2, 2020).

² The Williams Institute, *How May Adults Identify as Transgender in the U.S.?* (June 2016).

³ *Id.*

⁴ *Id.*

⁵ Brief for the American Medical Association as Amicus Curiae, p. 6, *R.G. & G.R. Harris Funder Homes v. EEOC*, U.S. 18-107, at p. 4 (2019) (the "AMA Brief").

⁶ HRC.org, <https://www.hrc.org/resources/reporting-about-transgender-people-read-this> (last visited June 2, 2020) (HRC.org).

⁷ AMA Brief, at p. 6.

⁸ *Id.*, at p. 8.

⁹ *Id.*, at pp. 3-4.

¹⁰ Psychiatry.org, Help with Gender Dysphoria, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited June 2, 2020).

¹¹ AMA Brief, at p. 12.

¹² *Id.*, at p. 19.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*, at p. 20.

¹⁷ 42 U.S.C. 2000e-2(a) (1991).

¹⁸ EEOC.gov, <https://www.eeoc.gov/laws/types/sex.cfm> (last visited June 2, 2020).

¹⁹ U.S. Dept of Justice, *Memorandum for Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, dated October 4, 2017.

²⁰ 139 S. Ct. 1599 (2019).

²¹ *Bostock v. Clayton County Ga.*, No. 17-1618, slip opinion at pp. 4-33 (U.S. June 15, 2020) (together with No. 17-1623, *Altitude Express, Inc., et al. v. Zarda et al.*, as Co-Independent Executors of the Estate of Zarda, on certiorari to the U.S. Court of Appeals for the Second Circuit, and No. 18-107, *R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission et al.*, on certiorari to the U.S. Court of Appeals for the Sixth Circuit).

²² NMSA 1978, § 28-1-1, et seq. (2019).

²³ NMSA 1978, § 28-1-2(Q) (2007).

²⁴ CAL. CODE REGS. §§ 11030-34 (2017).

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